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# CALIFORNIA REPORTER REFERENCES

## 25 CALIFORNIA REPORTS, 2d SERIES

| Cal. Page | P.2d Vol. | P.2d Page |
|---|---|---|
| 1 | 152 | 1003 |
| 23 | 152 | 441 |
| 26 | 152 | 442 |
| 37 | 152 | 625 |
| 45 | 153 | 53 |
| 48 | 153 | 47 |
| 59 | 153 | 21 |
| 108 | 153 | 9 |
| 129 | 152 | 729 |
| 141 | 152 | 999 |
| 149 | 153 | 1 |
| 165 | 153 | 338 |
| 171 | 153 | 331 |
| 177 | 153 | 315 |
| 196 | 153 | 179 |
| 198 | 153 | 177 |
| 202 | 153 | 334 |
| 209 | 153 | 358 |
| 216 | 153 | 344 |
| 226 | 153 | 325 |
| 237 | 153 | 349 |
| 254 | 153 | 341 |
| 259 | 153 | 313 |
| 264 | 153 | 741 |
| 274 | 153 | 714 |
| 287 | 153 | 705 |
| 305 | 153 | 734 |
| 314 | 153 | 739 |
| 318 | 153 | 727 |
| 322 | 153 | 553 |
| 330 | 153 | 729 |
| 341 | 153 | 720 |
| 353 | 153 | 746 |
| 375 | 153 | 945 |
| 384 | 153 | 950 |
| 399 | 154 | 399 |
| 422 | 154 | 657 |
| 447 | 154 | 854 |
| 473 | 154 | 377 |
| 486 | 154 | 687 |
| 494 | 154 | 670 |
| 501 | 154 | 681 |
| 506 | 154 | 703 |
| 520 | 154 | 384 |
| 535 | 154 | 692 |
| 547 | 154 | 710 |
| 561 | 154 | 674 |
| 573 | 154 | 698 |
| 582 | 154 | 684 |
| 588 | 154 | 392 |
| 593 | 154 | 867 |
| 605 | 155 | 42 |
| 624 | 154 | 892 |
| 652 | 155 | 9 |
| 664 | 155 | 24 |
| 697 | 154 | 879 |
| 719 | 154 | 891 |
| 721 | 155 | 329 |
| 746 | 155 | 343 |
| 784 | 154 | 849 |
| 794 | 154 | 873 |
| 799 | 154 | 875 |
| 806 | 155 | 633 |
| 814 | 155 | 826 |
| 822 | 155 | 809 |
| 842 | 155 | 823 |
| 848 | 155 | 819 |
| 854 | 155 | 831 |
| 862 | 156 | 249 |
| 880 | 156 | 7 |
| 913 | 156 | 25 |
| 918 | 156 | 1 |
| 930 | 156 | 737 |
| 938 | 156 | 741 |
| 947 | 154 | 680 |

## 66 CALIFORNIA APPELLATE REPORTS, 2d SERIES

| Cal.App. Page | P.2d Vol. | P.2d Page |
|---|---|---|
| 1 | 151 | 685 |
| 5 | 151 | 873 |
| 15 | 151 | 578 |
| 22 | 151 | 556 |
| 28 | 151 | 576 |
| 34 | 151 | 884 |
| 40 | 151 | 853 |
| 47 | 151 | 662 |
| 50 | 151 | 679 |
| 63 | 151 | 644 |
| 67 | 151 | 664 |
| 70 | 151 | 889 |
| 76 | 151 | 901 |
| 85 | 152 | 5 |
| 103 | 151 | 861 |
| 116 | 151 | 879 |
| 126 | 152 | 24 |
| 142 | 151 | 899 |
| 147 | 151 | 887 |
| 150 | 151 | 906 |
| 161 | 152 | 23 |
| 164 | 152 | 331 |
| 166 | 152 | 180 |
| 237 | 152 | 240 |
| 253 | 152 | 1021 |
| 258 | 151 | 892 |
| 264 | 152 | 19 |
| 271 | 152 | 229 |
| 280 | 152 | 221 |
| 290 | 152 | 226 |
| 295 | 152 | 234 |
| 303 | 152 | 39 |
| 309 | 152 | 354 |
| 319 | 152 | 339 |
| 330 | 152 | 333 |
| 333 | 152 | 349 |
| 335 | 152 | 15 |
| 339 | 152 | 33 |
| 348 | 152 | 216 |
| 357 | 152 | 360 |
| 369 | 152 | 450 |
| 373 | 152 | 238 |
| 376 | 152 | 501 |
| 382 | 152 | 490 |
| 390 | 152 | 480 |
| 401 | 152 | 457 |
| 406 | 152 | 498 |
| 408 | 152 | 454 |
| 413 | 152 | 351 |
| 420 | 152 | 347 |
| 425 | 152 | 460 |
| 431 | 152 | 329 |
| 436 | 152 | 519 |
| 450 | 152 | 485 |
| 460 | 152 | 629 |
| 469 | 152 | 336 |
| 475 | 152 | 499 |
| 480 | 152 | 508 |
| 483 | 152 | 509 |
| 491 | 152 | 533 |
| 500 | 152 | 649 |
| 504 | 152 | 448 |
| 509 | 152 | 639 |
| 518 | 152 | 463 |
| 522 | 152 | 513 |
| 524 | 152 | 526 |
| 532 | 152 | 452 |
| 535 | 152 | 494 |
| 543 | 152 | 465 |
| 549 | 152 | 530 |
| 554 | 152 | 746 |
| 562 | 153 | 69 |

| Cal.App. Page | P.2d Vol. | P.2d Page |
|---|---|---|
| 587 | 152 | 742 |
| 594 | 152 | 765 |
| 609 | 152 | 774 |
| 640 | 152 | 517 |
| 644 | 152 | 657 |
| 658 | 152 | 634 |
| 668 | 152 | 468 |
| 672 | 152 | 470 |
| 677 | 152 | 651 |
| 687 | 152 | 735 |
| 691 | 152 | 737 |
| 700 | 152 | 754 |
| 704 | 152 | 750 |
| 710 | 152 | 791 |
| 714 | 153 | 214 |
| 724 | 152 | 761 |
| 731 | 152 | 758 |
| 736 | 153 | 83 |
| 743 | 153 | 87 |
| 747 | 152 | 772 |
| 750 | 152 | 756 |
| 755 | 152 | 1019 |
| 757 | 153 | 55 |
| 771 | 152 | 1016 |
| 778 | 153 | 190 |
| 788 | 153 | 91 |
| 791 | 153 | 182 |
| 795 | 153 | 206 |
| 807 | 153 | 91 |
| 808 | 153 | 180 |
| 813 | 153 | 201 |
| 818 | 153 | 389 |
| 827 | 153 | 397 |
| 831 | 153 | 404 |
| 837 | 153 | 807 |
| 838 | 153 | 184 |
| 849 | 153 | 204 |
| 852 | 153 | 418 |
| 855 | 153 | 371 |
| 860 | 153 | 420 |
| 865 | 153 | 417 |
| 867 | 153 | 427 |
| 870 | 153 | 423 |
| 873 | 153 | 440 |
| 874 | 153 | 401 |
| 876 | 153 | 428 |
| 884 | 153 | 385 |
| 889 | 153 | 379 |
| 894 | 153 | 464 |
| 920 | 153 | 373 |
| 928 | 153 | 382 |
| 935 | 153 | 212 |
| 938 | 153 | 214 |
| 939 | 153 | 407 |
| 947 | 153 | 369 |
| 950 | 153 | 436 |
| 956 | 153 | 399 |
| 960 | 153 | 424 |
| 964 | 153 | 453 |
| 986 | 153 | 581 |
| 1011 | 152 | 42 |
| 1020 | 152 | 47 |

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## 157 P.2d – 158 P.2d

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### Associate Justices

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DOUGLAS L. EDMONDS ..... San Francisco
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I. M. Johnson ..... Chief Deputy Clerk ..... San Francisco
Loren F. White ..... Deputy Clerk ..... San Francisco
Samuel C. Shenk ..... Deputy Clerk ..... San Francisco
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H. P. Coultis ..... Deputy Clerk ..... Los Angeles
L. A. Endres ..... Deputy Clerk ..... Sacramento

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*Division 2*

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MARSHALL F. McCOMB - - - - - - - - - - Los Angeles

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[1] Temporary assignment.

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JUDGES

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JUDGES

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ATTORNEY GENERAL

ROBERT W. KENNY ..... San Francisco

[1] On leave of absence to enter military service.

# CASES REPORTED


| | Vol. | | Page |
|---|---|---|---|
| Allen v. California Water & Tel. Co., App. | 157 | P.2d | 663 |
| Allen v. California Water & Tel. Co., App. | 157 | P.2d | 680 |
| All Persons, etc.; Laurel Hill Cemetery Ass'n v., App. | 158 | P.2d | 759 |
| Ampuero v. Luce, App. | 157 | P.2d | 899 |
| Andrews v. California Employment Commission, App. | 158 | P.2d | 45 |
| Arden Farms Co.; Mosley v., Sup. | 157 | P.2d | 372 |
| Aristocrat Highway Displays v. Stricklin, App. | 157 | P.2d | 880 |
| Atlas Finance Corp. v. Kenny, App. | 157 | P.2d | 401 |
| Baer v. Smith, App. | 157 | P.2d | 646 |
| Balian v. Superior Court of Los Angeles County, App. | 158 | P.2d | 199 |
| Ball v. Stephens, App. | 158 | P.2d | 207 |
| Ballentine v. Superior Court of San Mateo County, Sup. | 158 | P.2d | 14 |
| Bank of America Nat. Trust & Sav. Ass'n; Carter v., App. | 158 | P.2d | 423 |
| Bank of America Nat. Trust & Sav. Ass'n v. Robbins, App. | 158 | P.2d | 412 |
| Bank of America N. T. & S. A.; Russi v., App. | 158 | P.2d | 252 |
| Bank of America Nat. Trust & Sav. Ass'n v. Wetherell, App. | 157 | P.2d | 46 |
| Barkett; Kline v., App. | 158 | P.2d | 51 |
| Barton; People v., App. | 157 | P.2d | 34 |
| Barrett v. Brown, Sup. | 158 | P.2d | 567 |
| Bear Film Co.; Hansen v., App. | 158 | P.2d | 779 |
| Beatty v. Wilcox, App. | 158 | P.2d | 32 |
| Bedel; Corbin v., App. | 158 | P.2d | 221 |
| Belcher v. City and County of San Francisco, App. | 158 | P.2d | 996 |
| Ben's Auto Park; Burroughs v., App. | 157 | P.2d | 380 |
| Bush Oil Co. v. Beverly-Lincoln Land Co., App. | 158 | P.2d | 754 |
| Beverly-Lincoln Land Co.; R. R. Bush Oil Co. v., App. | 158 | P.2d | 754 |
| Bischell v. State, App. | 157 | P.2d | 41 |
| Bland v. Kelley, App. | 158 | P.2d | 206 |
| Board of Fire Underwriters of Pacific; Speegle v., App. | 158 | P.2d | 426 |
| Board of Medical Examiners of Cal.; Brainard v., App. | 157 | P.2d | 7 |
| Boland; City of Compton v., Sup. | 158 | P.2d | 397 |
| Boland; Lloyd A. Fry Roofing Co. v., Sup. | 158 | P.2d | 397 |
| Booth v. Los Angeles County, App. | 158 | P.2d | 401 |
| Brainard v. Board of Medical Examiners of Cal., App. | 157 | P.2d | 7 |
| Brown; Barrett v., Sup. | 158 | P.2d | 567 |
| Brunton; Shnell v., App. | 157 | P.2d | 16 |
| Bryant v. Market St. Ry. Co., App. | 158 | P.2d | 18 |
| Buchmayer v. Buchmayer, App. | 157 | P.2d | 9 |
| Budway v. Hollibaugh, App. | 157 | P.2d | 30 |
| Burgess v. Cahill, Sup. | 158 | P.2d | 393 |
| Burroughs v. Ben's Auto Park, two cases, App. | 157 | P.2d | 380 |
| Cagigas; People v., App. | 158 | P.2d | 971 |
| Cahill; Burgess v., Sup. | 158 | P.2d | 393 |
| California Dept. of Employment; Twentieth Century Lites v., App. | 158 | P.2d | 600 |
| California Employment Commission; Andrews v., App. | 158 | P.2d | 45 |
| California Employment Commission; Empire Star Mines Co. v., App. | 158 | P.2d | 606 |
| California Employment Commission v. Grand View Heights Citrus Ass'n, App. | 157 | P.2d | 420 |
| California Employment Commission; Irvine Co. v., App. | 158 | P.2d | 257 |
| California Employment Commission v. Kovacevich, App. | 157 | P.2d | 416 |
| California Employment Commission v. Sutton, App. | 158 | P.2d | 949 |
| California Employment Commission; Wiltsee v., App. | 158 | P.2d | 612 |

| | Vol. | | Page |
|---|---|---|---|
| California Employment Stabilization Commission v. Lewis, App. | 157 | P.2d | 38 |
| California Lutheran Hospital; Rice v., App. | 158 | P.2d | 579 |
| California Prune & Apricot Growers Ass'n v. H. R. Nicholson Co., App. | 158 | P.2d | 764 |
| California State Bd. of Pharmacy, Department of Professional and Vocational Standards; Rosenblatt v., App. | 158 | P.2d | 199 |
| California Unemployment Reserves Commission; Porterville Citrus Ass'n v., App. | 157 | P.2d | 420 |
| California Water & Tel. Co.; Allen v., App. | 157 | P.2d | 663 |
| California Water & Tel. Co.; Allen v., App. | 157 | P.2d | 680 |
| Carter v. Bank of America Nat. Trust & Sav. Ass'n, App. | 158 | P.2d | 423 |
| Castro; People v., App. | 157 | P.2d | 25 |
| Cazaurang's Estate, In re, App. | 158 | P.2d | 48 |
| Chapman v. Title Ins. & Trust Co., App. | 158 | P.2d | 42 |
| Chase v. Trimble, App. | 158 | P.2d | 247 |
| Christian Science Benev. Ass'n v. Palmer, App. | 158 | P.2d | 62 |
| City and County of San Francisco; Belcher v., App. | 158 | P.2d | 996 |
| City of Compton v. Boland, Sup. | 158 | P.2d | 397 |
| City of Eureka; Kirack v., App. | 158 | P.2d | 270 |
| City of Long Beach; England v., App. | 158 | P.2d | 589 |
| City of San Diego; Fackrell v., Sup. | 157 | P.2d | 625 |
| City of San Diego v. Van Winkle, App. | 158 | P.2d | 774 |
| Coelho; People v., App. | 157 | P.2d | 654 |
| Compton, City of, v. Boland, Sup. | 158 | P.2d | 397 |
| Corbin v. Bedel, App. | 158 | P.2d | 221 |
| Cole v. Evans, App. | 157 | P.2d | 872 |
| Conger v. White, App. | 158 | P.2d | 415 |
| Cook v. Stewart McKee & Co., App. | 157 | P.2d | 868 |
| Credit Discount Co.; Milana v., App. | 158 | P.2d | 409 |
| Crowder; People v., App. | 158 | P.2d | 988 |
| Davidson v. Ealey, App. | 158 | P.2d | 1000 |
| Davis, Ex parte, App. | 158 | P.2d | 36 |
| Davis; Williams v., App. | 157 | P.2d | 655 |
| Davis; Williams v., App. | 158 | P.2d | 748 |
| Devere v. Southern Pac. Co., App. | 157 | P.2d | 442 |
| Diaz; People v., Sup. | 158 | P.2d | 194 |
| Doetsch v. Wagner, App. | 158 | P.2d | 991 |
| Dorr; People v., App. | 157 | P.2d | 859 |
| Drew; Hagge v., App. | 157 | P.2d | 408 |
| Drury v. Hagerstrom, App. | 157 | P.2d | 878 |
| Ealey; Davidson v., App. | 158 | P.2d | 1000 |
| Einer; Foster v., App. | 158 | P.2d | 978 |
| Empire Star Mines Co. v. California Employment Commission, App. | 158 | P.2d | 606 |
| Encinas v. Lowthian Freight Lines, App. | 158 | P.2d | 575 |
| Engebrecht v. Shelton, App. | 158 | P.2d | 570 |
| England v. City of Long Beach, App. | 158 | P.2d | 589 |
| English; People v., App. | 157 | P.2d | 429 |
| Erwing v. Jones, App. | 158 | P.2d | 265 |
| Estrin v. Kasviner, App. | 158 | P.2d | 264 |
| Evans; Cole v., App. | 157 | P.2d | 872 |
| Evans; Walton v., App. | 157 | P.2d | 68 |
| Everts v. Matteson, App. | 157 | P.2d | 651 |
| Fackrell v. City of San Diego, Sup. | 157 | P.2d | 625 |
| Ferrato; People v., App. | 158 | P.2d | 573 |
| Forneris v. Krell, App. | 158 | P.2d | 937 |
| Foster v. Einer, App. | 158 | P.2d | 978 |
| Francis v. Superior Court in and for City and County of San Francisco, App. | 157 | P.2d | 23 |

| | Vol. | | Page |
|---|---|---|---|
| Franco-Italian Packing Co.; Radisich v., App. | 158 | P.2d | 435 |
| Frey; People v., App. | 158 | P.2d | 404 |
| Fry Roofing Co. v. Boland, Sup. | 158 | P.2d | 397 |
| Gardner v. Rich Mfg. Co., App. | 158 | P.2d | 23 |
| Gartner v. Roth, Sup. | 157 | P.2d | 361 |
| Gilliam, Ex parte, App. | 157 | P.2d | 32 |
| Golden West Wineries; West Coast Winery v., App. | 158 | P.2d | 623 |
| Goldstein; Moon v., Super. | 158 | P.2d | 1004 |
| Gorman; People v., App. | 158 | P.2d | 267 |
| Gouldy; People v., App. | 158 | P.2d | 59 |
| Grand View Heights Citrus Ass'n; California Employment Commission v., App. | 157 | P.2d | 420 |
| Gray; Plante v., App. | 157 | P.2d | 421 |
| Gray; Thomas v., App. | 158 | P.2d | 48 |
| Greene v. Hawaiian Dredging Co., Sup. | 157 | P.2d | 367 |
| Griffith v. State Bar of Cal., Sup. | 158 | P.2d | 1 |
| Grimm v. Grimm, Sup. | 157 | P.2d | 841 |
| Hagerstrom; Drury v., App. | 157 | P.2d | 878 |
| Hagge v. Drew, App. | 157 | P.2d | 408 |
| Hansen v. Bear Film Co., App. | 158 | P.2d | 779 |
| Hart v. Olson, App. | 157 | P.2d | 385 |
| Hawaiian Dredging Co.; Greene v., Sup. | 157 | P.2d | 367 |
| Heffron v. Rich Mfg. Co., App. | 158 | P.2d | 23 |
| Heinz v. Heinz, App. | 157 | P.2d | 660 |
| Henshaw v. Henshaw, App. | 157 | P.2d | 390 |
| Henshaw's Estate, In re, App. | 157 | P.2d | 390 |
| Hines v. Milosivich, App. | 157 | P.2d | 45 |
| Hollibaugh; Budway v., App. | 157 | P.2d | 30 |
| Holmstrand (Watson); Lynch v., App. | 158 | P.2d | 250 |
| Horsman v. Maden, App. | 157 | P.2d | 882 |
| Howard, In re, App. | 158 | P.2d | 408 |
| Howard v. Howard, App. | 157 | P.2d | 874 |
| Hoyt; Hoyt Heater Co. v., App. | 157 | P.2d | 657 |
| Hoyt Heater Co. v. Hoyt, App. | 157 | P.2d | 657 |
| H. R. Nicholson Co.; California Prune & Apricot Growers Ass'n v., App. | 158 | P.2d | 764 |
| Industrial Acc. Commission; Pacific Emp. Ins. Co. v., Sup. | 158 | P.2d | 9 |
| Industrial Acc. Commission; Pacific Freight Lines v., Sup. | 157 | P.2d | 634 |
| Industrial Acc. Commission; State Compensation Ins. Fund v., Sup. | 158 | P.2d | 195 |
| Irvine Co. v. California Employment Commission, App. | 158 | P.2d | 257 |
| Irvine Co. v. McColgan, Sup. | 157 | P.2d | 847 |
| Isaman's Estate, In re, App. | 157 | P.2d | 872 |
| Jones; Erwing v., App. | 158 | P.2d | 265 |
| Jones; Nevada Irr. Dist. v., App. | 158 | P.2d | 973 |
| Jones; Thomasson v., App. | 157 | P.2d | 655 |
| Kasviner; Estrin v., App. | 158 | P.2d | 264 |
| Kelley; Bland v., App. | 158 | P.2d | 206 |
| Kendrick v. Schwartz, App. | 158 | P.2d | 405 |
| Kenny; Atlas Finance Corp. v., App. | 157 | P.2d | 401 |
| King v. Pacific States Sav. & Loan Co., Sup. | 158 | P.2d | 561 |
| Kirack v. City of Eureka, App. | 158 | P.2d | 270 |
| Kline v. Barkett, App. | 158 | P.2d | 51 |
| Kovacevich; California Employment Commission v., App. | 157 | P.2d | 416 |
| Krell; Forneris v., App. | 158 | P.2d | 937 |
| Krienke v. State, App. | 158 | P.2d | 941 |
| Lagomarsino v. Market St. Ry. Co., App. | 158 | P.2d | 982 |
| Lair's Estate, In re, App. | 157 | P.2d | 16 |
| La Rocca; People v., App. | 157 | P.2d | 378 |

| | Vol. | | Page |
|---|---|---|---|
| Laurel Hill Cemetery Ass'n v. All Persons, etc., App. | 158 | P.2d | 759 |
| Lee's Estate, In re, Sup. | 158 | P.2d | 193 |
| Lelande v. Lowery, Sup. | 157 | P.2d | 639 |
| Lewis; California Employment Stabilization Commission v., App. | 157 | P.2d | 38 |
| Linden v. Moore, App. | 157 | P.2d | 15 |
| Lloyd A. Fry Roofing Co. v. Boland, Sup. | 158 | P.2d | 397 |
| Lockheed Aircraft Corp.; Rannard v., Sup. | 157 | P.2d | 1 |
| Los Angeles County; Booth v., App. | 158 | P.2d | 401 |
| Low v. Low, App. | 158 | P.2d | 745 |
| Lowery; Lelande v., Sup. | 157 | P.2d | 639 |
| Lowthian Freight Lines; Encinas v., App. | 158 | P.2d | 575 |
| Luce; Ampuero v., App. | 157 | P.2d | 899 |
| Lynch v. Holmstrand (Watson), App. | 158 | P.2d | 250 |
| McColgan; Irvine Co. v., Sup. | 157 | P.2d | 847 |
| McCracken; People v., App. | 157 | P.2d | 21 |
| McKinstry; Smith v., App. | 158 | P.2d | 262 |
| Maden; Horsman v., App. | 157 | P.2d | 882 |
| Marin's Estate, In re, App. | 158 | P.2d | 412 |
| Market St. Ry. Co.; Bryant v., App. | 158 | P.2d | 18 |
| Market St. Ry. Co.; Lagomarsino v., App. | 158 | P.2d | 982 |
| Markham's Estate, In re, App. | 158 | P.2d | 62 |
| Marshall v. Marshall, App. | 157 | P.2d | 854 |
| Matteson; Everts v., App. | 157 | P.2d | 651 |
| Milana v. Credit Discount Co., App. | 158 | P.2d | 409 |
| Miller v. Miller, App. | 157 | P.2d | 867 |
| Miller v. Pacific Constructors, App. | 157 | P.2d | 57 |
| Milosivich; Hines v., App. | 157 | P.2d | 45 |
| Mitchell; People v., App. | 157 | P.2d | 862 |
| Moon v. Goldstein, Super. | 158 | P.2d | 1004 |
| Moore; Linden v., App. | 157 | P.2d | 15 |
| Mosley v. Arden Farms Co., Sup. | 157 | P.2d | 372 |
| Nevada Irr. Dist. v. Jones, App. | 158 | P.2d | 973 |
| Noble; People v., App. | 158 | P.2d | 225 |
| Olcott v. Superior Court in and for Los Angeles County, App. | 157 | P.2d | 36 |
| Olson; Hart v., App. | 157 | P.2d | 385 |
| Oreck; People v., App. | 158 | P.2d | 940 |
| Owen; People v., App. | 157 | P.2d | 432 |
| Pacific Constructors; Miller v., App. | 157 | P.2d | 57 |
| Pacific Emp. Ins. Co. v. Industrial Acc. Commission, Sup. | 158 | P.2d | 9 |
| Pacific Freight Lines v. Industrial Acc. Commission, Sup. | 157 | P.2d | 634 |
| Pacific States Sav. & Loan Co.; King v., Sup. | 158 | P.2d | 561 |
| Pack; People v., App. | 158 | P.2d | 945 |
| Palmer; Christian Science Benev. Ass'n v., App. | 158 | P.2d | 62 |
| People v. Barton, App. | 157 | P.2d | 34 |
| People v. Cagigas, App. | 158 | P.2d | 971 |
| People v. Castro, App. | 157 | P.2d | 25 |
| People v. Coelho, App. | 157 | P.2d | 654 |
| People v. Crowder, App. | 158 | P.2d | 988 |
| People v. Diaz, Sup. | 158 | P.2d | 194 |
| People v. Dorr, App. | 157 | P.2d | 859 |
| People v. English, App. | 157 | P.2d | 429 |
| People v. Ferrato, App. | 158 | P.2d | 573 |
| People v. Frey, App. | 158 | P.2d | 404 |
| People v. Gorman, App. | 158 | P.2d | 267 |
| People v. Gouldy, App. | 158 | P.2d | 59 |
| People v. La Rocca, App. | 157 | P.2d | 378 |
| People v. McCracken, App. | 157 | P.2d | 21 |
| People v. Mitchell, App. | 157 | P.2d | 862 |

| | Vol. | | Page |
|---|---|---|---|
| People v. Noble, App. | 158 | P.2d | 225 |
| People v. Oreck, App. | 158 | P.2d | 940 |
| People v. Owen, App. | 157 | P.2d | 432 |
| People v. Pack, App. | 158 | P.2d | 945 |
| People v. Quiel, App. | 157 | P.2d | 446 |
| People v. Radley, App. | 157 | P.2d | 426 |
| People v. Roche, App. | 157 | P.2d | 440 |
| People v. Thompson, App. | 158 | P.2d | 213 |
| People v. Voice, App. | 157 | P.2d | 436 |
| Peterson v. Sherman, App. | 157 | P.2d | 863 |
| Pinon v. Pollard, App. | 158 | P.2d | 254 |
| Plante v. Gray, App. | 157 | P.2d | 421 |
| Plaut's Estate, In re, App. | 158 | P.2d | 745 |
| Pollard; Pinon v., App. | 158 | P.2d | 254 |
| Porterville Citrus Ass'n v. California Unemployment Reserves Commission, App. | 157 | P.2d | 420 |
| Quiel; People v., App. | 157 | P.2d | 446 |
| Radisich v. Franco-Italian Packing Co., App. | 158 | P.2d | 435 |
| Radley; People v., App. | 157 | P.2d | 426 |
| Rannard v. Lockheed Aircraft Corp., Sup. | 157 | P.2d | 1 |
| Reeh v. Reeh, App. | 158 | P.2d | 751 |
| Reuze; Ziegler v., App. | 157 | P.2d | 396 |
| Rice v. California Lutheran Hospital, App. | 158 | P.2d | 579 |
| Rich Mfg. Co.; Gardner v., App. | 158 | P.2d | 23 |
| Rich Mfg. Co.; Heffron v., App. | 158 | P.2d | 23 |
| Robbins; Bank of America Nat. Trust & Sav. Ass'n v., App. | 158 | P.2d | 412 |
| Roche; People v., App. | 157 | P.2d | 440 |
| Rodriguez v. Superior Court in and for City and County of San Francisco, App. | 158 | P.2d | 954 |
| Rosenblatt v. California State Bd. of Pharmacy, Department of Professional and Vocational Standards, App. | 158 | P.2d | 199 |
| Roth; Gartner v., Sup. | 157 | P.2d | 361 |
| R. R. Bush Oil Co. v. Beverly-Lincoln Land Co., App. | 158 | P.2d | 754 |
| Ruddell v. Warne, App. | 157 | P.2d | 428 |
| Russi v. Bank of America N. T. & S. A., App. | 158 | P.2d | 252 |
| San Diego, City of, v. Van Winkle, App. | 158 | P.2d | 774 |
| Schwartz; Kendrick v., App. | 158 | P.2d | 405 |
| Scribner v. Young, App. | 157 | P.2d | 411 |
| Scribner v. Young, App. | 157 | P.2d | 414 |
| Shelby v. Southern Pac. Co., App. | 157 | P.2d | 442 |
| Shelton; Engebrecht v., App. | 158 | P.2d | 570 |
| Sherman; Peterson v., App. | 157 | P.2d | 863 |
| Shnell v. Brunton, App. | 157 | P.2d | 16 |
| Silver; Spillers v., App. | 158 | P.2d | 617 |
| Simpson v. Superior Court in and for Los Angeles County, App. | 158 | P.2d | 46 |
| Singleton v. Singleton, App. | 157 | P.2d | 886 |
| Smith; Baer v., App. | 157 | P.2d | 646 |
| Smith v. McKinstry, App. | 158 | P.2d | 262 |
| Southern Pac. Co.; Devere v., App. | 157 | P.2d | 442 |
| Southern Pac. Co.; Shelby v., App. | 157 | P.2d | 442 |
| Speegle v. Board of Fire Underwriters of Pacific, App. | 158 | P.2d | 426 |
| Spillers v. Silver, App. | 158 | P.2d | 617 |
| State; Bischell v., App. | 157 | P.2d | 41 |
| State; Krienke v., App. | 158 | P.2d | 941 |
| State Bar of Cal.; Griffith v., Sup. | 158 | P.2d | 1 |
| State Compensation Ins. Fund v. Industrial Acc. Commission, Sup. | 158 | P.2d | 195 |
| Stephens; Ball v., App. | 158 | P.2d | 207 |
| Stewart McKee & Co.; Cook v., App. | 157 | P.2d | 868 |

| | Vol. | | Page |
|---|---|---|---|
| Stricklin; Aristocrat Highway Displays v., App. | 157 | P.2d | 880 |
| Superior Court in and for City and County of San Francisco; Francis v., App. | 157 | P.2d | 23 |
| Superior Court in and for City and County of San Francisco; Rodriguez v., App. | 158 | P.2d | 954 |
| Superior Court in and for Los Angeles County; Olcott v., App. | 157 | P.2d | 36 |
| Superior Court in and for Los Angeles County; Simpson v., App. | 158 | P.2d | 46 |
| Superior Court of Los Angeles County; Balian v., App. | 158 | P.2d | 199 |
| Superior Court of San Mateo County; Ballentine v., Sup. | 158 | P.2d | 14 |
| Sutton; California Employment Commission v., App. | 158 | P.2d | 949 |
| Thomas v. Gray, App. | 158 | P.2d | 48 |
| Thomasson v. Jones, App. | 157 | P.2d | 655 |
| Thompson; People v., App. | 158 | P.2d | 213 |
| Tierney's Estate, In re, App. | 157 | P.2d | 411 |
| Tierney's Estate, In re, App. | 157 | P.2d | 414 |
| Tiffin; Yack v., App. | 158 | P.2d | 620 |
| Title Ins. & Trust Co.; Chapman v., App. | 158 | P.2d | 42 |
| Trimble; Chase v., App. | 158 | P.2d | 247 |
| Twentieth Century Lites v. California Dept. of Employment, App. | 158 | P.2d | 600 |
| Untrecht; Viner v., Sup. | 158 | P.2d | 3 |
| Van Winkle; City of San Diego v., App. | 158 | P.2d | 774 |
| Viner v. Untrecht, Sup. | 158 | P.2d | 3 |
| Voice; People v., App. | 157 | P.2d | 436 |
| Wagner; Doetsch v., App. | 158 | P.2d | 991 |
| Walton v. Evans, App. | 157 | P.2d | 68 |
| Warne; Ruddell v., App. | 157 | P.2d | 428 |
| Waters; White v., App. | 157 | P.2d | 434 |
| Way's Estate, In re, App. | 157 | P.2d | 46 |
| West Coast Winery v. Golden West Wineries, App. | 158 | P.2d | 623 |
| Wetherell; Bank of America Nat. Trust & Sav. Ass'n v., App. | 157 | P.2d | 46 |
| White; Conger v., App. | 158 | P.2d | 415 |
| White v. Waters, App. | 157 | P.2d | 434 |
| White v. White, App. | 157 | P.2d | 415 |
| Wilcox; Beatty v., App. | 158 | P.2d | 32 |
| Wilcox' Estate, In re, App. | 158 | P.2d | 32 |
| Williams v. Davis, App. | 157 | P.2d | 655 |
| Williams v. Davis, App. | 158 | P.2d | 748 |
| Wiltsee v. California Employment Commission, App. | 158 | P.2d | 612 |
| Yack v. Tiffin, App. | 158 | P.2d | 620 |
| Young; Scribner v., App. | 157 | P.2d | 411 |
| Young; Scribner v., App. | 157 | P.2d | 414 |
| Ziegler v. Reuze, App. | 157 | P.2d | 396 |


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# CALIFORNIA REPORTER

## 157 PACIFIC REPORTER

SECOND SERIES

26 Cal.2d 149

**RANNARD et al. v. LOCKHEED AIRCRAFT CORPORATION et al.**

**L. A. 19157.**

Supreme Court of California.

March 20, 1945.

**1. Appeal and error ⇐110**

An order denying a motion for new trial in a civil case is not appealable. Code Civ.Proc. § 963.

**2. Appeal and error ⇐782**

An appeal from a nonappealable order will be dismissed.

**3. Appeal and error ⇐863**

In reviewing a judgment for defendant on the pleadings, it is necessary to determine sufficiency of complaint upon same principle as though it had been attacked by general demurrer, since only where there is an entire absence of some essential allegation may a motion for judgment on pleadings be properly granted.

**4. Negligence ⇐111(1)**
**Pleading ⇐8(17)**

Generally, in a negligence action, it is sufficient to allege that an act was negligently done by defendant and that it caused damage to plaintiff without stating facts constituting such negligence.

**5. Physicians and surgeons ⇐18(4)**

The rule permitting the pleading of negligence in general terms is applicable in malpractice cases.

**6. Physicians and surgeons ⇐18(4)**

In a malpractice action, in addition to general allegations of negligence, complaint may include a recital of certain related particulars, but such inclusion does not deflect from force of general rule that it is sufficient in such cases to plead that act complained of was negligently done.

**7. Pleading ⇐205(2), 347, 406(7), 428(3)**

Where malpractice complaint against physician and physician's employer alleged negligence in general terms, defendants waived right to have alleged negligence stated with greater certainty by failure to interpose a special demurrer, and complaint was sufficient against general demurrer, objection to introduction of any evidence, or motion for judgment on the pleadings.

**8. Pleading ⇐347, 428(2)**

In malpractice action, complaint, which expressly alleged negligence with respect to diagnosis, operation, and subsequent treatment, and alleged that, as a direct and proximate consequence thereof, various items of damage had been sustained by plaintiffs, was sufficient against defendant's objection to plaintiffs' introduction of any evidence and motion for judgment on the pleadings.

**9. Physicians and surgeons ⇐18(4)**

Complaint in malpractice action must disclose a causal connection between alleged negligent act and injury complained of.

**10. Pleading ⇐18**

All that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that complaint set forth essential facts of case with reasonable precision and with sufficient particularity to acquaint defendant with nature, source, and extent of plaintiff's cause of action.

**11. Pleading ⇐11**

In a malpractice action based upon a general charge of negligence in diagnosis, operation, and subsequent treatment of plaintiff, specific acts or omissions relied upon were matters of evidence which were not required to be alleged.

**12. Negligence ⇐111(1)**

The standard of pleading in negligence cases rests upon considerations of fairness and convenience in view of situation of opposing parties, so that rule permitting pleading of negligence in general terms is justified by fact that person

charged ordinarily may be assumed to possess at least equal, if not superior, knowledge of affair to that possessed by injured party.

**13. Master and servant ⇐329**

Where complaint in malpractice action alleged that plaintiff was found acceptable for employment by corporate defendant subject only to a physical examination by its agent, individual defendant, and, after submitting to such examination, plaintiff, as a condition precedent to proposed employment, was required to undergo an operation, the pleading of joint responsibility of defendants for negligent acts in question occurring in diagnosis, operation, and subsequent treatment was proper.

**14. Master and servant ⇐301(1)**

Where corporate defendant employed defendant physician primarily to protect its own interests rather than interests of plaintiff as an applicant for employment, under doctrine of respondeat superior, corporate defendant would be liable for any injury to plaintiff proximately resulting from malpractice of defendant physician.

**15. Master and servant ⇐92(1)**

Where physician is employed by master but relation of physician and patient does not exist between physician and servant, rule of respondeat superior applies, and master may be liable to servant for physician's negligence.

**16. Master and servant ⇐258(6), 265(2)**

To hold master liable for negligent treatment of servant by master's physician, such negligence must be established, and complaint must positively allege facts imposing liability.

**17. Corporations ⇐388(1)**

Where corporation employed physician for its own protection to examine prospective employees, corporation was not relieved from liability for physician's negligence with respect to an operation performed on a prospective employee as a condition precedent to employment on ground that corporation could not lawfully practice medicine, since plea of ultra vires is not available to corporation as a premise to escape liability voluntarily assumed in order to gain an advantage or benefit for itself.

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In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by H. H. Rannard and wife against Lockheed Aircraft Corporation and Z. P. King for damages for alleged malpractice by individual defendant while in the employ of corporate defendant. From a judgment on the pleadings for corporate defendant and from an order denying plaintiffs' motion for a new trial, plaintiffs appeal.

Judgment reversed, and appeal from order dismissed.

Prior opinion, App., 150 P.2d 255.

A. G. Van Deventer, of Pasadena, for appellants.

George H. Moore and Hugh B. Rotchford, both of Los Angeles, and Harold C. Tallmadge, of Burbank, for respondents.

SPENCE, Justice.

[1, 2] Plaintiffs, who are husband and wife, have appealed from a judgment on the pleadings which was rendered in response to a motion made by defendant Lockheed Aircraft Corporation at the commencement of the trial after an objection to plaintiffs' introduction of any evidence had been sustained. Plaintiffs moved for a new trial. Allen v. California Mutual Building & Loan Ass'n, 40 Cal.App.2d 374, 104 P.2d 851. That motion was denied and plaintiffs have also appealed from the order thereupon entered. That order is nonappealable, Code Civ.Proc. § 963 and for that reason the appeal therefrom should be dismissed. Funk v. Campbell, 15 Cal.2d 250, 100 P.2d 762.

[3] In considering whether the judgment on the pleadings was properly granted, it is but necessary to determine the sufficiency of the complaint upon the same principle as though it had been attacked by general demurrer. In other words, it is only where there is an entire absence of some essential allegation that a motion for judgment on the pleadings may be properly granted. Hibernia Savings & Loan Soc. v. Thornton, 117 Cal. 481, 482, 49 P. 573; Union Flower Market, Ltd., v. Southern California Flower Market, Inc., 10 Cal.2d 671, 673, 76 P.2d 503; Elmore v. Tingley, 78 Cal.App. 460, 465, 248 P. 706; Bates v. Escondido Union High School Dist., 133 Cal.App. 725, 727, 24 P.2d 884.

The action is for damages for the alleged malpractice of one Z. P. King, a physician and surgeon, who, it is averred, was in the employ of defendant Lockheed Aircraft Corporation for the purpose of

giving physical examinations to persons who applied to said corporation for employment and of rendering certain other professional services. The medical treatment here in question was rendered to the plaintiff husband, H. H. Rannard, and not to the wife. The complaint contains five separate statements of fact, each designated as a cause of action, which, so far as here material, may be summarized as follows:

The first cause of action alleges that "defendant Lockheed Aircraft corporation retained in its employ, as its agent and employee, the defendant Z. P. King in the normal conduct of, and in the furtherance of its interests in, the business in which said defendant corporation was at all such times engaged"; that plaintiff H. H. Rannard applied to said defendant corporation for employment and was in all respects found acceptable for employment, subject only to a physical examination "which was required to be, and was actually, made by said defendant corporation and its agent, defendant Z. P. King"; that at the direction of defendant corporation, said plaintiff was given a physical examination by said defendants, and that said defendants conducted such physical examination negligently, carelessly and unskilfully; that as a direct and proximate consequence and result of such negligence plaintiffs, and each of them, have sustained and will continue to sustain "losses, damages, injuries, inconvenience, and hardships" consisting of physical pain and inconvenience, the necessity for surgical and medical treatment in the future, expenses of past medical care and treatment, loss of earnings, and loss of earning ability. The amount of the damages alleged to have been suffered by reason of these enumerated items is specified.

The second cause of action incorporates the allegations of the first cause of action but elaborates upon the employee relationship of defendant King by alleging that defendant Lockheed Aircraft Corporation hired and retained said King "for the purpose of conducting physical examinations of applicants for employment," and in so hiring and retaining him "negligently failed to select and employ a medical and surgical attendant physician and surgeon, possessed of or capable of exercising that degree of care, skill, ability or learning possessed and exercised by medical and surgical attendants, physicians and surgeons practicing their profession in the locality of said defendant Lockheed Aircraft Corporation's said principal office, but said defendant Lockheed Aircraft Corporation nevertheless held out said defendant Z. P. King to be so qualified and skilled."

The third cause of action incorporates the allegations of the first cause of action but elaborates upon the charge as to the negligent physical examination and alleges that, at the direction of defendant Lockheed Aircraft Corporation, plaintiff H. H. Rannard submitted to such examination by defendants and "was thereupon negligently, carelessly and unskilfully advised by said defendants that, as a condition precedent to the proposed employment of said plaintiff H. H. Rannard by said defendant Lockheed Aircraft Corporation, it would be necessary for said plaintiff to undergo and submit to an operation designed to correct a purported 'double-hernia' purportedly found in said plaintiff; said plaintiff did thereupon with the full acquiescence, knowledge and consent of defendant Lockheed Aircraft Corporation consent to the operation so advised, and did, on the 2nd day of November, 1941, at the direction of defendants, submit to and undergo the said advised operation; that said operation was performed upon said plaintiff by said defendant Z. P. King in a negligent, careless and unskilful manner"; and that in advising said operation and in performing it, "defendant Z. P. King at all times acted as the agent and employee of defendant Lockheed Aircraft Corporation, and such acts of said defendant Z. P. King were, and each of them was, done in the scope of, and as a routine and regular part of, the usual employment and services rendered by said defendant Z. P. King to defendant Lockheed Aircraft Corporation."

The fourth cause of action is against defendant King only and was held sufficient to state a cause of action against him.

The fifth cause of action incorporates the substance of the first cause of action but it alleges that the diagnosis made in the examination for employment was of a double hernia and that plaintiff submitted to an operation for that condition by defendant King. The allegations of the third cause of action with regard to the operation and defendant corporation's connection with it are incorporated by reference. It is further alleged that after the operation defendant King discontinued his employment with Lockheed Aircraft Corporation but that he continued to treat and take care of plain-

tiff H. H. Rannard following the operation; that he did so negligently, and that "defendant Lockheed Aircraft Corporation participated in and took an active part in said negligent, careless and unskilled subsequent treatment and care, and thereby ratified and adopted and constituted as the act of said last named defendant and of its agent, defendant Z. P. King, the said negligent, careless, and unskilful subsequent treatment and care."

Defendants answered separately without demurring to the complaint.

A transcript of the argument upon the motion for judgment on the pleadings has been added to the record on appeal by stipulation. It was furnished for the purpose of resolving a disagreement between counsel as to what possibilities for amendment were open to plaintiffs following a discussion of purported deficiencies in the statement of their cause of action. Careful review of this transcript reveals that the trial court, in ruling upon the motion before it, eliminated from consideration any objections to the complaint which would render it vulnerable to a special demurrer but viewed the pleading as a whole—in effect as though the separate counts were combined in a single cause of action—and upon that basis deemed it lacking in the allegation of facts necessary to state a cause of action against the defendant corporation. Plaintiffs' counsel took a contrary position as to the sufficiency of the complaint, declined the court's offer of opportunity for amendment, and requested the court to "rule one way or the other on the motion, then let me take such action as I see fit to make." Thereupon the motion was granted, judgment was entered accordingly, and this appeal was taken.

[4] Under the authorities, it is sufficient to allege that an act was negligently done by defendant, and that it caused damage to plaintiff. Bergen v. Tulare County Power Co., 173 Cal. 709, 161 P. 269; Barbieri v. Law, 209 Cal. 429, 287 P. 464; Taylor v. Oakland Scavenger Co., 12 Cal.2d 310, 83 P.2d 948; Latky v. Wolfe, 85 Cal.App. 332, 259 P. 470; Roberts v. Griffith Co., 100 Cal. App. 456, 280 P. 199; 19 Cal.Jur., "Negligence," § 96, pp. 671-673. The rule was early announced in this state in Stephenson v. Southern Pacific Co., 1894, 102 Cal. 143, 147, 148, 34 P. 618, 619, 36 P. 407, as follows: "In adopting what is known as the 'code system of pleading,' courts in most of the states have excepted from the general rule, requiring a complaint to state the facts constituting the cause of action in ordinary and concise language, cases founded upon negligence; or, rather, they have so far modified the rule as to permit the plaintiff to state the negligence in general terms, without stating the facts constituting such negligence. This modification of a rule of code pleading is founded in wisdom, and grows out of a fundamental rule in common-law pleading, to the effect that 'no greater particularity is required than the nature of the thing pleaded will conveniently admit,' (Steph. Pl. *367;) supported by that other rule that 'less particularity is required when the facts lie more in the knowledge of the opposite party,' (Id., *370.) In cases of negligence, the sufferer may only know the general, the immediate, cause of the injury, and may be entirely ignorant as to the specific acts or omissions which lead up to it. * * * The term 'negligence,' for the purpose of pleading, is a fact to be pleaded,—an ultimate fact, which qualifies an act otherwise not wrongful. Negligence is not the act itself, but the fact which defines the character of the act, and makes it a legal wrong. The absence of care in doing an act which produces injury to another, is actionable. The term 'negligence' signifies and stands for the absence of care. * * * As a result of the application of these principles to code pleading in cases of negligence, and to others of kindred character, it is held in this state, and in nearly all of the United States, that it is sufficient to allege the negligence in general terms, specifying, however, the particular act alleged to have been negligently done."

This elementary principle of negligence pleading has been followed in a variety of situations in this state. Thus, in cases involving automobiles or other vehicles, it is sufficient to aver that defendant negligently operated the vehicle without alleging how or in what respect it was done. A typical example is found in Stein v. United Railroads, 159 Cal. 368, 370, 113 P. 663, 664, where it was alleged merely that the defendant "operated, ran, and conducted one of its cars * * * in such a careless, negligent, reckless, wrongful, and unlawful manner that the said car * * * ran into and upon the plaintiff and severely injured the plaintiff," and the complaint was held sufficient. Other illustrations of general negligence pleading involving varying factual backgrounds may be found in Fish-

er v. Western Fuse and Explosives Co., 12 Cal.App. 739, 108 P. 659 (explosion of a powder mill); Champagne v. A. Hamburger & Sons, 169 Cal. 683, 147 P. 954 (falling elevator); and Ingalls v. Monte Cristo Oil & Development Co., 176 Cal. 128, 167 P. 857 (defective construction of roof).

[5-7] The same rule permitting the pleading of negligence in general terms has been applied in malpractice cases. Dunn v. Dufficy, 194 Cal. 383, 228 P. 1029; Ragin v. Zimmerman, 206 Cal. 723, 276 P. 107; McGehee v. Schiffman, 4 Cal.App. 50, 87 P. 290. That in such instances, in addition to general allegations of negligence, the complaint may include a recital of certain related particulars does not deflect from the force of the general rule that "it is sufficient in cases of this class to plead that the thing done was negligently done." Ragin v. Zimmerman, supra, 206 Cal. at page 725, 276 P. at page 108; cf. Blakeslee v. Tannlund, 25 Cal.App.2d 32, 76 P.2d 216. While the statement of other facts auxiliary to the main fact—"the fact which caused the injury" (McGehee v. Schiffman, supra, 4 Cal.App. at page 53, 87 P. at page 291)—might tend to provide a clearer conception of the principal act, it has been the settled rule in this state since the decision of Stephenson v. Southern Pacific Co., supra, that "negligence and proximate cause may be simply set forth." Roberts v. Griffith Co., 100 Cal.App. 456, 461, 280 P. 199, 201. The application of this rule to pleadings in malpractice cases is well stated in Abos v. Martyn, 31 Cal. App.2d 705, 707, 708, 88 P.2d 797, 798, as follows: "It sufficiently appears from this complaint that what was done by this defendant was the administration of chiropractic treatments, which treatments, it was alleged, were negligently administered. Having alleged what was done and that the same was negligently done, the complaint was sufficient in the absence of a demurrer. While the defendant might have insisted upon greater certainty and particularity, he waived such defects by failure to interpose a special demurrer. As against a general demurrer, which is what an objection to the introduction of any evidence amounts to, the complaint is sufficient."

[8-10] Tested by the requirements of the established rule for negligence pleading, the complaint in the present case must be held sufficient. Negligence is expressly alleged with respect to three successive stages in the medical services rendered to plaintiff H. H. Rannard: the diagnosis, the operation, and the subsequent treatment. In relation to this premise of negligence, the complaint further alleges that "as a direct and proximate consequence and result" thereof various items of damage had been sustained by plaintiffs, thus satisfying the requirement of pleading "a causal connection between the act and the injury." 19 Cal.Jur., "Negligence," § 101, pp. 677, 678. While the complaint is couched in very general language, "All that is required of a plaintiff, as a matter of pleading, even as against a special demurrer, is that his complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source, and extent of his cause of action." Dunn v. Dufficy, supra, 194 Cal. at page 391, 228 P. at page 1032.

[11] This the complaint here does and it should be no more necessary, after the general charge of negligence in the diagnosis, the operation and the subsequent treatment, to detail the specific act or omission upon which plaintiffs rely than it is incumbent upon a plaintiff in an automobile collision case to specify the particular in which the vehicle was negligently operated, such as driving on the wrong side of the road, driving at an excessive speed, or failure to give proper traffic signals. These are matters of evidence which may be shown under the scope of the general negligence charge. Taylor v. Oakland Scavenger Co., 12 Cal.2d 310, 316, 317, 83 P.2d 948.

[12] The standard of pleading in negligence cases rests upon considerations of fairness and convenience in view of the situation of the opposing parties, and the rule permitting the pleading of negligence in general terms finds justification in the fact that the person charged with negligence may ordinarily be assumed to possess at least equal, if not superior, knowledge of the affair to that possessed by the injured party. Stephenson v. Southern Pacific Co., supra. There are certain cases, such as Lang v. Lilley & Thurston Co., 20 Cal.App. 264, 128 P. 1031, and McAllister v. Brown, 114 Cal.App. 239, 299 P. 753, which appear to require a high degree of particularity in the pleading of negligence. While those cases may be distinguishable upon the ground that the complaint in each instance was attacked by

special as well as general demurrer, certain language in the opinions appears to be out of harmony with the liberal rule of pleading set forth in the authorities hereinbefore cited. To the extent that such language may be in conflict with the conclusions reached herein, such language is disapproved. Under the authorities hereinbefore cited, the complaint in the present case appears sufficient in its statement of a cause of action for malpractice.

[13] The remaining point to be considered is the matter of liability of defendant Lockheed Aircraft Corporation for the alleged malpractice of defendant King. As above noted, the complaint sets forth the relationship of principal and agent as existing between defendant corporation and Dr. King, expressly charging not only that he was "retained in its employ as its agent and employee * * * in the normal conduct of, and in the furtherance of its interest in, [its] business," but also that in rendering the specified medical treatment, he "at all times acted as the agent and employee of defendant * * * corporation and such acts of said defendant Z. P. King were, and each of them was, done in the scope of, and as a regular and routine part of, the usual employment and services rendered by said defendant Z. P. King to defendant * * * corporation." This theory of pleading the joint responsibility of defendants for the negligent acts in question was proper under the peculiar circumstances of this case, where it is alleged that plaintiff, H. H. Rannard was found acceptable for employment by defendant corporation, "subject only to a physical examination * * * by * * * its agent, defendant Z. P. King," and after submitting to such examination said plaintiff, "as a condition precedent to the proposed employment," was required to undergo the operation in question.

[14-16] Thus, it is clear that defendant corporation employed Dr. King primarily to protect its own interests rather than the interests of the applicant employee and, under the doctrine of respondeat superior, it would be liable for any injury proximately resulting from the malpractice of such doctor. The pertinent rule of law is stated in 39 Corpus Juris, "Master & Servant," section 356, pages 244, 245, as follows: "Where a physician is employed by the master but the relation of physician and patient does not exist between him and the servant, the rule of respondeat superior applies and the master may be liable for his negligence. In any event, in order to hold the employer liable for the negligent treatment of the employee, such negligence must be established, and the complaint must positively and directly allege the facts imposing liability." A case illustrating the application of this rule is Jones v. Tri-State Telephone & Telegraph Co., 118 Minn. 217, 136 N.W. 741, 40 L.R.A.,N.S., 485, where the plaintiff employee, who had been injured in the course of his employment but was making satisfactory progress in his recovery, was required to submit to the taking of certain X-ray pictures by a doctor hired for such purpose by the employer and suffered certain damages as the result of exposure to the X-ray. In sustaining the liability of the employer, the telephone company, the Supreme Court of Minnesota said at page 219 of 118 Minn., at page 741 of 136 N.W., 40 L.R.A.,N.S., 485: "The relation of physician and patient did not exist between Dr. Roberts and plaintiff. The doctor was the servant of defendant. The case is the same, therefore, as if defendants' manager, or any other agent or employé, had inflicted the injury, and the rule of respondeat superior applies, rather than the law relative to the liability of a physician or surgeon to his patient, or to the liability of a master who employs a physician to treat his servant. There can be no doubt that defendant wanted the picture for its own purposes, probably as evidence in case plaintiff should bring suit against it to recover for the injury received in the accident."

[17] The fact that here, in contrast to the situation in Jones v. Tri-State Telephone & Telegraph Co., supra, plaintiff H. H. Rannard was the prospective rather than the actual employee of defendant Lockheed Aircraft Corporation would not deflect from the force of the general rule that the employer is liable for the injury sustained through the incompetence or want of skill of the physician or surgeon acting as the employer's agent primarily in protection of the employer's interests. 35 Am. Jur., "Master & Servant," § 111, pp. 539, 540. It is true that defendant corporation could not lawfully practice medicine, but this circumstance should not affect the application of the principle of agency in an action of this character. The claim that the subject of the agency—the practice of medicine—would constitute an ultra vires

act by the corporation is of no avail as a premise to escape liability voluntarily assumed by the corporation in order to gain an advantage or benefit for itself. Hedlund v. Sutter Medical Service Co., 51 Cal.App.2d 327, 332, 124 P.2d 878.

It follows from the above observations that the complaint here is a sufficient pleading of a cause of action against defendant Lockheed Aircraft Corporation.

The appeal from the order denying plaintiffs' motion for a new trial is dismissed. The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.




68 Cal.App.2d 591

## BRAINARD v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.

Civ. 14732.

District Court of Appeal, Second District, Division 2, California.

March 29, 1945.

Rehearing Denied April 13, 1945.

Hearing Denied May 24, 1945.

**1. Physicians and surgeons ⇐11(3)**

In determining whether physician was convicted of offense involving moral turpitude warranting revocation of his license, Board of Medical Examiners was not limited by sentence pronounced, but was justified in hearing evidence concerning all surrounding circumstances. St.1937, p. 1275, § 2383.

**2. Mandamus ⇐172**

In mandamus to require Board of Medical Examiners to restore physician's license which had been revoked on ground that physician had been convicted of offense involving moral turpitude, court was not limited by sentence pronounced but could hear evidence concerning all the circumstances for purpose of determining if moral turpitude was involved. St.1937, p. 1275, § 2383.

**3. Physicians and surgeons ⇐11(2)**

Physician's conviction in municipal court of failing to keep a record of narcotics dispensed, with suspended sentence of 1 day, constituted the conviction of offense involving "moral turpitude" warranting revocation of physician's license, in view of surrounding circumstances. St. 1937, p. 1275, § 2383; St.1939, p. 761, § 11225.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

**4. Constitutional law ⇐275(1)**

A physician was not deprived of his license without due process of law on ground that he was charged in complaint before Board of Medical Examiners with a misdemeanor, where charge stated that physician had been convicted of a crime involving moral turpitude in failing to keep record of narcotics dispensed, and he was given opportunity to meet such charge at hearing accorded him. St.1937, pp. 1275, 1276, § 2383, 2391; St.1939, p. 761, § 11225.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition in mandamus by Forest John Brainard to require the Board of Medical Examiners of the State of California and others to restore the petitioner's license as a physician and surgeon which license had been revoked by the board because of petitioner's conviction of an offense involving moral turpitude. From an adverse judgment, petitioner appeals.

Affirmed.

J. Edward Keating and Theodore E. Bowen, both of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Allen L. Martin and Carl W. Wynkoop, Deputy Attys. Gen., for respondents.

W. J. WOOD, Justice.

Petitioner was licensed on November 23, 1938, as a physician and surgeon. On December 2, 1942, a complaint was filed with the Board of Medical Examiners of the State of California in which it was charged that petitioner was guilty of unprofessional conduct as defined by section 2383 of the Business and Professions Code, St.1937, p. 1275, and more particularly that he had been "convicted of a crime involving moral turpitude, to-wit, violation of section 11225 of the Health and Safety Code of the State of California, failure to keep records of narcotics dispensed, * * *." A copy of

the record of petitioner's conviction by the municipal court of Los Angeles was attached to the complaint, showing that on September 3, 1942, petitioner entered a plea of guilty to the charge of violating section 11225 of the Health and Safety Code, St.1939, p. 761.

After a hearing the Board of Medical Examiners revoked petitioner's license and petitioner filed with the superior court a petition for a writ of mandate to require the Board to restore his license. Petitioner has appealed from a judgment in favor of defendant Board.

In contending that the evidence is insufficient to justify the revocation of his license petitioner asserts that he was not found guilty in the municipal court of Los Angeles of a crime involving moral turpitude and points to the fact that he was given a suspended sentence of one day upon the entry of his plea of guilty to the charge of failure to keep a record of narcotics dispensed.

[1, 2] The Board has authority to revoke the certificate of a physician who is found to be guilty of unprofessional conduct and it is expressly provided by statute that conviction of any offense involving moral turpitude constitutes unprofessional conduct. Business and Professions Code, sec. 2383. Section 11225 of the Health and Safety Code makes it a public offense for anyone to administer or dispense narcotics without making a record of the transaction, which shall be open to inspection by specified state officers, an offense which is not a felony, but sec. 2383 of the Business and Professions Code does not require that the offense of which the holder of a license is convicted be a felony. It is merely required that the conviction be "of any offense involving moral turpitude". Whether or not the offense committed did in fact involve moral turpitude depends upon all of the surrounding circumstances. The Board of Medical Examiners was not limited by the sentence pronounced by the municipal court, but it was justified in hearing evidence concerning all of the circumstances surrounding the offense for the purpose of determining if indeed moral turpitude was involved. In re Hatch, 10 Cal.2d 147, 73 P.2d 885; In re Rothrock, 16 Cal.2d 449, 106 P.2d 907, 131 A.L.R. 226; State v. Mason, 29 Or. 18, 43 P. 651, 54 Am.St.Rep. 772; State Board of Medical Examiners v. Friedman, 150 Tenn. 152, 263 S.W. 75. The same rule was applicable when petitioner filed his application for a writ in the superior court.

[3] The record contains ample evidence to sustain the Board's finding that petitioner was guilty of an offense involving moral turpitude. Inspector John Fennell, of the Division of Narcotic Enforcement, testified that on September 3, 1940, he and Inspector Sanford gave marked money to a narcotic addict, whom they called an "operator". The "operator" entered petitioner's office and returned with narcotics. The same procedure was followed two days later. The marked money was recovered from petitioner. When confronted by the officers petitioner asserted that, although he had read the Narcotic Act, he did not know that he had to keep records and that the "operator" was a sick man. An examination of petitioner's records and of his stock disclosed a shortage in his supply of narcotics. The markings on the arm of the "operator" and his general physical appearance indicated that he was a narcotic addict.

[4] Petitioner asserts that he was deprived of his license without due process of law, basing his assertion upon the fact that he was charged in the complaint before the Board of Medical Examiners with the commission of a misdemeanor. In the charge before the Board it was set forth that petitioner had been convicted of a crime involving moral turpitude, and although it was specifically set forth that he was guilty of the violation of sec. 11225 of the Health and Safety Code, the language of the charge was such that petitioner was notified that he would be called upon to meet the accusation that the circumstances surrounding the commission of the offense involved moral turpitude. He was given opportunity to meet this charge at the hearing which was accorded him. It is not claimed that a charge of unprofessional conduct may not be based upon the furnishing of narcotics to an addict. Business and Professions Code, sec. 2391.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

68 Cal.App.2d 462

## BUCHMAYER v. BUCHMAYER.

Civ. 14696.

District Court of Appeal, Second District, Division 3, California.

March 19, 1945.

As Modified on Denial of Rehearing April 13, 1945.

**1. Deeds ⇐211(4)**

Evidence was insufficient to sustain finding that deed, executed by husband to himself and wife, which placed in joint tenancy three parcels of income property which had been husband's separate property was procured by means of undue influence. Civ.Code, § 1575.

**2. Trusts ⇐283(1)**

Where trustee obtains advantage over his beneficiary the law raises a presumption that undue influence was used, and burden is on trustee to overcome the presumption which can be done only by proof that there was no breach of duty and that transaction was understood by beneficiary and was entirely fair as to him. Civ.Code, §§ 1575, 2235.

**3. Contracts ⇐99(1)**

Where no trust or confidential relationship exists, proof that one of parties to transaction obtained an advantage over the other does not raise a presumption that undue influence was used and does not place burden on the one benefited of proving that it was not used.

**4. Husband and wife ⇐36**

In absence of evidence to contrary, it is to be assumed that husband and wife reposed confidence in each other, but that fact alone does not raise a presumption against validity of their dealings with each other.

**5. Divorce ⇐116**

In divorce action, where it appeared that parties had made a trip before marriage testimony that witness heard plaintiff threaten that if defendant did not sign over property to plaintiff she would put defendant in the pen for taking her out of the state was admissible under husband's allegation of cruelty in cross-complaint.

**6. Cancellation of Instruments ⇐53**

Where grantor seeks to have deed set aside on ground of undue influence, finding should be specific as to acts which constituted use of undue influence.

**7. Cancellation of Instruments ⇐53**

Specification in finding of definite acts as means employed to bring about execution of deed excluded the use of other means.

**8. Cancellation of Instruments ⇐53**

Even if conclusion of law that deed was made as result of undue influence of plaintiff and qualifying phrase while under domination and influence of plaintiff were treated as findings, they would be insufficient to support judgment declaring deed invalid, since there would be no showing of what the undue influence consisted.

**9. Cancellation of Instruments ⇐53**

Finding that wife had pursued a course of conduct toward husband which consisted of striking him, swearing at him, yelling at him, threatening him with criminal prosecution, importuning him to deed to her his separate property without consideration, and other acts inimical to her marital obligations negatived existence of confidential relationship and furnished no basis for presumption that undue influence had been exercised by wife in inducing husband to execute deed. Civ.Code, § 1575.

**10. Deeds ⇐70(7), 196(3)**

The rule that whenever there is great weakness of mind in grantor arising from age, sickness or any other cause, though not amounting to absolute disqualification, and consideration given for property is grossly inadequate, imposition or undue influence will be inferred and court of equity will, on proper application of grantor or his representatives or heirs, interfere and set conveyance aside, was inapplicable, where there was no evidence of great weakness of grantor's mental faculties.

**11. Deeds ⇐211(4)**

Husband was not entitled to judgment declaring invalid a deed, executed by him to himself and his wife, which placed in joint tenancy three parcels of income property which were his separate property, in absence of evidence that wife exerted an influence which amounted to substitution of her will for his own. Civ.Code, § 1575.

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Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action for divorce by Lillian N. Buchmayer against Frank W. Buchmayer,

wherein defendant filed a cross-complaint for divorce and to set aside a deed. Judgment for defendant, and plaintiff appeals.

Reversed and new trial ordered in part and affirmed in part.

W. L. Engelhardt, of Los Angeles, for appellant.

Irl Solomon and William G. Randall, both of Los Angeles, for respondent.

SHINN, Justice.

Lillian Buchmayer sued Frank Buckmayer for divorce upon the ground of cruelty. They had been married for three years and seven months at the time of their separation. The defendant answered and filed a cross-complaint for divorce upon the ground of cruelty. By his cross-complaint he also sought to have set aside a deed executed by himself to himself and his wife, which placed in joint tenancy three parcels of income property, which were his separate property. Findings and judgment were in favor of defendant and he was granted a decree of divorce, which also annulled the joint tenancy deed upon the theory that it had been obtained by plaintiff through the use of undue influence. Plaintiff appeals from the judgment; she is satisfied to have lost her husband by the decree, but not the property.

The first cause of action of the cross-complaint alleged cruelty in general terms. The second alleged that defendant was 74 years of age and plaintiff 45 when they married; that defendant then owned the real property in question; that plaintiff represented and promised that if defendant would marry her and make a will leaving her all his property she would treat him with conjugal love and affection and faithfully care for him during the remainder of his life; that defendant believed said representations and promises and was thereby induced to and did marry plaintiff and make a will in her favor; that plaintiff did not intend to and did not keep her promises and at all times after the marriage treated defendant with great unkindness and nagged and vexed and annoyed him to anger in order to aggravate him into giving her grounds for divorce. It was also alleged that defendant made a deed placing the property in question in joint tenancy, but it was not alleged that this was done in reliance upon the antenuptial promises, and no facts were stated which would constitute a cause of action for annulment of the deed. In the third cause of action it was alleged that plaintiff represented to defendant that under the law of California she owned a half interest in his real property as community property and that the law required him to make a deed in her favor as evidence of her interest; that she knew her representations to be untrue; that defendant was ignorant of the law, which fact was known to plaintiff; that he believed her representation that he was obliged under the law to deed her a half interest in the property, and by reason thereof executed the deed, which he would not have executed except for her false representation. It was alleged that he did not intend to make a gift of any interest in the property to plaintiff "save and except as title to said property should eventually become vested in the cross-defendant upon the taking effect of the last will and testament of the cross-complainant, as hereinbefore set forth." The fourth cause of action alleged that soon after the marriage plaintiff commenced and thereafter persistently urged defendant to convey her his property and represented and promised that if he would do so she would hold it as a "sacred trust" and administer it for his interest and benefit; "that the cross-complainant had great confidence in the good faith of the cross-defendant, and verily believed that the cross-defendant would truly fulfill her representations and promises to the cross-complainant as above set forth. That by reason of the confidence which cross-complainant had in the cross-defendant, and by reason of his age and enfeebled condition, the cross-complainant was unable to resist the continuous importunity of the cross-defendant; but the cross-complainant was over-persuaded and unduly influenced thereby, and the cross-complainant did execute and deliver to cross-defendant the said deed of conveyance, Exhibit A, as hereinbefore set forth." It was then alleged that plaintiff wholly failed to keep and perform her promises, that she collected rents from the properties, appropriated them to her own use, and refused to account to defendant therefor.

The parties were residents of Los Angeles, they went by automobile to Florida, where they were married November 27, 1939, they returned to Los Angeles soon thereafter, the deed in question was executed March 30, 1942, and they separated July 21, 1943, when defendant departed from the house. Both parties testified fully as to the circumstances under which

they first met, over sandwiches and beer in a cafe, and their subsequent platonic friendship and association prior to the marriage. Plaintiff was then the operator of a beauty shop, which had been her business for many years; defendant was a widower, without blood relatives so far as he knew and, admittedly, desirous of companionship. They saw each other at frequent intervals for a period of about two years. Some time before the marriage defendant loaned plaintiff $1,000 with which to complete the purchase of a house and lot. Plaintiff purchased a car in 1939, intending to drive to Florida, and defendant asked to go along, which was agreed upon. Defendant gave plaintiff $350 for her expenses on the trip and paid his own expenses. They occupied separate rooms on the trip, and in Florida, until they were married. Each accused the other of proposing the marriage. They agreed, however, that plaintiff insisted, as a condition to marriage, that defendant execute a will in her favor, to which defendant willingly consented.

The issues were tried at length, the court found plaintiff to have been guilty of extreme cruelty, and made additional findings as follows: "That prior to March 30, 1942, Defendant and Cross-Complainant was the sole owner of the following described real property in the County of Los Angeles, State of California, to-wit: [Here a description of the three properties.] That on March 30, 1942, Defendant and Cross-Complainant made and delivered to Plaintiff and Cross-Defendant a joint tenancy deed of the foregoing real property wherein Defendant and Cross-Complainant was described as grantor and Defendant and Cross-Complainant and Plaintiff and Cross-Defendant were described as grantees; that on said date and prior thereto Defendant and Cross-Complainant was a man of the age of 76 years and Plaintiff and Cross-Defendant was 45 years of age. That on said date and prior thereto Defendant and Cross-Complainant was sick in mind and body; that his mentality was weak and childish; that for the purpose of obtaining said joint tenancy deed, Plaintiff and Cross-Defendant threatened him with criminal prosecution and falsely accused him of criminal acts. That as the result of said threats and accusations and as the result of Defendant and Cross-Complainant's mental condition, he made the aforesaid deed while under the domination and influence of Plaintiff and Cross-Defendant and without consideration from her."

[1] It is contended that the evidence was insufficient to support the finding that the deed was procured by means of undue influence. We conclude that this finding is without evidentiary support and that the judgment must be reversed.

[2-4] There are three classes of undue influence defined by section 1575 of the Civil Code, as follows: "Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or, 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress." We are not concerned here with the third class. In cases of the first class which arise out of breach of a confidential relationship, weakness of mind of the person imposed upon is not a necessary element. If the trustee obtains an advantage over his beneficiary the law raises a presumption that undue influence was used, the burden is upon the trustee to overcome the presumption, which can be done only by proof that there was no breach of duty, and that the transaction was understood by the beneficiary and was entirely fair as to him. Civil Code, secs. 1575 and 2235. In the second class of cases the existence of a confidential relationship is not a necessary element, although weakness of mind of the person imposed upon is such an element. Where no trustee or confidential relationship exists, proof that one of the parties to a transaction obtained an advantage over the other does not raise a presumption that undue influence was used and hence does not place the burden upon the one benefitted of proving that it was not used. (Ripperdan v. Weldy, 1906, 149 Cal. 667, 671, 187 P. 276. While it is to be assumed, in the absence of evidence to the contrary, that the husband and wife reposed confidence in each other, that fact alone does not raise a presumption against the validity of their dealings with each other. Wilcox v. Wilcox, 1916, 171 Cal. 770, 772, 155 P. 95; Faria v. Faria, 1929, 100 Cal.App. 177, 185, 280 P. 107; McDougall v. McDougall, 1902, 135 Cal. 316, 67 P. 778; Stiles v. Cain, 1901, 134 Cal. 170, 66 P. 231. Defendant's cross-complaint was drawn on the theory that the deed was executed solely by rea-

son of certain specific representations and promises of plaintiff. There was a sufficient finding of undue influence, independent of the existence of a confidential relationship, but this finding was not supported by the evidence. It was found that defendant's mentality was weak and childish, that plaintiff threatened him with criminal prosecutions, and that the deed was executed by reason of such threats and defendant's weakness of mind. These are the only facts found which tended to establish a case of undue influence. It was not alleged in the cross-complaint that plaintiff ever accused defendant of the commission of crimes or threatened him with criminal prosecution. Defendant testified to no such threat or threats. One witness, a former tenant of defendant, testified that upon her return from the theater about midnight sometime in the spring of 1940, which was about two years before the deed was executed, she overheard plaintiff and defendant quarreling in the rear of their house and heard plaintiff threaten that if defendant did not "sign over the property to her she would put him in the pen for taking her out of the state." She testified that she was standing on the sidewalk in front of the house at the time. We think it pertinent to quote in connection with her testimony, which would seem to have been confusing to the court and counsel, the following statement made by defendant's attorney: "Mr. Solomon: I have in mind the age of the witness, and the court will have in mind whether or not she is capable of making statements correctly or not, or what she really meant by what she said."

[5] This testimony was admissible under the allegation of cruelty and was doubtless offered thereunder; there was no application to amend by alleging threats as a ground for setting aside the deed. Even if the court had believed that plaintiff uttered such a threat some two years before the execution of the deed, there was nothing in the evidence to indicate that defendant would have taken the threat seriously, and there was much to indicate that he would have appreciated the ludicrous nature of a charge that he had taken plaintiff over the state line for immoral purposes. If the threat was ever made, it evidently left no impression upon defendant. There was nothing in the cross-complaint or in defendant's testimony to the effect that he executed the deed in order to escape criminal prosecution for alleged violation of the Mann Act. Defendant testified explicitly that he had no remembrance whatever of having executed the deed and he claimed to have no recollection as to the circumstances of its preparation. He testified that he had been acquainted with Mr. Bradley, branch manager of the Bank of America, for 22 years; that Mr. Bradley was a friend in whom he had "a lot" of confidence and who advised him in business matters; that he and Mrs. Buchmayer went to see Mr. Bradley and talked to him about the deed; that Mr. Bradley said he would send someone out to see defendant; that a man did come to the house but that defendant had not seen him before and did not remember who he was. It appeared that the man who came was an attorney; he prepared wills for the parties, which were duly executed. Defendant testified that he could not remember about the wills. The only evidence in the case as to any conversation between plaintiff and defendant with respect to the deed in question was that given by defendant, as follows:

"Q. State to the court whether or not you remember signing that signature on there. A. I don't remember.

"Q. You made this deed? A. I don't remember that. We went down to the bank and the banker told us that Mr. Max Bradley said he would send a man over to take care of us.

"Q. State if you know, who drew this deed. A. No, sir, I don't know.

"Q. State the conversation with Lillian concerning this deed. What did he say as to why the deed should be made out to her? A. I think she was afraid I was going to die. She wanted to get it, even before the stroke. We had a quarrel over that.

"Q. What quarrel—you had a quarrel? A. Yes, we had quite a set-to. I told her it would cost too much money to have it transferred, and I did not think we ought to do it.

"Q. What did she say to that statement? A. She said, 'If you want to have it done—you haven't got anyone here anyway, and you might as well have it done.'"

The deed was acknowledged before Mr. Bradley as a notary public. He was called as a witness to testify to bank records but was not questioned at all as to the circumstances under which the deed was executed and acknowledged. Plaintiff denied having anything to do with the preparation or execution of the deed. The finding that de-

fendant executed the deed because of threats of criminal prosecution, coupled with mental weakness, is not sustained by the evidence.

[6-8] The court found as a conclusion of law that the deed was made "as a result of the undue influence of plaintiff and cross-defendant." Defendant would have us consider this conclusion as an additional finding, inadvertently labeled a conclusion of law. It is insisted that the judgment would then have support, independent of the finding which we have held to be unsupported by the evidence. We think this conclusion cannot be regarded as a finding and that it was not intended as such. The findings should be, and were, specific as to the acts of plaintiff which constituted the use of undue influence. The specification of definite acts as the means employed to bring about the execution of the deed excluded, by necessary inference, the use of other means. The qualifying phrase "while under the domination and influence of plaintiff and cross-defendant" must be read with the preceding portion of the sentence and as merely descriptive of a condition allegedly brought about by the threats. Even if we were to treat the phrase, or the conclusion in question, or both of them, as intended to serve as findings, they would not be sufficient to support the judgment. There would be no way of knowing of what the undue influence consisted. The cross-complaint pleaded as a complete cause of action the false representation that under the law plaintiff was the owner of one-half of defendant's property and that defendant was required by law to deed her share; and as a separate and distinct cause of action that plaintiff promised to hold the interest in trust for defendant and that defendant did not intend to make a transfer which would have any greater effect than a will in plaintiff's favor. It is contended by defendant that the cross-complaint went further and alleged sufficient facts to show the existence of a confidential relationship and that plaintiff took advantage thereof by continually insisting that defendant should turn over his property to her and that defendant finally succumbed to plaintiff's influence and acceded to her wishes. From this premise it is argued that the burden of proof was upon plaintiff to satisfy the court that the transaction was fully understood by defendant and that the deed was given freely and without the exertion by plaintiff of any influence or other sort of adverse pressure.

[9] In view of the conflicting theories of the cross-complaint, a general statement that the deed was procured through the exercise of undue influence would establish no factual basis for a decision. It would be impossible to determine the grounds of the decision or whether they were sufficient to render the deed invalid, or were sufficiently established by the evidence. No evidence whatever was introduced to prove any of the alleged representations or promises. No facts were alleged or proved which would have warranted a finding that a confidential relationship existed between the parties. It is true that a confidential relationship usually exists between husband and wife and that it is commonly said that it is presumed to exist. But the cross-complaint and defendant's testimony, as well, related a history of plaintiff's broken promises from the time of the marriage and a continuous course of cruel and abusive conduct toward defendant. Not only was it found that plaintiff accused defendant of crimes and threatened him with criminal prosecution, but it was also found that she had pursued a course of conduct toward defendant which consisted of "striking him, swearing at him, yelling at him, threatening him with criminal prosecution, falsely accusing him of crime, importuning him to deed to her his separate property without consideration, and other acts and things inimical to her marital obligations." Under these conditions it would have been impossible for the influence of a confidential relationship to exist, for, as said in Brison v. Brison, 1891, 90 Cal. 323, 336, 27 P. 186, 190: "The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue, whenever this confidence is subsequently violated or abused. Civil Code, § 1575, subd. 1." The facts found were sufficient to negative the existence of a confidential relationship and furnished no basis for a presumption that undue influence had been exercised. A finding of the use of undue influence would have been unwarranted without proof independent of the presumption of the exertion of influence at the time the deed was executed, and there was no such proof. We conclude that the specific finding of

the exercise of undue influence was intended to be the only finding upon that issue and that any other finding of the use of undue influence as specifically alleged in the cross-complaint or based upon the assumed existence of a confidential relationship would have been unsupported by the evidence.

[10] We might add that upon the record which is before us the case is not one which falls within the rule that whenever there is great weakness of mind in a person executing a conveyance of land, arising from age, sickness or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, imposition or undue influence will be inferred and a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. Moore v. Moore et al., 1880, 56 Cal. 89, 94; 9 Cal.Jur. 224. There was no evidence of great weakness of defendant's mental faculties. He had suffered a slight paralytic stroke some two months before he executed the deed but this was not confining nor generally disabling and he recovered from it satisfactorily. He attended to his business affairs without assistance and pursued his accustomed activities. It might be assumed from the fact that he testified that he had no remembrance of having executed the deed that he had suffered some severe loss of memory. The record tends to prove the reverse. He had a clear recollection of the events as to which he was questioned, with the exception of the ones upon which his attack upon the deed depended. He testified at length as to the circumstances under which he first met plaintiff, of their association together, their marriage and continued quarreling down to the time of the separation. He was shown to have been thrifty, he collected with interest the sum of $1,000 which he had loaned plaintiff prior to the marriage, and he successfully resisted what he described as her continued demands for his money and other property. Numbers of his intimate friends, including a relative by marriage, testified in his behalf and only one was questioned as to his supposed mental retrogression. This witness testified as to his observations a few days before the deed was executed: "A. His mind did not seem to be what it should. He said several things that made me question his mentality. He was in a very nervous condition." It is to be noted that this witness was also a witness to defendant's will, executed at the same time as the deed, and that he subscribed the declaration that he believed defendant to be of sound mind. Two physicians, brothers, who prescribed medicine to reduce a blood clot which was the cause of defendant's illness, were questioned as to their observations of his mental condition. One testified that some five days after his attack he was rather childish in action, "a little below par mentally. * * * I don't remember any of the questions that I asked him, but I have that impression." The other testified that a year later, "I thought he was far below par," and in response to a leading question, "I would say he was childish." No one of these witnesses gave any reason for his opinion. The physicians saw defendant but a few times, did not examine him as to his mental condition and made no notes thereof. Mr. Bradley, defendant's business adviser, and who arranged for the preparation of the deed and the wills, was not questioned as to defendant's mental condition. As we have already stated, defendant had no blood relatives, and was at all times willing that plaintiff should receive his property upon his death. He evidently consulted with his banker before executing the deed but did not care to have the latter testify to any of the circumstances.

[11] There was nothing unnatural or which shocks the conscience in defendant's placing his property in joint tenancy with his wife. It is unfortunate that his act did not end the discord between them, but in the present action he has failed to establish grounds for annulment of the deed. Four days before the trial he verified his cross-complaint, setting forth specific representations and promises upon the part of plaintiff. Upon the trial he professed to remember nothing as to the same matters. Without evidence that plaintiff exerted an influence which amounted to the substitution of her will for his own, defendant was not entitled to findings and judgment declaring the deed invalid.

The judgment is reversed and a new trial is ordered as to the issue of title to the real property, and is affirmed insofar as it awards plaintiff a divorce.

DESMOND, P. J., and PARKER WOOD, J., concur.

68 Cal.App.2d 501

## LINDEN v. MOORE.

Civ. 14682.

District Court of Appeal, Second District, Division 3, California.

March 23, 1945.

1. Partnership ⇐71

Where the agreement as to what plaintiff would contribute to the partnership formed with defendant was ambiguous, the agreement must be interpreted in light of the purpose for which the partnership was formed.

2. Evidence ⇐60

In entering into a partnership, it must be presumed that the parties intended to enter into a legal, and not an illegal, transaction.

3. Contracts ⇐108(2)

An agreement whereby a chiropractor and a layman entered into a partnership for purpose of selling and using a mechanical device in the treatment of rupture, each to receive one-half of the net profits, was not, on its face, illegal as being contrary to public policy on ground that it involved the splitting of fees.

4. Contracts ⇐141(3)

Evidence supported finding that contract between chiropractor and layman, forming a partnership for purpose of selling and using a mechanical device in the treatment of rupture, was not illegal and contrary to public policy on theory that under it chiropractor rendered services for customers of the partnership and that the contract therefore involved the splitting of fees.

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Appeal from Superior Court Los Angeles County; Jess E. Stephens, Judge.

Action by Joseph P. Linden against Frederick Earl Moore, also known as Fred E. Moore, to dissolve an alleged partnership and for an accounting. Judgment for plaintiff, and defendant appeals.

Affirmed.

Claude L. Welch, of Los Angeles, for appellant.

James M. Gammon, of Los Angeles, for respondent.

FOX, Justice pro tem.

Plaintiff brought this action to dissolve an alleged partnership with the defendant and for an accounting. From a judgment for $2,194.72 in favor of plaintiff, the defendant appeals.

Plaintiff is a chiropractor licensed to practice in California. The defendant, a layman, is alleged to own the patent rights upon a certain mechanical device, known by the trade name of "Adomolator," used in the treatment of rupture. Plaintiff alleges that on or about May 1, 1942, he and defendant entered into an oral agreement for the purpose of selling and using the Adomolator in the treatment of rupture without the use of drugs or surgery. It was agreed according to the complaint that defendant should contribute the use of the said Adomolator and "That plaintiff was to contribute his knowledge and skill as a chiropractor in the treatment of patients suffering from rupture by using said mechanical device and method of treatment." Plaintiff further alleged that each of the parties was to receive one-half of the net profits after the payment of current expenses. The court found these allegations were true, since it found that all of the allegations of the amended complaint were true.

Defendant takes the position that the quoted allegation which the court found to be true means, in effect, that plaintiff agreed to and did contribute his professional services as a chiropractor to the partnership business. From this premise he argues that the arrangement involved the "splitting of fees" between a chiropractor and a layman, and that such a contract is void as against public policy. We do not, however, agree with defendant's premise, or the applicability of his legal proposition when the record is considered in its entirety.

[1-3] The agreement as to what plaintiff would contribute to the partnership, as revealed by the quoted allegation, is somewhat ambiguous. The agreement must therefore be interpreted in light of the purpose for which the partnership was formed. In this connection it is alleged that the parties entered into the agreement "for the purposes of *selling and using* a certain mechanical device [the Adomolator] in the treatment of rupture." (Italics added.) It must also be presumed that the parties intended to enter into a legal, and

not an illegal, transaction. Plaintiff did not undertake to give chiropractic treatments to the customers of the partnership. Rather, he was to use his expert knowledge and skill in treating rupture "by using said mechanical device and method of treatment," and in making sales of said Adomolator. The fact that plaintiff had training and experience as a chiropractor was no doubt of great value to him in properly fitting the Adomolator on persons suffering from rupture and in making sales. The agreement, on its face, which plaintiff alleged, was neither illegal nor contrary to public policy. It was, however, proper to admit evidence of the character of the services rendered by plaintiff for the partnership.

[4] Any doubt as to whether the plaintiff was to render chiropractic services for the customers of the partnership is set at rest by the findings of fact. The defendant alleged in his answer that the plaintiff was: "* * * particularly to use his education, knowledge, skill and California State License to practice chiropractic in connection with the trusses aforesaid in the treatment and cure of patients suffering from rupture and hernia; that all patients so afflicted were to be so treated professionally by the plaintiff as a licensed Chiropractor under the fictitious firm name Adomolator Company." Defendant also alleged the contract was illegal, and against public policy. The court found these allegations were untrue. The court also found that the plaintiff and defendant "entered into an oral agreement for the formation of a partnership to carry on the business of treating rupture by the use of a truss and a device called the Adomolator." There is no substantial conflict between these findings and the finding that all the allegations of the amended complaint are true. Furthermore, it is clear from the statement of the trial court which is set forth in the narrative statement on appeal (which does not, however, contain a summary of the evidence) that there was no substantial evidentiary foundation for a finding that plaintiff rendered chiropractic services for the customers of the partnership. On this point the court said at the conclusion of the trial, "Another basis for construing the contract is the construction by the parties themselves by their actual performance" and also that under the "overwhelming testimony before me, not only by the parties themselves, but by the witnesses presented, there wasn't any practice of chiropractic there." Consequently, there is no factually established basis for the application of defendant's proposition that the contract between the parties was illegal and contrary to public policy on the theory that it involved the splitting of fees between plaintiff and a layman.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.




**In re LAIR'S ESTATE.**

**SHNELL et al. v. BRUNTON. ***

**Civ. 14368.**

District Court of Appeal, Second District, Division 3, California.

March 19, 1945.

**Rehearing Granted April 18, 1945.**

**1. Trusts ⇐227**

"Proper expenses" of a testamentary trustee, within contemplation of Code section directing court to allow trustee his proper expenses on settlement of account, include reasonable fees for necessary legal services rendered in behalf of trustee. Probate Code, § 1122.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Expenses".

**2. Trusts ⇐227**

The Code sections pertaining to allowance of expenses to a testamentary trustee and providing for an order directing an executor or administrator to pay attorney's fees out of estate do not give probate court jurisdiction to award attorney's fees directly to attorney for a trustee. Probate Code, §§ 911, 1122.

**3. Courts ⇐198**

The probate court has no powers other than those given by statute and such incidental powers as pertain to court to enable it to exercise jurisdiction conferred.

**4. Trusts ⇐227**

Generally, an attorney employed by a trustee must look to trustee for payment

* Subsequent opinion 161 P.2d 288.

and can have no claim on trust fund except that, when trustee is without funds of estate in his possession, he may by agreement require those rendering services to look solely to trust estate, and, when facts creating exception appear, creditor may proceed in equity for satisfaction of claim from trust estate.

**5. Trusts ⇐227**

Where record did not disclose any agreement that attorney should look to testamentary trust estate for his compensation rather than to trustee, order for payment of attorney's fees directly to attorney made in connection with settlement of trustee's account was erroneous. Probate Code, § 1122.

**6. Trusts ⇐329**

Where error in order directing payment of fee directly to trustee's attorney in a lump sum with fee as administrator of estate of deceased trustee was not a clerical error, District Court of Appeal would not direct on reversal that probate court order payment of such amount to attorney in his capacity as administrator by correcting alleged clerical error. Probate Code, § 1122.

**7. Trusts ⇐227**

A testamentary trustee who acts as attorney for himself cannot be given compensation for his service as such attorney under rule of public policy forbidding one who acts in a fiduciary capacity from becoming his own employer.

**8. Trusts ⇐227**

Attorney was entitled to an award for legal services rendered to trustee during trustee's lifetime and to an award for services as legal representative of deceased trustee, but he was not entitled to fees for legal services rendered in propria persona as administrator of deceased trustee's estate.

**9. Trusts ⇐227**

Where allowance for attorney fees for testamentary trustee was based partly upon services for which court had no power to order payment and fees were awarded in a lump sum and condition of record was such that improperly allowed fees could not be segregated from total allowance, whole order for fees was reversed.

**10. Trusts ⇐322**

On settlement of account of deceased testamentary trustee, fees awarded for legal services to testamentary trustee, for services rendered by attorney as trustee's administrator after trustee's death, and for services of trustee, should be stated separately to permit interested parties to determine whether amounts awarded for specific items were reasonable and whether amounts were for services rendered by a person acting in a double capacity and whether they were awarded upon any illegal basis.

**11. Trusts ⇐330**

That trustee and his administrator sought to determine ownership of corpus of trust estate for alleged violation by remainder beneficiaries of a contest provision in will, which violation court had branded as an unfounded action, did not establish that trustee and administrator sought to destroy trust and thereby should be denied allowance for attorney fees.

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Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Proceedings in the matter of the estate of Nancy Ray Lair, deceased, between A. W. Brunton, individually and as administrator with the will annexed of the estate of John W. Lair, deceased, trustee of a testamentary trust, and John W. Shnell and others. From a judgment and decree settling the final account of the trustee and apportioning and distributing the assets, John W. Shnell and others appeal.

Affirmed in part and reversed in part with directions.

See also, Cal.App., 150 P.2d 560.

Charles W. Cradick, of Los Angeles, for appellants.

A. W. Brunton, of Los Angeles, in pro. per. for respondent.

PARKER WOOD, Justice.

This is an appeal from a judgment settling an amended and supplemental first and final account rendered by the legal representative of a deceased trustee of a testamentary trust; awarding a "lump sum" fee to A. W. Brunton "for services as attorney and administrator of the estate" of the deceased trustee; and distributing the trust estate to the remainder-beneficiaries. Although the notice of appeal states that the appeal is from the whole judgment, the brief of appellant

states that the appeal is directed only to the following portion thereof: "It is further Ordered, Adjudged and Decreed, that the said A. W. Brunton be and he is hereby allowed the sum of $800.00 for his services as attorney and as Administrator of the Estate of John W. Lair, rendered in the above entitled matter, and that the said A. W. Brunton have a lien upon all of the assets of said trust estate to secure the payment of said sum of $800.00."

Appellants contend in part that the court was without jurisdiction to award attorney's fees direct to the attorney for the trustee; that an administrator or a testamentary trustee who acts as attorney for himself cannot have compensation for his services as attorney; and that when a part of a lump sum allowance for fees has been made upon an improper basis and there is no means of segregating the improper part from the total allowance, the whole order for fees should be reversed.

The appellants are the husband, son and daughter of a deceased sister of the trustor, Nancy Ray Lair, deceased, which sister was one of four remainder-beneficiaries of the corpus of the trust. The appellants were the objectors to the account herein. The other beneficiaries have not appealed.

In 1936 John W. Lair became the trustee of the testamentary trust of his deceased wife, Nancy Ray Lair. Under the provisions of the trust he was to receive the income from the trust during his life and upon his death the corpus of the trust was to be distributed to her brother and three sisters. In 1939 he filed his first account as such trustee. The remainder-beneficiaries objected to the account upon the ground, among others, that the trustee should be charged personally with $850 which had been made a lien upon the corpus of the estate during the administration and before distribution to the trustee. That objection was sustained, but the order was reversed on appeal. Estate of Lair, 38 Cal.App.2d 737, 102 P.2d 436. Upon a rehearing of the account after the reversal, the trial court found that an item of $55.11 (which the trustee had listed as income) was a part of the corpus, and ordered that said sum should be charged against the trustee personally; and further ordered that no expenses should be charged against the corpus of the estate. Those orders were reversed on appeal. Estate of Lair, 52 Cal.App.2d 222, 126 P.2d 133. Soon after the trial court in 1939 had ordered that the trustee be charged personally with the $850, the remainder-beneficiaries filed a complaint, designated a bill in equity, to remove the trustee. That action was tried and submitted on January 20, 1941. On February 6, 1941, before the decision therein was rendered, the trustee John W. Lair died. While the first appeal, above mentioned, was pending the trustee filed a second account, and after the reversal on that appeal he filed an amended and supplemental second account which was set for hearing on February 7, 1941. Mr. Lair having died prior to the date for that hearing, the matter of said second account was placed off calendar pending the appointment of a legal representative of the deceased trustee. A. W. Brunton, an attorney at law who had been the attorney for the trustee John W. Lair, was appointed administrator with the will annexed of the estate of John W. Lair, deceased, on March 11, 1941. As such administrator, Mr. Brunton was substituted in place of Mr. Lair in the action which had been submitted on January 20, 1941. That action was decided on June 5, 1941, and it was therein adjudged that plaintiff recover $55.11 from defendant for the benefit of the corpus of the trust estate. That judgment was reversed on appeal. Shnell v. Brunton, 52 Cal.App.2d 226, 126 P.2d 135.

On November 20, 1942, Mr. Brunton, as such administrator of the deceased trustee's estate, filed the amended and supplemental first and final account, petition for fees, and petition to determine ownership of corpus, which are involved herein.

In the petition for fees the administrator asked that fees in the sum of $50 be allowed A. W. Brunton as administrator for services rendered by the deceased trustee, and that fees in the sum of $3,000 "be allowed A. W. Brunton as attorney for said trustee and as Administrator" of his estate for services rendered as such administrator. The petition alleged that, in connection with the action to remove the trustee, Mr. Brunton rendered 69 hours of services as attorney for the trustee prior to the death of the trustee, and that after the death of the trustee Mr. Brunton rendered 55 hours "appearing in pro. per." as administrator of the estate of the deceased trustee; that he spent 5 hours in preparing the first account, and 10 additional hours in preparing a first account rendered by himself as administrator (not

the one now before the court); that he had spent 10 hours in preparing the account now before the court and he would spend 10 additional hours in the hearing of the account and preparing the findings and decree; and that he spent more than 100 hours in connection with the first account filed by the trustee, including the appeals involved therein. Mr. Brunton submitted evidence in support of those allegations.

It therefore appears that the petitioner sought an allowance for the services of the deceased trustee, and sought an allowance for the services of himself as attorney rendered before and after the death of the trustee, and for services as administrator of the estate of the deceased trustee; that the court made no allowance for the services of the deceased trustee although it found (in its general findings) that he had rendered services of the value of $50; and that the court made a lump sum allowance of $800 to A. W. Brunton individually "for his services as attorney and as Administrator."

[1-6] Appellants assert, as above stated, that the court was without jurisdiction to award attorney's fees direct to the attorney for the trustee. Section 1122 of the Probate Code, in a Chapter entitled "Administration of Trusts," provides in part: "On the settlement of each such account the court shall allow the trustee his proper expenses and such compensation for services as the court may deem just and reasonable." Proper expenses of the trustee, referred to in said section, include reasonable fees for necessary legal services rendered in behalf of the trustee, but there is no provision in that section or in any statute that the court is authorized to make an allowance for such expense of a trustee to the attorney directly. On the contrary that section provides, as above noted, that the proper expenses of the trustee shall be allowed to the trustee. Under the provisions of Section 911 of the Probate Code the court is given express authority to "make an order requiring the *executor* or *administrator*" to pay attorney's fees "out of the estate" to an "attorney who has rendered services to an *executor* or *administrator*" (italics added), but that section does not give the court authority to order the payment of fees to an attorney for a trustee. The probate court has no other powers than those given by statute and such incidental powers as pertain to it and enable the court to exercise the jurisdiction conferred upon it. Section 1556 of the Probate Code which relates to payment of expenses of a guardian is similar to said Section 1122 which relates to expenses of a trustee. Said Section 1556 is in part as follows: "Every guardian shall be allowed the amount of his reasonable expenses incurred in the execution of his trust * * *." In Garra v. Superior Court, 1943, 58 Cal.App.2d 588, at pages 590, 591, 137 P.2d 31, at page 32, which was a proceeding to prohibit the trial court from enforcing an order that attorney's fees be paid directly to the attorney for a guardian, the court said: "* * * the decree * * * in so far as it purports to award attorney's fees directly to W. C. Wilde, is void, as the court had no jurisdiction to award 'judgment' to a person not a party to the proceedings. The order in the instant proceeding was a direct judgment for money in favor of a person not a party to the proceeding and to that extent was irregular and void. [Citations.] The judgment and order for the payment of fees to the guardian's attorney being void, the respondent court was without jurisdiction to enforce such judgment." As a rule, an attorney employed by a trustee must look to the trustee for payment, and can have no claim on the trust fund, but to this rule there is an exception, namely, when a trustee is without funds of the estate in his possession he may by agreement require those rendering services to look solely to the trust estate and when the facts creating the exception appear the creditor may proceed in equity for the satisfaction of the claim from the trust estate. Cullinan v. Mercantile Trust Co., 1926, 80 Cal.App. 377, 385, 252 P. 647. The record herein does not show any agreement that the attorney should look to the trust estate for his compensation rather than to the trustee. The order herein that the fees be paid to A. W. Brunton individually was erroneous. Mr. Brunton has suggested in his brief that if it should be determined that such order awarded $800 to him individually and that such order was erroneous that the trial court be directed to correct the clerical error by directing that said sum be paid to him as administrator with the will annexed of the estate of John W. Lair, deceased trustee. It does not appear, however, that such error was a clerical one.

[7, 8] Appellants' further contention, that a testamentary trustee who acts as attorney for himself cannot be given compensation for his services as such attorney, is sustained. In Estate of Parker, 1926, 200 Cal. 132, at page 135, 251 P. 907, at page 909, 49 A.L.R. 1025, it was said: "An executor, administrator, or testamentary trustee who is himself an attorney at law may properly employ another attorney to render the necessary legal services for the estate. * * * But if the executor, administrator, or testamentary trustee, being himself a practicing lawyer, elects to act as his own attorney * * * the general rule is that he will not be entitled to an allowance against the estate for his professional services, in the absence of some statutory provision entitling him thereto." That rule is one of public policy forbidding one who acts in a fiduciary capacity to become his own employer. Estate of Parker, supra, page 136 of 200 Cal., page 909 of 251 P., 49 A.L.R. 1025. Mr. Brunton was entitled to compensation as attorney for the trustee for legal services rendered while Mr. Lair was trustee, and it would have been proper to make an award for such services to A. W. Brunton as legal representative of Mr. Lair, the deceased trustee. He was also entitled to compensation for his services as such legal representative of the deceased trustee, and it would have been proper to make an award for such services to A. W. Brunton as such legal representative. The petition for fees and the evidence in behalf of the petitioner are to the effect that part of the services for which fees were sought was legal services rendered by Mr. Brunton in propria persona as administrator of the deceased trustee's estate. The court found that "the services alleged in the petition for fees were rendered as alleged therein," and the court then enumerated in its findings various specific items of legal services rendered by Mr. Brunton after the death of Mr. Lair. It does not appear from the findings or the judgment that the amount awarded for fees did not include an award for such legal services rendered after the death of Mr. Lair, but it does appear from the judgment that the award was for Mr. Brunton's "services as attorney and as administrator," and under these circumstances it is to be assumed that the judgment included an award for legal services of Mr. Brunton after the death of Mr. Lair. Insofar as the judgment included an award for legal services of Mr. Brunton as attorney for himself as legal representative of the deceased trustee's estate, it was also erroneous.

[9, 10] Another contention of appellants is that since the allowance for fees is based partly upon services for which the court had no power to order payment, and since the fees were awarded in a lump sum and the condition of the record is such that the improperly allowed fees cannot be segregated from the total allowance, that the whole order for fees should be reversed. This contention is sustained. As above mentioned, it cannot be determined from the record what portion of the total award, if any, was awarded for legal services rendered during the life of Mr. Lair, and it cannot be determined therefrom what portion, if any, was awarded for legal services rendered after the death of Mr. Lair while Mr. Brunton was acting in propria persona. The fees awarded for legal services, and for services rendered as administrator, and for services of Mr. Lair as trustee, if any, should have been stated separately in the judgment in order that the interested parties might consider whether the amounts awarded for specific items were reasonable, whether the amounts were for services rendered by a person acting in a double capacity as attorney and administrator, and whether they were awarded upon any illegal basis.

[11] Another contention of appellants is that the trustee and the administrator of the deceased trustee's estate sought to destroy the trust and therefore attorney's fees should not be allowed. The assertion that they sought to destroy the trust is based upon an allegation, in the petition herein to determine ownership of the corpus of the estate, to the effect that all of the remainder-beneficiaries had forfeited their interests in the trust because they had attacked the will of Nancy Ray Lair in violation of a contest provision in the will. The alleged violation was based upon their effort to charge the trustee personally with the $850 lien against the estate, and their efforts to remove him as trustee. The court had stated in the Estate of Lair, 1942, 52 Cal.App.2d 222, at page 225, 126 P.2d 133, at page 134, that the action, designated a bill in equity, to cancel the $850 lien and to remove the trustee was "an unfounded action" and "clearly there was no occasion for the fil-

ing of the suit," and that the $850 was charged properly against the corpus. It was necessary that the trial court herein determine the ownership of the corpus, and it was not improper to call the court's attention to the efforts of the remainder-beneficiaries to impair the provisions of the trust. Said contention of appellants is not sustained.

The portion of the judgment wherein A. W. Brunton was allowed "$800.00 for his services as attorney and as Administrator," which portion is the third paragraph of the judgment appealed from, is reversed; and the superior court is directed to fix and separately state and to secure by a lien on the assets of the trust estate, the fees, if any, properly payable to A. W. Brunton, administrator with the will annexed of the estate of John W. Lair, deceased: (1) For services rendered by John W. Lair as trustee; (2) for legal services rendered by A. W. Brunton as attorney for John W. Lair while Mr. Lair was trustee; and (3) for services rendered in connection with the trust matters by A. W. Brunton as administrator with the will annexed of the estate of John W. Lair, deceased. The judgment as to all portions other than the third paragraph is affirmed.

DESMOND, P. J., and SHINN, J., concur.




68 Cal.App.2d 574

**PEOPLE v. McCRACKEN.**

**Cr. 2328.**

District Court of Appeal, First District, Division 1, California.

March 29, 1945.

**1. Criminal law ⇐995(6)**

Where defendant pleaded guilty to two separate offenses and was sentenced to imprisonment in county jail for term of one year for one offense and in second action was sentenced for like term with sentence to run consecutively with sentence imposed in first action, the judgment in second action sufficiently directed that imprisonment to which defendant was sentenced in second action should commence at termination of first term of imprisonment. St. 1941, p. 2820, § 11160; Pen.Code, § 669.

**2. Criminal law ⇐995(6)**

A sentence which runs "consecutively" is one which commences at the termination of the first term of imprisonment to which accused has been sentenced or at termination of second or subsequent term of imprisonment to which he has been sentenced.

See Words and Phrases, Permanent Edition, for all other definitions of "Consecutively".

**3. Criminal law ⇐995(6)**

Where sentence in second action provided that sentence was to run consecutively with sentence imposed in certain numbered action, the reference was sufficient to identify the action referred to with certainty and sufficiently complied with statute requiring second judgment to direct whether imprisonment shall commence at termination of first term of imprisonment. Pen.Code, § 669.

**4. Habeas corpus ⇐4**

Where defendant pleaded guilty to charges of two separate violations of Health and Safety Code, claim that defendant had been sentenced twice for same offense was a matter properly to be raised on appeal and not by habeas corpus. St. 1941, p. 2820, § 11160.

**5. Habeas corpus ⇐85(1)**

Where defendant pleaded guilty to charges of two separate offenses, after expiration of sentence for one offense, he was not entitled to discharge on habeas corpus on theory that he had been sentenced twice for same offense where facts to support claim were neither alleged in petition nor shown by record.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding by the People of the State of California against Paul McCracken. From an order of the superior court discharging the defendant from custody of the sheriff of the city and county of San Francisco by writ of habeas corpus, the People appeal.

Order reversed.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Alfred

Del Carlo, Deputy Dist. Atty., both of San Francisco, for appellant.

Bell & Anderson, of Redwood City, for respondent.

DOOLING, Justice pro tem.

This is an appeal from an order of the Superior Court of San Mateo County discharging the respondent from the custody of the sheriff of the City and County of San Francisco by writ of habeas corpus.

Respondent pleaded guilty in the Superior Court in San Francisco to charges of two separate violations of § 11160 of the Health and Safety Code, St.1941, p. 2820, in actions numbered in that court No. 34351 and 34352 respectively. In action No. 34351 he was sentenced to imprisonment in the county jail for the term of one year. In action No. 34352 he was sentenced for a like term "said sentence to run consecutively with sentence imposed in Action No. 34351." He was confined in the San Francisco County jail in San Mateo County. After the lapse of more than one year he filed his petition for writ of habeas corpus claiming that the two sentences ran concurrently.

Section 669 of the Penal Code provides: "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently, or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be; provided, however, if the punishment for any of said crimes is expressly prescribed to be life imprisonment, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term. In the event that the court at the time of pronouncing the second or other judgment upon such person had no knowledge of a prior existing judgment or judgments, or having knowledge, fails to determine how the terms of imprisonment shall run in relation to each other, then, upon such failure so to determine, or upon such prior judgment or judgments being brought to the attention of the court at any time prior to the expiration of 60 days from and after the actual commencement of imprisonment upon the second or other subsequent judgments, the court shall, in the absence of the defendant and within 60 days of such notice, determine how the term of imprisonment upon said second or other subsequent judgment shall run with reference to the prior incompleted term or terms of imprisonment. Upon the failure of the court so to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently."

It is respondent's position that the sentence in Action No. 34352 was too indefinite to comply with the requirement of this section that "the second * * * judgment shall direct * * * whether the imprisonment to which he is * * * sentenced upon the second * * * conviction shall commence at the termination of the first term of imprisonment * * *," and that the court failed "to determine how the terms of imprisonment shall run in relation to each other"; and for that reason the terms ran concurrently under the provision of the section that: "Upon the failure of the court so to determine how the terms of imprisonment on the second * * judgment shall run, the term of imprisonment on the second * * * judgment shall run concurrently."

[1, 2] The same question was directly before the court in People v. Hirschbein, 16 Cal.App.2d 458, 60 P.2d 532. In that case the identical language was used in sentencing the defendant on several counts of grand theft. The court there concluded, 16 Cal.App.2d at page 460, 60 P.2d at page 533:

"There is no difficulty, when reading the California cases, in understanding that a sentence which runs consecutively is one which 'shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be.' There is no merit in defendant's contention." Cf. Rice v. United States, 9 Cir., 7 F.2d 319; Boyd v. Archer, 9 Cir., 42 F.2d 43, 70 A.L.R. 1507.

[3] The further argument is made that the second sentence is too indefinite be-

cause it refers to the first action only by its number. The reference is sufficient to identify the action referred to with certainty which is all that is required. In re Mann, 192 Cal. 393, 220 P. 305.

[4, 5] The claim is also made by respondent that he was sentenced twice for the same offense. This would seem to be a matter properly to be raised on appeal and not by habeas corpus. Matter of Hughes, 159 Cal. 360, 362, 113 P. 684. In any event it is a sufficient answer to this claim that the facts to support it are neither alleged in the petition nor shown by the record.

In view of our conclusion on the points herein discussed it becomes unnecessary to consider other questions argued.

The order discharging the defendant on habeas corpus is accordingly reversed.

PETERS, P. J., and WARD, J., concur.




68 Cal.App.2d 643

## FRANCIS v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12894.

District Court of Appeal, First District, Division 1, California.

April 4, 1945.

**1. Time ⇐10(1)**

Under statutes, holidays extend the statutory periods for performance of acts only when last day falls on a holiday, except in case of holidays fixed by the President or Governor, in which latter type of holidays the total period fixed by statute is extended by number of such holidays, notwithstanding last day of period does not fall on such holiday. Code Civ.Proc. § 12a; Pol.Code, § 10.

**2. Time ⇐10(7)**

Under statute extending time in which act is to be performed by numbers of intervening holidays fixed by the President or Governor, order granting moving party a new trial on December 4, 1944, after such party was served with written notice of entry of judgment on October 2, 1944, was void as not timely made, since trial court's power to grant such motion expired on December 2, on ground that of the four holidays intervening during the 60-day statutory period during which trial court would have had such power, only Thanksgiving Day was a holiday fixed by the President or Governor. Code Civ.Proc. §§ 12a, 660; Pol.Code, § 10.

**3. Prohibition ⇐5(3)**

Prohibition is the proper remedy where trial court has made a void order granting a motion for a new trial and is attempting to proceed with a second trial.

Proceeding by Guy Francis for a writ of prohibition to restrain the Superior Court of the State of California, in and for the City and County of San Francisco, from enforcing its order granting a new trial in a certain case against petitioner.

Peremptory writ issued.

Bronson, Bronson & McKinnon and Harold Ropers, all of San Francisco, for petitioner.

James Sykes, of San Francisco, for respondent.

PETERS, Presiding Justice.

By this proceeding petitioner seeks by writ of prohibition to restrain the Superior Court from enforcing its order granting a new trial in the case of Ruth Brune v. Guy Francis. It is urged that such order was void for the reason that it was made more than sixty days after service of written notice of entry of judgment in violation of § 660 of the Code of Civil Procedure. Neither respondent court, nor Ruth Brune, the real party in interest, although properly served, has appeared in this proceeding in opposition to the granting of the writ.

There can be no doubt but that the writ should issue. The petition alleges that on September 28, 1944, judgment, based on a jury verdict, was entered in favor of petitioner in the case of Brune v. Francis; that written notice of entry of judgment was served on the attorney for Ruth Brune on October 2, 1944; that thereafter the attorney for Ruth Brune served and filed a notice of intention to move for a new trial; that such motion was argued on Oc-

tober 25, 1944, and thereupon submitted; that on December 4, 1944, the trial court purported to grant the motion for a new trial. Thus it appears that the trial court attempted to grant the new trial sixty-three days after service of written notice of entry of judgment.

Section 660 of the Code of Civil Procedure provides in part: "Except as otherwise provided in section 12a of this code, the power of the court to pass on motion for a new trial shall expire sixty (60) days from and after service on the moving party of written notice of the entry of the judgment. * * * If such motion is not determined within said period of sixty (60) days, or within said period as thus extended, the effect shall be a denial of the motion without further order of the court."

The sixty-day period fixed in this section expired on Friday, December 1, 1944. Unless this period was extended by § 12a of the Code of Civil Procedure, it is clear that the power of the trial court to grant the new trial then expired and the motion was automatically denied. Kahn v. Smith, 23 Cal.2d 12, 142 P.2d 13; Kraft v. Lampton, 13 Cal.App.2d 596, 57 P.2d 171; Spier v. Lang, 4 Cal.2d 711, 53 P.2d 138.

Section 12a provides:

"As to any act provided or required by law to be performed within a specified period of time, such period of time is hereby extended—

"(a) To and including the next day which is not a holiday (other than a special holiday), if the last day of such period falls upon a holiday; and

"(b) By such number of days as equals the number of holidays (other than special holidays) appointed by the President or by the Governor and which occur within or during such period; and

"(c) In any event, as to any such period of time which commenced prior to the date this act takes effect, but not less than ten days.

"The term 'special holiday' is used herein in the same sense as used in section 10 of the Political Code."

Section 10 of the Political Code referred to above provides in part: "Holidays within the meaning of this code, are every Sunday, the first of January, twelfth day of February, to be known as Lincoln Day, twenty-second day of February, thirtieth day of May, fourth day of July, ninth day of September, first Monday in September, twelfth day of October, eleventh day of November, known as 'Armistice Day,' twenty-fifth day of December, every day on which an election is held throughout the State, and every day appointed by the President of the United States or by the Governor of this State for a public fast, thanksgiving or holiday * * *." It is further provided that Saturday is a half holiday after 12 o'clock, noon.

[1] Under these sections holidays serve to extend the periods fixed by statute for the performance of acts only when the last day falls on a holiday, except in the case of holidays fixed by the President or Governor. As to this last type of holiday the total period fixed by statute is extended by the number of such holidays. During the period October 2, 1944, to December 4, 1944, there were four holidays—October 12th, Columbus Day; election day; Armistice Day and Thanksgiving Day. The only one of these holidays fixed by the President or Governor was Thanksgiving Day. This holiday extended the sixty-day period to Saturday, December 2, 1944. None of the other holidays extended the period. It is quite clear that since § 12a provides that periods of time are extended only by holidays appointed by the President or Governor, that ordinary statutory holidays do not extend such periods. This was the express holding in Adolph Ramish, Inc., v. Behr, 40 Cal.App.2d 54, 104 P.2d 410, where it was contended that Washington's Birthday extended the time for serving and filing a notice of appeal. The court held that since February 22nd was a holiday fixed by statute and not one appointed by the President or Governor, it did not operate to extend the period. Statutory holidays were also held excluded from § 12a, Subd. (b), in Lynch v. Harrell, 44 Cal.App.2d 863, 113 P.2d 261.

[2, 3] It is thus apparent that the trial court's power to grant a new trial expired on December 2, 1944. The court was without power to grant the motion on December 4, 1944. Prohibition should therefore issue. As was said in Bank of America, etc., Ass'n v. Superior Ct., 115 Cal.App. 454, 456, 1 P.2d 1081, 1082: "It seems to be settled in California that prohibition is a proper remedy to be invoked where the trial court has made a void order granting a motion for a new trial and is attempting to proceed with a second trial." Shepherd v. Superior Court, 54 Cal.App. 673, 202 P.

466; Finkle v. Superior Court, 71 Cal. App. 97, 234 P. 432; United Railroads v. Superior Court, 197 Cal. 687, 242 P. 701.

Let a peremptory writ of prohibition issue in accordance with the prayer of the petition.

WARD, J., and DOOLING, Justice pro tem., concur.




68 Cal.App.2d 491

**PEOPLE v. CASTRO et al.**

**Cr. 2324.**

District Court of Appeal, First District, Division 1, California.

March 23, 1945.

As Modified on Denial of Rehearing April 7, 1945.

Hearing Denied April 19, 1945.

**1. Criminal law ⇐1141(2)**

Where there is positive direct testimony that accused was one of the participants in crime, he must show that such testimony is inherently unbelievable in order to prevail on appeal.

**2. Criminal law ⇐741(1), 742(1)**

The credibility of a witness and weight that should be given testimony are matters for the trier of facts, and conduct, appearance and demeanor of witnesses may be considered in determining truth or falsity of their testimony.

**3. Robbery ⇐24(3)**

The testimony of victims of robbery perpetrated while armed and reasonable inferences that might be drawn from such testimony substantially supported identification of defendants as perpetrators of the offense.

**4. Robbery ⇐20, 23(1)**

In prosecution for robbery while armed, proof that defendants were armed when they perpetrated offense was necessary, and ownership or interest in a weapon taken from the person of one of the defendants when arrested several weeks later was a circumstance tending to prove such issue. Pen.Code, § 1158a.

**5. Witnesses ⇐277(2)**

Where one charged with perpetrating a robbery while armed testified that one of the guns taken from his person when arrested three weeks later belonged to another named person, cross-examination to ascertain business and address of such person was proper, though such cross-examination disclosed that owner of gun was an inmate of state penitentiary. Pen.Code, § 1158a.

**6. Criminal law ⇐730(1)**

Where evidence disclosed that defendants were absent without leave from an army camp more than a month before commission of offense for which they were on trial, and they were apprehended approximately three weeks later, district attorney's reference to them as deserters was not prejudicial, where objection to district attorney's inquiry of one of the defendants as to whether AWOL was not another term for desertion was sustained.

**7. Criminal law ⇐808½, 1172(2)**

Trial courts in charging jury should adopt the definition of reasonable doubt contained in Penal Code, but failure to do so does not necessarily constitute reversible error. Pen.Code, §§ 1096, 1096a.

**8. Criminal law ⇐561(1)**

"Abiding conviction" as used in statutory definition of reasonable doubt is the equivalent of "settled conviction," being used in the sense of convinced. Pen.Code, § 1096.

See Words and Phrases, Permanent Edition, for all other definitions of "Abiding Conviction" and "Settled Conviction".

**9. Criminal law ⇐1172(2)**

Where jury was instructed in language of statute that reasonable doubt was that state of case which left their minds in that condition that they could not say they felt an abiding conviction to a moral certainty of the truth of charge, failure to repeat the word "abiding," in concluding portion of instruction defining moral certainty as that degree of proof which produces conviction in an unprejudiced mind, was not reversible error. Pen.Code, §§ 1096, 1096a.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Julian Castro and Fernando Matas were convicted of robbery perpetrated while armed with revolvers, and from the judgment and an order denying a new trial, each appeals.

Judgment and order as to each defendant affirmed.

Leo R. Friedman, of San Francisco, for appellant Julian Castro.

Nathan C. Coghlan, of San Francisco, for appellant Fernando Matas.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Edmund G. Brown, Dist. Atty., and Thomas C. Lynch, Deputy Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

A jury convicted defendants of robbery, perpetrated while armed with revolvers. A motion for a new trial was denied. Each has appealed from the judgment and order affecting him, and filed separate briefs in support of his appeal.

Each claims that irrelevant evidence, prejudicial to him, was introduced, which resulted in a verdict based upon passion and prejudice. In addition appellant Matas contends that the court erred in an instruction touching the doctrine of reasonable doubt.

John Icardi and his wife operate a grocery store in San Francisco. Between the hours of 10 and 10:30 P.M. on November 20, 1943, while they were engaged in working on their books in a room back of the store, they heard the door open. Icardi advanced to the middle of the store, while his wife remained in the doorway. Two young men, each with a white handkerchief over his nose and his hat pulled down over his eyes, had entered; both were carrying revolvers. As the two approached Icardi they said "hold up." Icardi replied "Go on, beat it," to which they responded "this is no time to joke, this is real," and advised him to give them the money. The smaller man instructed the other to take care of Icardi, and between them they secured about ninety dollars, part of which was taken from the person of Icardi and part from the cash register. Three weeks later the defendants were arrested in Los Angeles, at which time Castro had an automatic pistol in his possession, and Matas, two guns. Both men were away without official leave from the United States army. On the trial each offered as a defense, an alibi. Castro, supported by another witness and his sister-in-law, testified that he attended a theatre on the night in question until 11 P.M. and then visited a restaurant until after midnight. Matas, supported by his sister, contended that he had spent the evening with her visiting concessions at the beach; that thereafter they had gone to her home, which he left about midnight.

The identity of the defendants is the main question on appeal. The victims, Mr. and Mrs. Icardi, testified that they had never seen either of the perpetrators of the offense before the day of its commission. The husband and wife admitted "scare" at the time of the holdup. There is testimony in the way of identification from one or the other on the following points: a portion of the head of each defendant was visible; one had "black hair and curly" and was recognized thereby. The voice, walk, general appearance and clothing of the robbers tended to identify one or the other of the appellants. It is true that the husband and wife seemed to have some difficulty upon direct and cross-examination in understanding questions and in expressing themselves, but there is substantial evidence placing each appellant at the scene of the robbery as a participant.

There is some suggestion in the briefs that at the time of defendants' identification, some six weeks after the commission of the offense, Mrs. Icardi had been coached by the police relative to the position of each defendant in a "line up" with some fifteen or twenty other men. The claim is made upon the following testimony:

"Q. Did the police say anything as to who to look for? A. The police?

"Q. Were you told to look for any particular men? A. Yes, when they come out the door I say they look like the boys.

"Q. I am afraid you don't understand me. About 20 or more people came out of the door? A. Yes.

"Q. And the police told you to look at the first two persons that came out? A. (Witness nods affirmatively.)"

From her statement: "That is all the two men I see" the jury may have concluded that the sight of the first two was sufficient; that it was unnecessary to look further.

[1] On appeal "In a case such as the present one, where there is positive direct testimony that the defendant was one of the perpetrators of the crime, it is incum-

bent upon him to show that the testimony is inherently unbelievable in order to prevail." People v. Braun, 14 Cal.2d 1, 5, 92 P.2d 402, 404; see, also, People v. Waller, 14 Cal.2d 693, 96 P.2d 344; People v. Haydon, 18 Cal.App. 543, 123 P. 1102, 1114; People v. Holquin, 48 Cal.App.2d 551, 120 P.2d 71; People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. White, 35 Cal. App.2d 61, 94 P.2d 617; People v. Foster, 198 Cal. 112, 243 P. 667; People v. Harsch, 44 Cal.App.2d 572, 112 P.2d 674; People v. Knight, 44 Cal.App.2d 887, 113 P.2d 226.

[2, 3] Witnesses appeared in support of the defenses of alibi. The jury was fairly instructed upon this phase of the case. No contention is made to the contrary. The credibility of a witness and the weight that should be given testimony are matters for the trier of the facts. The conduct, the appearance, the demeanor of the witnesses are all matters that may be considered in determining the truth or falsity of their testimony. A review of the testimony of Mr. and Mrs. Icardi, and reasonable inferences that may be drawn therefrom, substantially support the identification. People v. Waller, supra; People v. Deal, 42 Cal.App.2d 33, 108 P.2d 103; People v. Hunter, 49 Cal.App.2d 243, 121 P.2d 529.

[4, 5] As stated, two "guns" were taken from the person of appellant Matas and "an automatic pistol" from Castro upon their arrest in Los Angeles three weeks after the commission of the offense. The weapons were not identified as those used on the occasion of the robbery. However, no objection was made to their reception in evidence. One of the guns is the property of an inmate of San Quentin and Matas was holding it for a loan of five dollars. It is claimed that this testimony was prejudicial to him. The cross-examination of Matas reveals the following:

"Q. Where did you get the other gun? A. It is John McGoldrick's.

"Q. John McGoldrick, who is he? A. Well, he is some boy that was down in Los Angeles.

"Q. Where is he now?

"Mr. Coghlan: That, of course, is not relevant, competent or material.

"The Court: Overruled.

"Mr. Lynch: Q. Where is John Goldrick? A. He is in San Quentin.

"Mr. Coghlan: There is no foundation that he knows.

"Mr. Lynch: He just answered—where did you say he was?

"The Court: Overruled.

"A. San Quentin.

"Mr. Coghlan: I move that the answer be stricken out.

"The Court: Denied."

It was essential to prove that the defendant was armed when he perpetrated the offense. A separate verdict upon the charge of being armed is provided in Penal Code section 1158a. Ownership or interest in the weapon was a circumstance tending to prove this issue. When Matas testified that it was McGoldrick's gun, it was proper cross-examination to find out the business and address of McGoldrick. The entire testimony on this subject does not indicate that the district attorney deliberately tried to connect the defendant with inmates of the state prison but that when Matas answered in reference to McGoldrick that "he is some boy that was down in Los Angeles" it was a proper question to ask "Where is he now" as a means of determining the ownership of one of the guns.

[6] The evidence shows that the defendants were "away without leave" from an army camp "over a month" prior to the commission of the offense; they were apprehended approximately three weeks thereafter. During the trial the district attorney referred to AWOL as desertion from the army. Appellants claim that they were prejudiced by this incident. The record shows the following question asked without objection:

"You were a deserter from the Army at that time, weren't you? A. I was A.W.O.L."

Further in the proceedings the following appears:

"Q. And you were absent without leave? A. AWOL.

"Q. AWOL, that is another term for desertion?

"Mr. Coghlan: I object to that.

"The Court: I will sustain that."

Under the circumstances the incident does not require further comment.

Convinced that the jury was justified in finding the defendants guilty we leave these trivial contentions to discuss a question which under other facts and circumstances might be declared error.

It is contended that the court erred in a portion of its instruction on reasonable

doubt in the respect that it used the following language: "[Y]ou feel an abiding conviction to a moral certainty of the truth of the charge, and you will understand that moral certainty only is required, or, in other words, that degree of proof which produces conviction in an unprejudiced mind." The court failed to follow the exact language of Penal Code, section 1096, which provides that there should be in the minds of the jurors "an abiding conviction, to a moral certainty, of the truth of the charge." The form of the instruction contained in section 1096 is similar to that approved by a former Chief Justice of the Supreme Court of the State of Massachusetts, Justice Shaw, and adopted generally by the courts of California. In 1927, section 1096 was amended to read as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'" A new section was added, designated 1096a, which provides: "In charging a jury, the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." Stats. 1927, Ch. 604, p. 1039.

[7] Trial courts have been repeatedly admonished to follow the Justice Shaw instruction and subsequently the language of section 1096. Failure to do so is simply inviting error. This is emphasized by the act of the Legislature in permitting the section to be read, in which case no further definition need be given. People v. Kynette, 15 Cal.2d 731, 104 P.2d 794. Under such circumstances trial courts should adopt the Code definition. Notwithstanding that section 1096a provides only that the definition *may* be given, it is safer to follow the language of the code section than to "struggle for originality where precedent alone should govern." State v. Morey, 25 Or. 241, 35 P. 655, 36 P. 573, 577. If cases are to be reversed, however, for some slight, harmless misstatement in instructions, the number of reversals will seriously interfere with the fair administration of justice as undoubtedly it not infrequently happens that the guilty are the beneficiaries of them. State v. Morey, supra. We proceed therefore to consider the instruction further. In cases prior to the amendment in 1927 of section 1096, during the period when the Shaw definition was the accepted and approved form of instruction on reasonable doubt, trial courts, though such method was advised, were not required to give such instruction verbatim. There are numerous cases upholding the following: "Indeed, trial courts have been frequently admonished by appellate courts to conform their definitions upon the general subject of reasonable doubt to this language, rather than to attempt new departures. But it does not follow that to give other definitions constitutes reversible error. It is not error to refuse other definitions if Justice Shaw's definition is given, and, on the other hand, it is not error to refuse Justice Shaw's definition if the term is elsewhere sufficiently defined." 8 Cal. Jur., pp. 362, 363. It also appears that when there are several errors, deviation from the instruction formulated by Justice Shaw has been included as a reason for reversal (People v. Schoedde, 126 Cal. 373, 58 P. 859), or its absence has been criticized but held not prejudicial when the order of reversal was based upon other grounds.

It should be noted that under Code section 1096 the giving of the instruction is not mandatory so that unless there appears a grave discrepancy that misled the jury the judgment may be affirmed. In People v. Soldavini, 45 Cal.App.2d 460, 114 P.2d 415, a portion of section 1096 was read exactly as it appears, but some of the essential language was omitted and not properly covered in other instructions. The judgment of conviction was reversed. It was held that it was the duty of the court to instruct on general principles of law pertinent to the case. It was also held that the reading of section 1096 may meet the requirement of the rules with reference to "reasonable doubt," but there is no relaxation of the rule that instructions on general principles should be given notwith-

standing a failure of defendant to propose instructions.

A reasonable doubt, based upon a rational, as distinguished from an insufficient or conjectural, ground growing out of the evidence or the lack of evidence in a case, often causes instructions to be offered in addition to the instruction in section 1096. In People v. Carson, 43 Cal.App.2d 40, 44, 110 P.2d 98, 100, it is said: "Respondent contends that since the court read to the jury section 1096 of the Penal Code on the subjects of presumption of innocence and reasonable doubt the matter was sufficiently covered and cites section 1096a, which provides that if section 1096 be read no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given. It is to be noted, however, that section 1096a provides that no further instruction *defining* reasonable doubt need be given. It is not provided therein that no other instruction on the *subject* of reasonable doubt need be given in any particular case."

In People v. Brunette, 39 Cal.App.2d 215, at pages 230, 231, 102 P.2d 799, at page 807, the exact language of section 1096 was not used. This court said: "Appellant offered an instruction on reasonable doubt. The court refused to give the proffered instruction, but in other instructions he informed the jury that all of the elements of the offense had to be proved by the state to a moral certainty and beyond a reasonable doubt. He also instructed the jury almost in the identical words of section 1096 of the Penal Code on the presumption of innocence and as to the effect and definition of reasonable doubt. This is all that was required. Pen.Code, sec. 1096a."

Appellants cite People v. T. Wah Hing, 15 Cal.App. 195, 200, 201, 114 P. 416, for their contention that it was error to add the final portion of the instruction. In that case the trial court gave a separate instruction in the phraseology of the concluding words of the instruction in the present case. The appellate court pointed out that the instruction as thus worded was derived from section 1826, Code of Civil Procedure, relating to actions in general. The section reads: "The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. *Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind.*" (Italics added.) The appellant in that case contended that it was error to give an instruction embodying the italicized words of the Code section in a criminal case, citing Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L.R.A. 498, 13 Am.St.Rep. 175. The court held in the T. Wah Hing case that considering the instructions as a whole the jury could not have been misled as to the thought embraced in the term "reasonable doubt."

In Treadwell v. Whittier, supra, Mr. Justice McFarland, elaborating upon the remarks of Mr. Justice Thornton, author of the main opinion, observed that use of the terms "moral certainty" both in sections 1826, Code of Civil Procedure, and 1096, Penal Code, was "somewhat confusing," that they could not be deemed to have been used in the same sense, since in a civil action net proof beyond reasonable doubt, but upon a preponderance of the evidence is all that is required. This led Judge McFarland to remark that to have used the words "moral certainty" in the instructions in the civil case before him would have tended to confuse the jury. Hence he joined in the view of Mr. Justice Thornton that it was not error to strike the words "moral certainty" from the instruction as there given. The effect of the decision in that case was to sanction the omission of the words "moral certainty" in a civil case, rather than to condemn their use in a criminal case, which is now expressly provided for in section 1096, Penal Code. In the case herein use of the terminology of section 1826, Code of Civil Procedure, in concluding an instruction given in the words of section 1096, Penal Code, created no inconsistency in the definition of "reasonable doubt." But the words based on section 1826 might better have been omitted since they did not add to the correctness of the definition and served but to create a controversy on appeal.

[8, 9] Appellants contend that the jury might be "morally certain" of their guilt and yet, consistent with the proper definition of "reasonable doubt," entertain such doubt of their guilt. The words "moral certainty" were not used alone in the concluding part of the instruction, but in turn were defined as "that degree of proof which produces conviction in an unprejudiced

mind." Had the court instructed that the jury should acquit unless it was convinced to a moral certainty of the truth of the charges we would have been forced to affirm a conviction. "Abiding conviction" is the equivalent of "settled conviction." State v. Silverio, 79 N.J.L. 482, 76 A. 1069. It is used in the sense of "convince." State v. Leo, 80 N.J.L. 21, 77 A. 523; 36 Words and Phrases, Perm.Ed., p. 298. When the instruction is read in its entirety it is apparent that the only departure from the statute is in the omission of the word "abiding" before "conviction." But this qualification was supplied by the immediately preceding portion of the instruction by which the jury was told in the language of the statute that reasonable doubt was that state of the case which left their minds in that condition that they could not say they felt "an *abiding* conviction to a moral certainty of the truth of the charge." (Italics added.) The failure to repeat the word "abiding" is not significant and could not have misled the jury. "We must attribute some reasoning power to the jury." People v. Boggs, 12 Cal.2d 27, 35, 82 P.2d 368, 372.

The judgment and the order denying motion for new trial as to each defendant are affirmed.

PETERS, P. J., and KNIGHT, J., concur.

Hearing denied; TRAYNOR, J., dissenting.




68 Cal.App.2d 473

## BUDWAY v. HOLLIBAUGH.

Civ. 14715.

District Court of Appeal, Second District, Division 3, California.

March 19, 1945.

**1. Officers ⇐30**

Under constitutional provision prohibiting a member of the assembly from holding any other state office except an office filled by election by the people, assemblyman was not prohibited from holding office of city councilman to which he had been elected by the people. Const. art. 4, § 19; St. 1939, p. 276, § 9705.

**2. Elections ⇐305(3)**

Where election contest presented single issue whether an assemblyman was eligible to hold office of city councilman, contestant could not present for the first time on appeal issue whether contestee was disqualified from holding both offices and whether he should therefore be removed from either the office of councilman or office of assemblyman. Const. art. 4, § 19; St.1939, p. 276, § 9705.

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Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by Louis Budway against Joe Hollibaugh, also known as Jonathan J. Hollibaugh, contesting an election for the office of City Councilman of the City of Huntington Park. Judgment for defendant, and contestant appeals.

Affirmed.

Louis Budway, of Huntington Park, in pro. per., for appellant.

Harry R. Simon, of Los Angeles, for respondent.

PARKER WOOD, Justice.

Contestant, Louis Budway, appeals from a judgment rendered in favor of defendant, Jonathan J. Hollibaugh, in an election contest.

Contestant filed with the county clerk a written statement of contest which set forth that at an election held on April 11, 1944, the contestant, defendant and 3 other persons were candidates for the office of city councilman of the City of Huntington Park, at which time 2 councilmen were to be elected; that the election was held and defendant received 1502 votes, Wendell W. Schooling received 1494 votes, contestant received 428 votes, and the other 2 candidates each received fewer votes than contestant; that on April 18, 1944, the city council canvassed the votes, and passed a resolution declaring that defendant received 1504 votes, Wendell W. Schooling 1500 votes, contestant 429 votes, and the other two candidates 418 and 356 votes respectively; that in said resolution it was declared that defendant and Wendell W. Schooling were duly elected; that thereafter they "were given the oath of office" and they "proceeded to exercise their office"; that Huntington Park is a city of the sixth class; that at the time defendant was sworn in as councilman "and at all times

herein mentioned he was the duly elected, qualified and acting Assemblyman of the 52nd District of the State of California, and still is, and was therefore disqualified from becoming a candidate or of qualifying or taking the oath of office of Councilman of the said City." The statement of contest included a prayer that it be adjudged that defendant was disqualified "from taking and assuming" the office of councilman, and that contestant "was the duly elected candidate." The statement of contest was filed on April 20, 1944.

Defendant was directed by the court to appear on June 23, 1944, for a hearing of the contest. Defendant made an affidavit, which was served on contestant, wherein he stated that he was the contestee and that he would appear at said time set forth in said order. In a recital which preceded the findings of fact, the court stated that the cause came on for trial on June 23, 1944, before the court without a jury; that both parties appeared; and that the court heard the testimony and examined the proof offered by the parties. The court found that the allegations of the contest were true, except that it was not true defendant was disqualified, by reason of being assemblyman, from becoming a candidate for, or taking the oath of office of, councilman of the City of Huntington Park. The court found further that defendant is a duly elected, qualified and acting city councilman of Huntington Park.

It therefore appears that the questions presented to the trial court by the statement of contest were: (1) Whether defendant was disqualified to become a candidate for the office of city councilman, or was disqualified to take the oath of that office, by reason of the fact that at the times he became such candidate and took such oath he was an assemblyman; and (2) whether contestant, who received the third highest number of votes, "was the duly elected candidate" in the event defendant was so disqualified. On appeal, however, the contestant asserts further that the defendant was "disqualified from holding both offices in that the duties of said offices were incompatible."

[1] Section 19 of Article IV of the Constitution of California provides: "No Senator or member of Assembly shall, during the term for which he shall have been elected, hold or accept any office, trust, or employment under this State; *provided, that this provision shall not apply to any office filled by election by the people.*" (Italics added.) The office of city councilman here involved was an "office filled by election by the people." Section 9705 of the Elections Code, St.1939, p. 276, provides: "A general municipal election shall be held in all cities of the sixth class on the second Tuesday in April in each even-numbered year." This election, on April 11, 1944, was on a date designated by that section, and defendant was elected by the people at that election. Defendant was not disqualified to become a candidate for the office of city councilman, and was not disqualified to take the oath of said office. See Carter v. Com. of Qualifications, etc., 14 Cal.2d 179, 93 P.2d 140.

[2] The further assertion of contestant that defendant was "disqualified from holding both offices" was not an issue within the statement of contest and was not presented as an issue in the trial. This was an election contest to determine whether defendant was eligible to become a candidate for, and qualify for, the office of councilman, and was not a proceeding to determine whether he was ineligible, if properly elected as councilman, to hold the office of councilman and the office of assemblyman. That it was the intention of contestant to limit the issues to the matter of determining who was elected is indicated by his prayer that it be adjudged that he, contestant, "was the duly elected candidate." If the defendant was eligible to be elected to the office of councilman and was duly elected to that office, but was ineligible to occupy both that office and the office of assemblyman for the reason that the duties of those offices were incompatible, and if he ought to be removed from one of those offices, it does not follow that contestant should become the duly elected councilman. The question as to whether the defendant, after having been duly elected to the office of councilman, should have been removed from either the office of councilman or the office of assemblyman, if he was occupying both of those offices, is not before the court.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.

## Ex parte GILLIAM. *

Cr. 1890.

District Court of Appeal, Third District, California.

March 23, 1945.

Hearing Granted April 19, 1945.

1. Criminal law ⇐1202(1)

The terms "State prison and/or Federal penitentiary", within habitual criminal statute, do not contemplate that accused may be adjudged an habitual criminal unless he has actually served sentences in named institutions, but a reformatory is not covered by quoted terms. Pen.Code, § 644.

See Words and Phrases, Permanent Edition, for all other definitions of "Federal Penitentiary" and "State Prison".

2. Habeas corpus ⇐50

Where accused was erroneously found to be an habitual criminal because he was imprisoned in a reformatory and not in a penitentiary upon prior conviction of a felony, but his sentence was valid with respect to principal crime of burglary and prior conviction of a felony for which he served a sentence in the state prison, and accused did not serve even the minimum prescribed by law, he was not illegally restrained of his liberty because of the erroneous conviction and hence was not entitled to be discharged from custody on habeas corpus. Pen.Code, §§ 644, 3024(c).

3. Criminal law ⇐1211

An indeterminate sentence rendered against alleged habitual criminal was in legal effect a sentence for maximum term prescribed by law subject to shortening of that term by prison board. Pen.Code, §§ 461, 644, 1168, 3020, 3024.

4. Criminal law ⇐1202(6)

Where trial court had jurisdiction of accused and principal offense with which he was charged, and accused was also charged with a prior felony for which he served a term in a state prison and another prior felony for which he served a term in a reformatory, the judgment of conviction and commitment were valid with respect to principal offense and to the prior conviction for which he served in state prison. Pen.Code, § 644.

5. Criminal law ⇐991(2)

When trial court has jurisdiction of offense with which accused is charged, and court has merely erroneously fixed an excessive penalty, sentence is valid as to the term prescribed by law and invalid only as to the excess term pronounced by the court.

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Proceeding in the matter of the application of Wilford Gilliam for a writ of habeas corpus to be discharged from custody.

Writ denied and prisoner remanded.

Wilford Gilliam, in pro. per., for petitioner.

Robt. W. Kenny, Atty. Gen., and Arthur A. Ohnimus and James O. Reavis, Deputy Attys. Gen., for respondent.

THOMPSON, Justice.

By means of habeas corpus Wilford Gilliam seeks to correct an alleged error of the trial court determining on sentence, under Section 644 of the Penal Code, that he is an habitual criminal.

The information contained three counts. The petitioner was charged with burglary and with two prior convictions of felonies. One of the prior felonies was alleged to have been committed in Texas and it was asserted he served sentence therefor in the Texas State Prison. Regarding the other prior felony it was alleged the defendant served sentence therefor in a "Federal Prison known as 'U.S.I.R.' at Chillicothe, Ohio." The last mentioned prison is a Federal reformatory and not a penitentiary. The defendant pleaded guilty to the principal charge of burglary, and admitted conviction of the prior felonies as charged. The trial court determined that the principal crime, of which the defendant pleaded guilty, was that of burglary of the second degree and that the prior convictions of the two other felonies rendered him an habitual criminal under Section 644 of the Penal Code. He was sentenced, May 12, 1942, to State Prison "for the term prescribed by law on Counts One, Two and Three of the information."

[1] We assume that the defendant was erroneously found to be an habitual criminal for the reason that he did not serve imprisonment on one of the prior convictions of felony in a "Federal Penitentiary." The terms "State prison and/or

* Subsequent opinion 161 P.2d 793.

Federal penitentiary" as they are used in Section 644 of the Penal Code do not contemplate that an accused person may be adjudged to be an habitual criminal unless he has actually twice served sentences in said named institutions. A reformatory is not ordinarily considered either a state prison or a penitentiary. 53 C.J. 1058, sec. 1; Webster's New International Dictionary, 2d Ed., p. 2094.

[2] In the present case commitment to the state prison for the term prescribed by law is valid with respect to the principal crime of burglary and to the prior conviction of burglary committed in Texas for which he served sentence in the state prison of that state. In re Miller, 133 Cal.App. 228, 23 P.2d 1034; In re Schenk, 61 Cal.App.2d 168, 142 P.2d 343; People v. McVicker, 37 Cal.App.2d 470, 99 P.2d 1110. Excluding the erroneous determination that the defendant was an habitual criminal because he had not served sentence for the other prior felony in a Federal penitentiary, the minimum term of sentence on the two other valid counts of the information would be five years' imprisonment. Penal Code, sec. 3024(c). Since the sentence in this case was pronounced May 12, 1942, it is evident that the petitioner has not served even the minimum penalty prescribed by law. It follows that he is not illegally restrained of his liberty on that account, and that he is not entitled to be discharged from custody upon this petition for a writ of habeas corpus.

[3] The indeterminate sentence which was rendered in this case in legal effect is a sentence for the maximum term prescribed by law, which is fifteen years on the charge of burglary alone. Penal Code, sec. 461. The defendant in this case was sentenced to the maximum term prescribed by law, subject to the shortening of that term by the Prison Board, as provided by Sections 1168 and 3020 of the Penal Code. People v. Ralph, 24 Cal.2d 575, 150 P.2d 401; In re Lee, 177 Cal. 690, 171 P. 958.

[4] The erroneous determination that the defendant is an habitual criminal had the effect of extending the term of imprisonment provided by law. Since the trial court had jurisdiction of the person and the principal offense with which the defendant was charged, the judgment of conviction and commitment are valid with respect to the principal offense of burglary and to the prior conviction of felony in Texas for which he served imprisonment in the state prison of that state.

In 13 California Jurisprudence, page 243, section 22, it is said in that regard:

"Where the superior court imposes a sentence in excess of that permitted by statute it is not void but it is recognized as a valid sentence for the term authorized by law."

Likewise it is said in 25 American Jurisprudence, at page 188:

"Contrary to some early decisions, it is now well settled that in the case of a sentence that was merely excessive, if the court which imposed it had jurisdiction of the person and subject matter, such sentence was not void ab initio because of the excess, but was good in so far as the power of the court extended and was invalid only as to the excess, and, therefore, a person in custody under such sentence cannot be discharged on habeas corpus until he has suffered or performed as much of it as was within the power of the court to impose."

[5] Numerous California cases hold that when the trial court has jurisdiction of the offense with which the accused person is charged, and the court has merely erroneously fixed an excessive penalty, the sentence is valid as to the term prescribed by law and invalid only as to the excess term pronounced by the court. In re Morck, 180 Cal. 384, 181 P. 657; People v. McVicker, supra; In re Goetz, 46 Cal. App.2d 848, 117 P.2d 47; 25 Am.Jur. 188, sec. 59; 76 A.L.R. 476, note.

In the Morck case, supra, the court said with respect to the consideration of an alleged excessive term of imprisonment, on habeas corpus, prior to the completion of the valid portion of a sentence that:

"It is the established practice of this court not to consider any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. It is clear, therefore, that a writ should not be granted at this time."

Assuming, as we have previously held, that, notwithstanding the invalidity of the finding that petitioner is an habitual criminal under Section 644 of the Penal Code, the judgment and sentence of the indeterminate term of imprisonment for the principal offense of burglary of the second degree and of one other conviction

of a prior felony, is severable and valid, and that petitioner has not completed his sentence for the valid portion of the judgment, even deducting such credits for good behavior, if any, to which he might be entitled under Section 2920 of the Penal Code, he is not illegally restrained of his liberty.

The writ is denied and the prisoner is remanded.

ADAMS, P. J., and PEEK, J., concur.




68 Cal.App.2d 646

**PEOPLE v. BARTON.**

Cr. 2348.

District Court of Appeal, First District, Division 1, California.

April 4, 1945.

**1. Criminal law ⇐1148**

The trial court's determination on application for bail pending appeal from conviction will not be disturbed except in case of manifest abuse of discretion or occurrence of some extraordinary circumstance, such as defendant's illness, since trial. Pen.Code, § 1272.

**2. Bail ⇐44**

Denial of application, made only 12 days after judgment on applicant's conviction of manslaughter, for bail pending appeal therefrom on ground that his health would be endangered by immediate incarceration in penitentiary, was not abuse of discretion, in view of conflicting testimony and affidavits as to applicant's mental and physical condition and absence of showing that his alleged nervous condition and physical disorders developed after his conviction. Pen.Code, § 1272.

**3. Criminal law ⇐1148**

On application to District Court of Appeal, immediately after applicant's conviction of manslaughter, for bail pending appeal on ground of illness respecting which he makes same showing as in superior court on his previous application thereto for bail, appellate court can do no more than determine whether lower court exercised its discretion arbitrarily. Pen.Code, §§ 1272, 1291; Rules on Appeal, rule 32(b).

Petition from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Henry E. Barton was convicted of manslaughter, and he appeals. On appellant's application for bail pending appeal.

Application denied.

James Martin MacInnis, of San Francisco, for petitioner.

Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst. Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

Petitioner applies to this court for bail pending his appeal from a judgment of conviction of the crime of manslaughter. He asked for and was refused bail by the trial court. The present application is directed to the original jurisdiction of this court. Penal Code, § 1291; Rule 32(b), Rules on Appeal. Counsel for petitioner and the district attorney stipulated that the evidence offered in the superior court might be examined by this court in lieu of affidavits of merit or other original evidence. This method of presenting the application is more in the nature of an appeal than an address to the original jurisdiction of the court.

Petitioner was charged with murder in the first degree and convicted of manslaughter. He was incarcerated on or about September 5, 1944. Judgment of conviction was rendered against him on or about February 2, 1945. On February 13, 1945 petitioner applied to the superior court for bail on appeal. The evidence upon which the superior court denied bail, and which is now before this court, consists of conflicting testimony and affidavits as to whether or not petitioner's health would be endangered by immediate incarceration in the state penitentiary at San Quentin. The testimony and affidavits of doctors presented by petitioner reveal that in their opinion he is suffering from anxiety neurosis, tremors, high blood pressure, and possibly ulcers. They believe that immediate confinement in San Quentin would be hazardous to his health.

In opposition is the testimony of Dr. Harry W. Davis, who examined petitioner for the people. He found that except for tremors petitioner's physical condition was normal, and that nothing in petitioner's mental condition would lead him to conclude that he was suffering from an anxiety neurosis. In his opinion imprisonment was not imminently dangerous to petitioner's health. Dr. Mervyn Hirschfeld, who also examined petitioner for the people, stated in an affidavit that while petitioner was an emotionally unstable individual, he had shown no difficulty in adjusting himself to the routine of the county jail and that he would anticipate no serious consequences from his transfer from one penal institution to another. The record shows that during the entire time petitioner has been confined in the county jail his name has not appeared on the sick list, nor has he or anyone on his behalf called his alleged illness to the attention of the jail physician. The people also introduced an affidavit from the psychiatrist at San Quentin stating that the prison was equipped with the personnel and physical facilities to handle cases of anxiety neurosis.

This court recently passed on an application for bail in People v. Davis, 67 Cal.App.2d 837, at page 839, 155 P.2d 675, at page 676, wherein it was said: "It always has been the law in this state that the discretion referred to in section 1272 of the Penal Code, supra, is a discretion conferred upon the trial court where the conviction was had, and is not a discretion conferred upon the appellate courts. [Citing cases.] Of course, such discretion should not be arbitrarily exercised, and an abuse thereof will be controlled by an appellate court. [Citing cases.] The discretion being vested in the trial court where the conviction was had, its exercise by that court will not be disturbed except in an instance of manifest abuse, or where some extraordinary circumstance has occurred since the trial, such as the illness of the defendant, or after discovered evidence which tends to show his innocence. [Citing cases.]"

Petitioner believes that the case of In re Pantages, 209 Cal. 535, 291 P. 831, is controlling, and that under the decision therein he is entitled to the relief he asks for. The Supreme Court granted bail on appeal to Alexander Pantages after it had been denied by the trial court and by the District Court of Appeal. Pantages had been convicted of a felony and upon his conviction incarcerated in the Los Angeles county jail. Five physicians, including the jail physician, testified that Pantages was suffering from heart attacks and that if he continued to be kept in jail his health and even his life would be endangered. Two physicians filed affidavits in opposition. Both of them admitted that Pantages suffered from a heart condition but stated that adequate treatment could be obtained in the jail. The court granted the application for bail because the overwhelming weight of evidence indicated that Pantages' condition was serious and that his surroundings endangered his life.

[1] The present application is not controlled by the Pantages decision. As stated in the Davis case, supra, the determination of the trial court in an application for bail on appeal will not be disturbed except in an instance of manifest abuse, or unless some extraordinary circumstance has occurred since the trial, such as the illness of the defendant. Pantages had been incarcerated some eight months after he had been convicted before he was granted bail by the Supreme Court. The illness which secured him his conditional freedom had occurred since his conviction and confinement. Petitioner in the present case applied to the trial court for bail twelve days after judgment of conviction. There is no showing that his nervous condition and physical disorders developed in the twelve days following his conviction although they may have become somewhat accentuated. On the contrary, the facts indicate that the "nervous breakdown" which petitioner claims he will suffer should he be confined in the state penitentiary would be only one more manifestation of the emotional instability which caused his discharge from the United States Navy and the commission of the very crime for which he is now being punished.

[2, 3] It is clear from the discussion of the facts in this case that the trial court did not abuse its discretion in denying petitioner bail. Were we to exercise our independent judgment in this matter we would also deny the application on its merits. However, we need not consider that question. When a person applies for bail, immediately after conviction, on the ground of illness and makes the same showing in both the superior and appellate

courts, the higher court can do no more than determine whether or not the lower court has exercised its discretion arbitrarily.

Petitioner's application for bail on appeal is therefore denied.

PETERS, P. J., and DOOLING, Justice pro tem., concur.




68 Cal.App.2d 603

## OLCOTT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 14846.

District Court of Appeal, Second District, Division 2, California.

March 29, 1945.

Rehearing Denied April 23, 1945.

Hearing Denied May 24, 1945.

1. Divorce ⇐305

Where mother disobeyed court order, entered in divorce proceeding, by removing child from state, fact that mother had established residence outside state and was not personally served with process did not deprive court of jurisdiction to make order adjudging her guilty of contempt where service was made on her attorney of record in the divorce proceeding.

2. Divorce ⇐305

Where party to divorce litigation had permanently established her residence outside state, service of order to show cause why she should not be adjudged guilty of contempt for disobeying order, on her attorney of record, constituted a valid service.

3. Divorce ⇐312

Where order, entered in divorce litigation, prohibited mother from taking child from Southern California, mother's removal of child from California pending father's appeal from subsequent order permitting the child's removal authorized court to adjudge mother guilty of contempt in disobeying the order then in force prohibiting removal. Code Civ.Proc. § 949.

4. Divorce ⇐312

Order permitting mother to remove minor child from state was ineffective during pendency of father's appeal from order. Code Civ.Proc. § 949.

Proceeding in the matter of the petition for writ of review by Angela M. Olcott against the Superior Court of the State of California, in and for the County of Los Angeles, and McDonald White for annulment of an order whereby petitioner was adjudged guilty of contempt of court.

Writ of review discharged.

George I. Devor and Finlayson, Bennett & Morrow, all of Los Angeles, for petitioner.

James C. Bone, of Arcadia, and Gerald E. Kerrin, of Los Angeles, for respondents.

W. J. WOOD, Justice.

Petitioner filed an application for a writ of review in the District Court of Appeal, Second District, seeking the annulment of an order of the superior court of Los Angeles County whereby she had been adjudged guilty of contempt of court in removing her minor daughter from the State of California pending an appeal from a court order permitting the child's removal. Her application was denied by Division One of this court without opinion and thereafter, with the permission of the court her application was withdrawn. Thereupon she filed an application in the Supreme Court seeking the same relief and that court on January 15, 1945, issued a writ commanding the superior court to certify and return to this court a transcript of its proceedings in the matter sought to be reviewed and commanding the superior court to refrain pending action upon the writ from punishing petitioner for her alleged contempt in removing the child from California.

On the complaint of petitioner she was granted an interlocutory decree of divorce from McDonald White on November 27, 1939. A property settlement had been made between petitioner and White in which it is provided that the care and custody of the daughter of the parties, Nancy White, a child then about five years of age, should be given to petitioner with certain rights of visitation being accorded to the child's father. In the interlocutory decree the custody of the child was given to petitioner "with visitation privileges to defendant as set forth in the property settlement agreement", with which the defendant was or-

dered to comply. A final decree of divorce was entered on December 6, 1940, on one of the usual printed forms in which it was set forth that "wherein said interlocutory decree makes provision for alimony or the custody and support of the child, said provision be and the same is hereby made binding upon the parties". Between the time of the entry of the interlocutory decree and the time of the entry of the final decree, on July 31, 1940, the court made an order providing that "this child shall not be taken out of Southern California" and further providing for the continuation of the monthly payments of $30 per month to petitioner for the support of the child and for the right of the father to visit the child and have her with him during certain specified periods. Petitioner married Ben L. Olcott on April 9, 1944. Her present husband is a captain in the armed forces of the United States having a permanent residence at Cheney, Pennsylvania. Petitioner left California on July 25, 1944, with her daughter and is now residing with her husband's mother at the home in Cheney, Pennsylvania, which her husband has established as the family domicile.

After her remarriage petitioner obtained an order to show cause for permission to remove the minor child from the State of California and on May 23, 1944, the court made the following order: "In the matter of the order to show cause in re removal of minor child from the State, which was heard May 10, 1944 and taken under submission by the court, it is ordered that the motion of the plaintiff for permission to remove the child of the parties, Nancy White, from the State of California be and it is hereby granted upon the following conditions: (1) That said child shall not be removed until the completion of the present school term; (2) that defendant shall at all times be advised of the address where said child is domiciled; and (3) that plaintiff upon request shall cooperate in making reasonable arrangements for defendant to visit said child." The child's father promptly appealed from this order and pending the appeal the petitioner removed the child to her new home in Pennsylvania.

At the request of the child's father the superior court issued an order to show cause on September 15, 1944, commanding petitioner to show cause why she should not be adjudged guilty of contempt for "disobeying the order heretofore made on the 31st day of July 1940, which order and the disobedience of which are more fully described in the affidavit of McDonald White * * *" By order of the court this order to show cause was served upon George I. Devor, the attorney who had appeared for petitioner in the divorce proceedings. A motion was made on behalf of petitioner for attorney's fees and costs on the appeal which McDonald White was prosecuting from the order permitting the removal of the child from California. The motion came on for hearing together with the order to show cause in re contempt and on October 19, 1944, the court made an order granting to petitioner certain sums as attorney's fees and costs and found that petitioner "is guilty of contempt of court and until such time as plaintiff purges herself of contempt and returns the child to California defendant will be relieved of the obligation of supporting the minor child."

[1, 2] There is no merit in petitioner's attack on the jurisdiction of the court to make the order adjudging her guilty of contempt for the reason that she was absent from the state and was not personally served with process. In making the order that service should be made upon the attorney who was her attorney of record in the divorce proceedings the court followed the approved procedure. Petitioner having permanently established her residence outside the State of California service upon her attorney of record was authorized and constituted a valid service. Foley v. Foley, 120 Cal. 33, 52 P. 122, 65 Am.St.Rep. 147; Shibley v. Superior Court, 202 Cal. 738, 262 P. 332.

[3, 4] Before the entry of the order of May 23, 1944, giving permission to petitioner to remove the child from California, both parties were, under the provisions of the court order of July 31, 1940, obligated to refrain from taking the child from Southern California. It is provided in section 949 of the Code of Civil Procedure that an appeal from such an order as that made on May 23, 1944, "stays proceedings in the court below upon the judgment or order appealed from." See Ex parte Queirolo, 119 Cal. 635, 51 P. 956, 957; Foster v. Foster, 5 Cal.2d 669, 55 P.2d 1175. Thereafter the parties gained no rights or privileges from the making of the order pending the appeal and the justification, if any, for the removal of the child from California by petitioner rests upon her rights under the orders previously made. As above pointed out under

those orders she was prohibited from taking the child from Southern California. It follows that the court was authorized to adjudge her guilty of contempt in disobeying an order of the court then in force.

The writ is discharged.

MOORE, P.J., and McCOMB, J., concur.

Hearing denied; CARTER and SPENCE, JJ., dissenting.




68 Cal.App.2d 552

## CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION v. LEWIS.

Civ. 7111.

Sac. 5679.

District Court of Appeal, Third District, California.

March 27, 1945.

**1. Taxation ⇐49, 59**

The tax assessed upon an employer under Unemployment Insurance Act is not a direct tax on property, but is an excise tax or a tax on right to do certain things, and is not within contemplation of constitutional provision requiring taxation to be in proportion to value. St.1937, pp. 2053, 2054, §§ 9(a, b), 9.5; St.1939, p. 2037, § 9.7; Const. art. 13, § 1.

**2. Master and servant ⇐78**

The Unemployment Insurance Act is a remedial statute which must be liberally construed for purpose of accomplishing its object. St.1935, p. 1226 et seq., as amended.

**3. Master and servant ⇐78**

The Unemployment Insurance Act was enacted, not as a revenue-raising measure, but as part of a national plan to assist in stabilization of employment conditions and to ameliorate conditions of unemployment. St.1935, p. 1226 et seq., as amended; St. 1939, p. 1968, §§ 1, 2.

**4. Constitutional law ⇐283**
**Taxation ⇐37**

The Unemployment Insurance Act is constitutional with respect to State Constitution and is not violative of due process clause of Federal Constitution. St.1935, p. 1226 et seq., as amended; St. 1939, p. 1968, §§ 1, 2; U.S.C.A.Const. Amend. 14.

**5. Taxation ⇐59**

Purchaser of barber shop who did not avail himself of statutory method for terminating tax liability was not improperly required to pay tax imposed under Unemployment Insurance Act on wages paid his own employees, after he acquired shop on August 1 of calendar tax year, in conformance with section 9(b) defining as an employer within the act one who acquires the business of an employing unit during tax year, notwithstanding that proprietor did not become an employer within terms of section 9(a) basing definition of employer on number of employees. St.1937, p. 2053, § 9(a, b); Const.Cal. art. 13, § 1; U.S.C.A. Const. Amend. 14.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by California Employment Stabilization Commission, successor to the California Employment Commission (formerly the Unemployment Reserves Commission), against Lee S. Lewis, individually and doing business as Cralle's Barber Shop, to recover contributions claimed to be due from defendant as an employer under provisions of the California Unemployment Insurance Act. Judgment for plaintiff, and defendant appeals.

Affirmed.

E. S. Mitchell, of Eureka, for appellant.

Robt. W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondent.

ADAMS, Presiding Justice.

This action was brought to recover contributions claimed to be due from defendant as an employer, under the provisions of the California Unemployment Insurance Act. Stats.1935, ch. 352, as amended, 2 Deering's General Laws, Act 8780d. The facts are not in dispute, the parties having stipulated that on July 22, 1940, defendant entered into a contract in writing to purchase Cralle's barber shop, in Eureka; that on said date notice of intended sale was recorded in accordance with section 3440 of the Civil Code; that defendant took possession of the shop as owner, on August 1, 1940, and was thereafter, during the period covered in the complaint, the actual operating owner

thereof; that from August 1, 1940, to June 30, 1941, the period for which contributions were claimed, defendant employed four employees for a period of six weeks, one of them being a janitor who worked one day a week and was paid $1.25 per week; that actual wages paid by defendant from August 1, 1940, to June 30, 1941, amounted to $119; that prior to defendant's purchase of the property his predecessor had employed four or more employees on twenty days or longer, each day being in a different calendar week.

Plaintiff contended that defendant was an employer within the provisions of sections 9(a) and 9(b) of the act, and was liable for contributions under 9(b) though he did not himself employ enough men for a sufficient period to bring himself within the definition of an employer under section 9(a) of the act. Those sections provide:

"Sec. 9. * * * 'Employer' means:

"(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; * * *

"(b) Any individual or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this act."

Section 9.5 of said act provides: "Any employing unit which is or becomes an employer subject to this act within any calendar year shall be subject to this act during the whole of such calendar year."

Section 9.7 St. 1939, p. 2037, provides a method by which an employer who ceases to be subject to the provisions of the act may terminate his coverage in a proper case by application to the commission for such termination.

Defendant contended that as he had not employed enough employees during the period set forth in the complaint to constitute him an employer under section 9(a), he could not be held bound to pay contributions solely by reason of the fact that his vendor was such employer; and that section 9(b) is unconstitutional.

Judgment having been rendered in favor of plaintiff, defendant has appealed, his contentions before this court being the same. He argues in his brief that the assessments levied under the act are taxes, and the statute a taxing act which must be strictly construed against the taxing power; that the tax deprives appellant of property without due process of law; that it violates Art. XIII, sec. 1, of the California Constitution which requires taxation to be in proportion to value, and that it violates the rule that taxes must be uniform and equal.

[1] That the taxes assessed upon an employer under this and similar acts is not a direct tax on property, but is an excise tax, or a tax on the right to do certain things, is stated in Gillum v. Johnson, 7 Cal. 2d 744, 763, 62 P.2d 1037, 63 P.2d 810. Also see Charles C. Steward Machine Co. v. Davis, 301 U.S. 548, 578, 57 S.Ct. 883, 81 L.Ed. 1279, 1286, 109 A.L.R. 1293.

[2] And that statutes such as our Unemployment Insurance Act are remedial statutes which must be liberally construed for the purpose of accomplishing their objects, is generally held not only by the courts of this state but elsewhere. See California Employment Commission v. Butte County Rice Growers Association, 25 Cal.2d 624, 154 P.2d 892; California Employment Commission v. Los Angeles Down Town Shopping News Corporation, 24 Cal. 2d 421, 150 P.2d 186; California Employment Commission v. Black-Foxe Military Institute, 43 Cal.App.2d Supp. 868, 110 P.2d 729; Godsol v. Unemployment Compensation Commission, 302 Mich. 652, 5 N.W.2d 519, 524, 142 A.L.R. 910.

[3, 4] The Unemployment Insurance Act of California was enacted, not as a revenue-raising measure, but as part of a national plan to assist in the stabilization of employment conditions and to ameliorate conditions of unemployment. This appears from the declaration of policy made in sections 1 and 2 of the act, St.1939, p. 1968, and is stated in numerous court decisions. Similar statutes have been enacted in most of the states; and that such statutes are constitutional and do not violate the due process clause of the Federal Constitution is held generally by the courts of this state, of the United States and of the several states. Illustrative cases in addition to California cases above cited are: Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327 (up-

holding the validity of the Alabama Unemployment Compensation Act); Charles C. Steward Machine Co. v. Davis, supra (holding that the Federal Social Security Act, 42 U.S.C.A. § 301 et seq., does not violate constitutional requirements of due process and uniformity); Globe Grain & Milling Co. v. Industrial Commission, 98 Utah 36, 91 P.2d 512 (holding that Unemployment Compensation Law of Utah does not violate the due process clause of either the State or the Federal Constitutions); Jeffreys-McElrath Mfg. Co. v. Huiet, 196 Ga. 710, 27 S.E.2d 385, 150 A.L.R. 1200 (holding that the Georgia Unemployment Compensation Act does not violate the due process or equal protection clauses of the State or Federal Constitutions, or the principle of uniformity of taxation); Buckstaff Bath House Co. v. McKinley, 198 Ark. 91, 127 S.W.2d 802 (upholding validity of Arkansas Unemployment Compensation Act, and holding the tax to be an excise and not a tax on property); Godsol v. Unemployment Compensation Commission, supra, (holding the Michigan Unemployment Compensation Act does not violate the 14th Amendment); Howes Brothers Co. v. Massachusetts Unemployment Compensation Commission, 296 Mass. 275, 5 N.E.2d 720 (holding the Massachusetts Unemployment Compensation Act valid and the tax an excise and not a property tax); W. H. H. Chamberlin, Inc., v. Andrews, 271 N.Y. 1, 2 N.E.2d 22, 106 A.L.R. 1519 (holding the New York Unemployment Insurance Act constitutional); Pickelsimer v. Pratt, 198 S.C. 225, 17 S.E. 2d 524 (holding the South Carolina Unemployment Compensation Act not violative of the due process and equal protection clauses of State and Federal Constitutions, and that, as tax levied thereunder is not a property tax but an excise tax, the constitutional requirement of uniformity of taxation of property does not apply); Tatum v. Wheeless, 180 Miss. 800, 178 So. 95 (holding Mississippi Unemployment Compensation Law valid).

While the foregoing cases do not deal directly with provisions of the various acts similar to section 9(b) of the California act, the validity of such a provision was directly before the Supreme Court of Tennessee in Southern Photo & Blue Print Co. v. Gore, 173 Tenn. 69, 114 S.W.2d 796, and held to be valid. There plaintiff company had acquired the assets and good will of a corporation which was an employer within the provisions of the Tennessee Act; and it was held that the change of ownership of the business did not change its status as an employing unit. The court said, 114 S.W. 2d at page 800:

"It is argued that the exaction of contributions of complainants is, in its nature, a tax on the transfer of property. We think this argument is based on a misconception of the intent and purpose of what is termed the successor in interest clause, section 19 (f) of the act. Complainants acquired not only the assets of their respective predecessors, but also the good will of their respective businesses. The ownership of the businesses was simply shifted from the former owners to complainants. They were charged with the knowledge that under the act their respective predecessors occupied the status of 'employers' and that they, by virtue of such acquisitions, would succeed to such status. If complainants contemplated the carrying on of the respective businesses with less than eight employees there was nothing to prevent them from demanding that they be indemnified against the contributions for the year 1937, which they were charged with knowing would be required of them under the terms of the act.

"In our opinion section 19(f) of the act is valid and complainants were liable for the contributions exacted of them."

Arguendo, see Godsol v. Michigan Unemployment Compensation Commission, supra, where a section of the Michigan Unemployment Compensation Act defining an "employing unit" (comparable to section 8.5 of the California act) was held valid and not violative of the 14th Amendment. Also see similar cases cited in 142 A.L.R. 919 et seq.

[5] While the decisions of other states are not conclusive upon the courts of this state, we agree with the decision in Southern Photo & Blue Print Co. v. Gore, supra, and therefore hold that no constitutional right of appellant is impaired by requiring him to pay the tax imposed by the act upon the wages which he paid to his own employees after he acquired the barber shop on August 1, 1940, in conformity with the provisions of section 9(b), supra, even though he did not become an "employer" within the terms of section 9(a). Though he asserts in his brief that he is being compelled to pay a tax upon property owned by his vendor, Cralle, and assessed prior to ownership by appellant, such is not the case. He is being assessed only upon the basis of

wages paid by him to his own employees after the ownership of Cralle had entirely terminated. The only thing that carried over was the status of the vendor as an employing unit. When appellant acquired the shop he was charged with knowledge that at least for the remainder of the calendar year he would have to make his contributions under the act; and under section 9.7, supra, he could have terminated his liability thereafter by compliance with its provisions.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.




68 Cal.App.2d 557

**BISCHELL et ux. v. STATE et al.**

**Civ. 3173.**

District Court of Appeal, Fourth District, California.

**March 27, 1945.**

**Rehearing Denied April 25, 1945.**

**Hearing Denied May 24, 1945.**

**1. Automobiles ⇐175(2)**

Under statute defining emergency vehicle as one operated by state or county "forest ranger" or "fire warden", quoted phrases would be construed in harmony with intent of the act, and common-sense rules should be applied. Vehicle Code, §§ 401, 454, St.1937, pp. 1993, 168; Vehicle Code, § 44(c), St.1935, p. 97; St.1939, pp. 1141, 1143, § 4000 et seq., § 4009.

See Words and Phrases, Permanent Edition, for all other definitions of "Fire Warden" and "Forest Ranger".

**2. Automobiles ⇐175(2)**

A salaried employee of State Forestry Department, dispatched to forest fire in state fire truck, was a "fire warden" within terms of statute defining "emergency vehicle", so that statutory immunities and exemptions were applicable in action by persons injured in collision with fire truck. Vehicle Code, §§ 401, 454, St.1937, pp. 1993, 168; Vehicle Code, § 44(c), St.1935, p. 97; St.1939, pp. 1141, 1143, § 4000 et seq., § 4009.



See Words and Phrases, Permanent Edition, for all other definitions of "Emergency Vehicle".

**3. Trial ⇐241**

In action against state and driver of fire truck for injuries suffered in collision with fire truck, instructions in statutory language on duty of drivers of other vehicles to yield right of way, drive to right-hand edge of highway and stop clear of intersection, were proper. Vehicle Code, § 554, St.1941, p. 2725.

**4. Automobiles ⇐244(16, 41)**

In action arising out of intersection collision between automobile and state-owned fire truck, evidence authorized denial of recovery to either automobile occupants or the state.

**5. Automobiles ⇐245(67)**

In action against state and driver of fire truck for injuries suffered in intersection collision, sufficiency of reasons offered by plaintiffs for failure to see the truck or hear siren was for jury.

**6. Trial ⇐191(7)**

An instruction stating inference that one sees a clearly visible object when he looks and hears that which is audible when he listens, and that evidence to contrary shows either irreconcilable conflict in evidence or that person was negligently inattentive, was not improper as assuming that fire truck was plainly visible or siren plainly audible in particular case.

**7. Trial ⇐295(6)**

In action arising out of intersection collision with fire truck, instruction stating inference that one sees a clearly visible object when one looks and hears that which is clearly audible when he listens, and that evidence to contrary shows either irreconcilable conflict in evidence or that person was negligently inattentive, was not prejudicial as ambiguous, when read as a whole.

**8. Trial ⇐260(1)**

Plaintiffs could not complain of refusal to give proffered instructions where instructions given, though offered by defendants, fully and adequately covered the subject matter.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by Alex Bischell and wife against the State of California and another for injuries suffered in an automobile collision, wherein defendants filed cross-complaint. From a judgment on a verdict allowing no recovery for either party, plaintiffs appeal.

Affirmed.

Strother P. Walton, of Fresno, for appellants.

Chester O. Hansen, of Fresno, for respondents.

GRIFFIN, Justice.

Plaintiffs and appellants brought this action for damages against defendants and respondents as a result of an automobile accident occurring about 7:10 p. m. on July 7, 1943, near the intersection of Blackstone and Gettysburg avenues just north of Fresno. Blackstone Avenue runs due north and south; Gettysburg Avenue runs east and west and intersects Blackstone Avenue at right angles. At the point of the accident Blackstone Avenue, a well-traveled street, is approximately 45 feet wide. The main traveled portion of the highway consists of a 16-foot strip of pavement with a white center line. The pavement on each side is bordered by an oiled shoulder four to six feet in width and those shoulders are each bordered by a graded dirt road approximately ten feet in width. Gettysburg Avenue consists of a 21-foot strip of oiled surface with approximately five feet of graded dirt road on each side thereof. A stop sign is erected on the northeast and southwest corners of the intersection affecting traffic approaching on Gettysburg Avenue.

Plaintiff Alex Bischell was driving his Plymouth coupe, in which his wife was seated, south on Blackstone Avenue. Defendant Redding was driving a state-owned Chevrolet fire truck east on Gettysburg. His wife, who was a fire fighter, was seated next to him. He had just about negotiated a turn to the north on Blackstone Avenue when about 60 or 65 feet north of the intersection described, the left rear end of the fire truck came in contact with the left front portion of plaintiffs' car, causing considerable damage thereto and injuring the plaintiffs.

Plaintiffs in their complaint allege that Redding was "an employee and agent of the State of California, the Department of National Resources and Division of Forestry," and was operating the truck "within the course and scope of his employment by the State of California as the operator and driver of said fire truck". Damages in the sum of $32,500 were sought. Defendants filed an answer, denied generally any negligence on their part, alleged negligence on the part of plaintiffs, and by way of a cross-complaint sought $592.61 damages.

Defendants set up several additional and separate affirmative defenses. The first is that Redding was a "volunteer member of the fire department maintained by the Fig Garden Fire Protection District, a political subdivision," and was driving the fire truck in responding to a fire alarm and emergency call; that Redding was then and there an employee of the Division of Forestry of the State of California, and that under secs. 44(c), 401 and 454 of the Vehicle Code defendants were not liable. After trial the jury allowed no recovery for either party. Plaintiffs only appealed from the judgment that followed.

Plaintiffs' grounds for a reversal are that defendant Redding was not a person authorized by the provisions of the sections of the Vehicle Code above mentioned to claim the exemptions and privileges accorded the driver of an authorized emergency vehicle and that all instructions given to the jury on that phase of the case were erroneous.

In this connection, and in connection with the question of the negligence of the parties, defendant Redding's testimony shows that on the day in question there was no fog or rain; that in responding to the call he proceeded east on Gettysburg Avenue at about 20 to 25 miles per hour with the siren going and a red light turned on; that when he was about 400 feet west of the intersection he looked across the field at the northwest corner thereof and saw plaintiffs' car approaching the intersection about one-fourth of a mile north; that he changed to a lower gear, slackened his speed to make the turn and had not yet returned to high gear when the accident happened; that as he approached a point about 150 feet from the intersection plaintiffs' car was then close to 400 feet from it; that when he went into the intersection, at about 12 to 14 miles per hour, with the siren on, plaintiffs were then about 150 feet north of it; that he put his hand out, indicating a left turn; that he then turned north; that all but about 1½ feet of his truck had passed over and across the center white line of Blackstone Avenue when plaintiffs' car struck the fire truck back of the cab on the lefthand side; that he only proceeded the length of the truck

before he stopped it; that when it was stopped all of the truck was on the east side of the white center line headed in a northwesterly direction; that when plaintiffs' car stopped, it was headed in a general southeasterly direction with the left front wheel partially over the white center line and the right rear portion just off of the west pavement; that after the accident Mr. Bischell told him that he "didn't see the fire engine".

Mr. Bischell testified that about 7 p. m. that day he and his wife decided to go to the store which was just south of Gettysburg Avenue on Blackstone Avenue; that the window on the left side of his car was closed and the right window was within two inches of being closed; that he was knocked unconscious and the last he remembered was turning on Blackstone and proceeding southerly; that he never did see the fire engine before the impact nor hear the siren.

Mrs. Bischell testified that she did not remember anything that happened after July 4th, three days before the accident, and that she did not regain consciousness until August 5th.

Leron Neil testified that he was State Forest Ranger in charge of Fresno County forestry work; that in connection with forestry work the State owns and maintains the fire equipment involved; that the drivers of the trucks in his district are under his direction and supervision; that Mr. Redding, who was his "employee in charge of that station", was actually dispatched to the fire in question; and that he sent a similar truck and driver from Fresno headquarters to subdue the fire.

[1] Secs. 401 and 454 of the Vehicle Code, St.1937, pp. 1993, 168, provide that the driver of an authorized emergency vehicle shall be exempt from certain provisions of the Vehicle Code and from liability when the vehicle is being driven in response to a fire alarm and when the vehicle is properly equipped, etc. Sec. 44(c) of the Vehicle Code, St.1935, p. 97, defines an authorized emergency vehicle as "A motor vehicle, either publicly or privately owned, operated by a State or county forest ranger, or a fire warden on salary and directly in charge of fire protection work upon behalf of the State or in any county, * * * in responding to emergency fire calls". The question is whether the facts related are sufficient to bring the fire truck in question within the meaning of that term. It is conceded that the truck was publicly owned and was in the process of responding to an emergency fire call. The only debatable question is whether it was being operated by a state or county forest ranger or a fire warden on salary and directly in charge of fire protection work on behalf of the state or in any county. It is plaintiffs' argument that the driver of the truck was not, in a most technical sense, a state or county "forest ranger" or a "fire warden". We are convinced that a common sense rule should here be applied and that such terms should be construed in harmony with the intent of the act. For the prevention and suppression of forest fires, the Legislature adopted sec. 4000 et seq. Public Resources Code, Division 4, Chapter 1, Art. 1, St.1939, p. 1141.

Under the act the state is divided into a convenient number of fire districts and provides for the appointment of a district "fire ranger" for each district. The district fire ranger shall, under the direction of the State Forester, have charge of the fire fighting system and men in such district and is charged with the duty of extinguishing and preventing forest fires. The Board of Forestry provides fire fighting apparatus, organizes fire companies, establishes observation stations and employs men to attend them. The board may enter into cooperation agreements with associations or individuals for the prevention of forest fires and bear a proportionate share of the cost. A State Forester may appoint "voluntary fire wardens" to take active steps in extinguishing fires, and perform such duties as the State Forester may direct. Sec. 4009, St.1939, p. 1143.

[2] Defendant Redding testified that he was employed by the Forestry Department of the State of California. He was on salary and assigned to this duty by an authorized fire warden or fire ranger who was charged with the duty of extinguishing forest fires. It must be held that Redding was, in the broader sense of the word, "a fire warden" within the meaning of sec. 44(c) of the Vehicle Code, and was directly in charge of fire protection work on behalf of the state or in the county. The station and apparatus operated by the defendant Redding was but a part of an organized fire fighting system, which system was in charge of the district fire ranger but under the direction of the State Forester. Several such fire trucks were employed in that fire district. It would be physically impossible

for the "fire ranger" specified in the Public Resources Code, to personally operate all of the fire trucks in his district. It would be placing a strained construction on sec. 44(c) of the Vehicle Code to hold that that section did not apply to defendant Redding, who was on a salary, duly appointed by the State Forester, and assigned to the particular duty of driving a properly equipped fire truck, who had charge of the station and apparatus and who had been directed to attend fires as such driver and take charge of such fire protection work on behalf of the State. Under the facts here involved, it clearly appears to us that it was the intention of the Legislature to include the driver of such a fire truck as this within the term "fire warden" and to bring him within the provisions of sec. 44(c) of the Vehicle Code, and that the immunities and exemptions extended by secs. 401 and 454 of the Vehicle Code are applicable.

[3, 4] The instructions given on this subject were proper as well as the instruction given in the language of sec. 554 of the Vehicle Code, St.1941, p. 2725, on the duty of drivers of other vehicles to yield the right of way, to drive to a position at the right-hand edge of the highway and stop clear of any intersection. Under the facts related, the jury's conclusion on the question of the negligence of the parties is fully supported.

Plaintiffs next complain of defendants' given instruction which reads: "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listended, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either there is an irreconcilable conflict in such evidence or the person was negligently inattentive."

[5-7] It is argued that the instruction is "highly ambiguous" in that there can be no "irreconcilable conflict" if, as the first part of the instruction states, the "object was clearly visible and clearly audible"; that the instruction assumed as a fact that the fire truck was clearly visible and clearly audible when, in fact, the evidence on the question was conflicting. This instruction follows very closely, similar instructions approved in O'Brien v. Schellberg, 59 Cal. App.2d 764, 769, 140 P.2d 159; Astone v. Oldfield, 67 Cal.App.2d 814, 821, 155 P.2d 398; and Busch v. Los Angeles Ry. Co., 178 Cal. 536, 174 P. 665, 2 A.L.R. 1607. There is ample evidence that the fire truck could have been seen and the siren heard by plaintiffs had they exercised reasonable care and vigilance. They offered many reasons why the truck could not have been seen or the siren heard by them. These were questions of fact for the jury to determine. The instruction does not assume that the fire truck was plainly visible or the siren plainly audible, but leaves to the jury the application of the general rule to the facts in the case. While not happily worded, the instruction, when read as a whole, cannot be said to be "highly ambiguous". No prejudicial error appears.

[8] The next complaint is directed to the failure of the court to give two of the plaintiffs' instructions, one bearing upon their right of recovery notwithstanding the exemptions granted defendants by sec. 454 of the Vehicle Code, if the evidence disclosed that defendant Redding drove the emergency vehicle in such a manner as to be guilty of reckless driving or guilty of an arbitrary exercise of the privileges declared in that section. The trial court not only read to the jury sec. 454 of the Vehicle Code in its entirety but also gave other instructions adequately covering the subject matter. The second instruction bore upon the question of contributory negligence. Instructions, offered by defendants, were given covering the general doctrine of contributory negligence. Plaintiffs cannot now be heard to complain because of the refusal of the trial court to give their proffered instruction on that same doctrine where the instructions given, even though offered by defendants, fully and adequately covered the subject matter. This complaint is without merit.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; EDMONDS and CARTER, JJ., dissenting.

68 Cal.App.2d 520

## HINES v. MILOSIVICH.

Civ. 14757.

District Court of Appeal, Second District, Division 2, California.

March 27, 1945.

**1. Appeal and error ⇐1010(1)**
**Negligence ⇐136(14)**

Negligence is a question of fact for determination of trier of facts whose finding supported by substantial evidence will not be disturbed.

**2. Municipal corporation ⇐819(4)**

Evidence supported finding that negligence of sewer contractor in failing to place barriers around open portion of ditch as required by county ordinance was proximate cause of injuries sustained by eight year old boy who fell into ditch while playing nearby with other boys.

**3. Negligence ⇐136(29)**

Whether a minor is of sufficient age and capacity to appreciate risk of injury to which he is exposing himself is a question of fact for determination of trier of facts, taking into consideration the usual thoughtlessness, carelessness and lack of discretion in children, their childish instincts, impulses and propensities, together with all circumstances.

**4. Municipal corporations ⇐821(21)**

Evidence failed to establish as matter of law that eight year old boy who fell into ditch while playing nearby with other boys was guilty of contributory negligence, so as to preclude recovery for his injuries from sewer contractor who dug ditch.

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Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Don Lee Hines, a minor, by his guardian ad litem, Fred Hines, against Max Milosivich, to recover for injuries alleged to have been caused by defendant's negligence in failing to provide proper barriers around an excavation. From a judgment for plaintiff, the defendant appeals.

Affirmed.

J. P. Nunnelley and R. E. Erwin, both of Los Angeles, for appellant.

Russell H. Pray, of Long Beach, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages alleged to have been caused by the negligence of defendant in failing to provide proper barriers around an excavation, defendant appeals.

The evidence being viewed in the light most favorable to plaintiff (respondent), the essential facts are:

Defendant, a sewer contractor, made an excavation approximately 120 feet long and 18 inches wide, varying in depth from 10 inches to 7 feet, from a house to the center of Nichols Street in Ballflower, California. The excavation was not open the entire distance, but was constructed with an opening in the middle of the street to which was a tunnel for a short distance, then a second opening, thence a tunnel to the street sufficient in length to accommodate automobile traffic, then open the remaining distance to the house. The dirt removed from the excavation was piled along the sides and around the openings. A county ordinance required defendant to maintain barriers not less than three feet high at each end of the excavation. This defendant did not do.

On October 3, 1943, plaintiff, a boy 8 years of age, while engaged in a clod battle with some of his playmates, observed his father driving his car and heard him honk his horn for him to come home. This plaintiff started to do, and while watching the boys with whom he had been playing, and while walking backward fell into the excavation made by defendant and suffered a fractured leg. It is conceded that plaintiff had been warned by his mother to keep away from the excavation and also that defendant had warned the boy to stay away from it.

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Was defendant's negligence the proximate cause of plaintiff's injury?*

[1] This question must be answered in the affirmative. Negligence is a question of fact for the determination of the trier of fact whose finding supported by substantial evidence will not be disturbed by an appellate court. McWane v. Hetherton, 51 Cal.App.2d 508, 511, 125 P.2d 85.

[2] In the present case since the evidence discloses that defendant had not

erected barriers at the end of his excavation, that plaintiff was a normal active boy of only 8 years of age engaged in a normal pastime, playing with his associates, who suddenly heard his father summon him home, the trial judge properly inferred that had the defendant erected barriers in accordance with the county ordinance at the end of the excavation these barriers might have so impressed the minor with the danger of the ditch that he would not have played near it.

The trial judge may also have inferred that, since the boy had on previous occasions played near the ditch and had returned after repeated warnings by defendant to keep away from it, defendant should have known that plaintiff did not realize the danger and should have taken proper precautions to prevent him from falling into the ditch by placing barriers around the open portions. Since the trial judge evidently drew these inferences from the evidence, such inferences support his findings that defendant was negligent in not placing barriers around the open portions of the ditch, and that such negligence was the proximate cause of plaintiff's injury.

Second: *Was plaintiff guilty of contributory negligence as a matter of law?*

[3] This question must be answered in the negative and is governed by the rule: That whether a minor is of sufficient age and capacity to realize and appreciate the risk of injury to which he is exposing himself is a question of fact for the determination of the trier of fact, taking into consideration the usual thoughtlessness, carelessness, and lack of discretion in children, their childish instincts, impulses, and propensities, together with all the circumstances in a particular case. Cahill v. E. B. & A. L. Stone, 167 Cal. 126, 141, 138 P. 712; Richmond v. Moore, 103 Cal.App. 173, 177, 284 P. 681.

[4] Applying the foregoing rule to the facts in the instant case, the trial judge very properly concluded, from an observation of the child who testified before him together with the other facts in evidence, that plaintiff was not aware of the danger to which he was exposing himself, and that therefore plaintiff was not guilty of contributory negligence.

Hernandez v. Santiago Orange Growers' Ass'n, 110 Cal.App. 229, 293 P. 875, relied on by defendant is factually distinguishable from the instant case. In the Hernandez case the suit was brought by the father for the wrongful death of his minor son who was killed when ice fell from refrigerator cars which were being iced. It is stated in the opinion that the deceased knew the danger from the falling ice, therefore recovery was barred because of the contributory negligence of deceased.

Blodgett v. B. D. Byas Co., 4 Cal.2d 511, 50 P.2d 801, is likewise inapplicable to the facts of the present case, for the reason that in the Blodgett case the question involved the conduct of an adult and not of a minor.

In view of our conclusions it is unnecessary to discuss other authorities cited by defendant.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.




**In re WAY'S ESTATE.**

**BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. v. WETHERELL et al.**

**Civ. 12799.**

District Court of Appeal, First District, Division 1, California.

March 23, 1945.

Hearing Granted May 21, 1945.

Hearing Dismissed Nov. 4, 1946.

**1. Husband and wife ⇐246**

Property which when acquired by husband in a state not a community property state was his sole property subject only to wife's dower rights, remained his separate property when husband and wife became domiciled in California.

**2. Husband and wife ⇐273(1)**

Statute providing that upon death of either spouse one-half of all personal property, wherever situated, acquired after marriage by husband or wife while domiciled elsewhere, which would not have been separate property of either if acquired while domiciled in California, shall belong to surviving spouse applies to all property in estate of deceased, real as well

as personal, which had its source in personal property acquired by husband or wife while domiciled elsewhere which would not have been separate property of either if acquired while domiciled in California. Probate Code, § 201.5.

**3. Husband and wife ⇐262(1, 2)**

Property acquired during marriage and standing in husband's name at his death is presumed to be community property and burden of proof is upon party contending that it was husband's separate property.

**4. Husband and wife ⇐273(12)**

Daughters of decedent contending that property acquired in California with funds brought from common-law states in which decedent and wife were domiciled before moving to California and standing in decedent's name at death was not subject to distribution as community property, had burden of showing what part of source property was owned by decedent before marriage or acquired thereafter by gift, devise, bequest or descent, and in absence of such showing presumption that it would have been community property if acquired while domiciled in California applied. Probate Code, § 201.5.

**5. Husband and wife ⇐273(12)**

Evidence that decedent was 30 years of age when married and had been working two years for clock company in common-law state with which he was employed at ever increasing compensation for 26 years after marriage was insufficient to overcome presumption that funds brought to California when decedent and wife moved there and invested in property standing in decedent's name at death would have been community property if acquired while domiciled in California and was therefore subject to distribution as such under statute. Probate Code, § 201.5.

**6. Husband and wife ⇐262(2)**

Where community and separate funds are intermingled and community funds are not small in proportion to separate funds, one claiming rights in separate property has burden of proof to support his claim.

**7. Evidence ⇐35**

Courts take judicial notice of the laws of another state. Code Civ.Proc. § 1875, subd. 3.

**8. Husband and wife ⇐30**

Oral agreement between spouses mutually releasing rights in estate of the other, though ineffective in Colorado had parties continued to reside there, would be operative as a contract made in California upon removal of husband and wife to that state if they intended it to regulate their rights upon becoming residents of California. Laws Colo. 1913, p. 636, as amended by Laws Colo. 1915, p. 513.

**9. Husband and wife ⇐30**

Oral contracts whereby spouses mutually agree to release rights in the estate of the other are valid in California.

**10. Husband and wife ⇐34**

Evidence failed to establish as a matter of law alleged oral agreement between husband, since deceased, and wife that each should have exclusive control of his or her own property, including the right to dispose of it by will, and trial court was justified in finding against the existence of such an agreement.

**11. Husband and wife ⇐34**

That husband and wife had agreed to keep their respective properties separate while each was alive did not support an inference that they had agreed that neither should inherit from the other or that the benefits of statutory provisions restricting testamentary power of either or both had been waived. Probate Code, § 201.5.

**12. Evidence ⇐590, 591**

Trial court had jurisdiction to reject testimony of witnesses having a financial interest in outcome of case or related to witness having such interest which was not produced until last day of trial after several months' recess and which was at variance with testimony previously given by many witnesses for same parties. Code Civ.Proc. § 1847.

**13. Witnesses ⇐363(1)**

The trier of facts in passing on credibility of witnesses is entitled to take into consideration the interest of the witness in result of case.

**14. Evidence ⇐594**

The trier of facts, provided he does not act arbitrarily, may reject in toto the testimony of a witness though uncontradicted. Code Civ.Proc. § 1847.

**15. Appeal and error ⇐970(2)**

Whether it should be presumed from failure of widow to testify when she was 84 years of age and incapacitated to extent that guardian of her estate had been

appointed that her testimony, if given, would have been adverse to her own position was for trial court. Code.Civ. Proc. § 1847.

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Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Proceeding in the matter of the estate of John H. Way, deceased, wherein Bank of America National Trust & Savings Association (a national banking association), as guardian of the estate of Clara H. Way, an incompetent person, and Clara H. Way filed petitions opposed by Geraldine Wetherell and another requesting a determination of widow's right to one-half of decedent's property. From an order declaring the widow to be entitled to one-half of all decedent's property, Geraldine Wetherell and another appeal.

Order affirmed.

Kirkbride & Wilson, of San Mateo (Reuel R. Sutton and Arthur J. Harzfeld, both of San Mateo, of counsel), for opponents and appellants.

Athearn, Chandler & Farmer, F. G. Athearn, Earl C. Berger, Arthur M. Sammis, and Leigh Athearn, all of San Francisco, for guardian of estate of Clara H. Way.

Walter A. Dold, of San Francisco, personal atty., for Clara H. Way.

PETERS, Presiding Justice.

Decedent's two daughters, Geraldine Wetherell and Athelyn Wetherell, appeal from an order determining that all property standing in the name of decedent at his death is subject to § 201.5 of the Probate Code, with the result that his widow, respondent Clara H. Way, is entitled to one-half thereof. The section provides: "Upon the death of either husband or wife one-half of all personal property, wherever situated, heretofore or hereafter acquired after marriage by either husband or wife, or both, while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, shall belong to the surviving spouse; the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code."

The decedent died on January 28, 1943, at the age of 88 years, a resident of San Mateo County. His estate was appraised at $68,184.96. By will dated October 15, 1942, he bequeathed $100 to his son, "this amount only being left him for personal reasons with which he is familiar." The residue he bequeathed to the San Francisco Bank as trustee. The bank was directed to pay to decedent's wife the difference between $150 a month and what she received from her separate property, and to pay $60 a month to each of decedent's two daughters, the appellants herein. The widow was 84 years of age at the time of trial in December, 1943, and was living with the son. The San Francisco Bank was appointed guardian of her estate on June 15, 1942, and thereafter the Bank of America replaced The San Francisco Bank. In the guardianship proceeding, in December, 1942, her estate was appraised at $47,029.23. Claiming that under § 201.5 the decedent did not have testamentary power over all the property of which he attempted to dispose of by will, the widow individually, and the bank as guardian of her estate, filed petitions requesting a determination of the widow's rights.

[1] The decedent, John H. Way, and his wife, Clara H. Way, married in Connecticut in 1884 and lived there until 1910. At the time of his marriage decedent was working for the Waterbury Clock Company as a bookkeeper and had been employed by that company for two years. In 1910, at the age of 56 he retired from his position as purchasing agent for that company, and the family moved to Denver. About 1922 Mr. Way came to California from Colorado and his family followed the next year. It is agreed that decedent never worked after he left Connecticut, and that all real and personal property of which he died possessed is the proceeds of what he owned when he left Connecticut. That state is not a community property state, so that such property when acquired was the sole property of the husband, subject only to the wife's dower rights, and it remained his sole property (known here as "separate property") when the parties became domiciled in California. Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343. It was admittedly separate property of the husband at the time of his death. But the widow contends, and the trial court found, that it was the peculiar type of separate property defined in § 201.5, that is, it was property of a type that had the parties been

domiciled here when the property was acquired it would have been community property. The trial court concluded that under that section, upon the death of her husband, the widow had the same rights as if it were community property, and was therefore entitled to one-half thereof, over which the husband had no power of testamentary disposition.

On this appeal the appellants make several contentions. It is first urged that § 201.5 applies only to that portion of the estate of the decedent that was personal property at the time of death and can have no application at all to the real property in such estate. It is next contended that respondents had the burden of proving the facts necessary to bring § 201.5 into operation, and that they failed to sustain this burden in that they failed to prove that the estate owned by her husband at the time of his death did not have its origin, in part at least, in property owned by him before his marriage. The last major contention of appellants is that the uncontradicted evidence demonstrates that decedent and his wife entered into an oral contract to the effect that, regardless of § 201.5, each should have the unlimited right to dispose of his or her separate property by will to the exclusion of the other. The trial court found against appellants on all three points.

The decedent's estate consists of cash in the amount of $6,250.11, of five promissory notes secured by deeds of trust on California realty, and of seven parcels of California realty.

The first point urged is that § 201.5 has no application at all to real property in the estate regardless of its source. In the trial court appellants' contentions in reference to the proper interpretation of the section was much broader. In addition to contending that the section has no application to real property in the estate, it was urged that as to personal property the section applies only when specific personalty acquired while the spouses were domiciled elsewhere remains part of his estate in the same form on his death. In other words, it was contended that personal property acquired while domiciled elsewhere under such circumstances that § 201.5 would otherwise be applicable, but brought to this state and transmuted into another form of personalty, and in the transmuted form constituting part of the estate, is not governed by the section. Upon oral argument, and in a memorandum filed thereafter, appellants withdrew their contention in reference to personal property, and expressly admitted that the section applies to personal property in the estate which had its origin in personal property acquired by the husband or wife while domiciled elsewhere and which would not have been the separate property of either if acquired while domiciled in this state. This concession is in accord with the clear meaning and purpose of the section, and the point as to personal property need not be further considered. This leaves for consideration only the question as to whether the section applies to real property in the estate which had its origin in personal property acquired under circumstances set forth in the Code section.

[2] In our opinion, when the language of the section is considered in view of its history and in light of its obvious purpose, there can be no reasonable doubt that the Legislature intended and expressed the intent that the section applies to all property of the estate that had its source in personal property acquired by the husband or wife while domiciled elsewhere and which would not have been the separate property of either if acquired while domiciled in this state.

Section 201.5, although first enacted as part of the Probate Code in 1935, has had a long and interesting history. Ever since 1917 the Legislature has attempted to apply to property acquired in common law states under circumstances that it would have been community property had it been acquired here by parties domiciled here, when the parties become domiciled here, the rules of community property. This the Legislature attempted to do by certain amendments in 1917 and 1923 to § 164 of the Civil Code. The obvious purpose of the legislation was to equalize fairly the rights of husband and wife in marital property. If property is acquired in a common law state by a husband from his earnings it is his sole property, but his wife has certain very important rights in the property known as dower rights. Prior to 1917 it had been established that, if such a couple, after so acquiring marital property, became domiciled in California, and brought the property with them, the property remained the sole and separate property of the husband, but the rights of the husband became much greater than they were in the common law state in that the wife's dower

rights were entirely lost. In an attempt to correct this obvious injustice the Legislature in 1917 attempted to redefine community property by amending § 164 of the Civil Code. As then amended community property was defined as "all other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state." The Supreme Court held this amendment did not apply retroactively to the property of persons who had become domiciled in this state and brought their property here prior to the date of the amendment. Estate of Frees, 187 Cal. 150, 201 P. 112; Estate of Arms, 186 Cal. 554, 199 P. 1053; 10 Cal.L.Rev. 154. In 1923, in the very next legislative session after these decisions were rendered, the Legislature announced its desires in the matter by amending the section to expressly provide that the section applied to property "heretofore or hereafter acquired." This section, as thus amended, first came before the Supreme Court in Estate of Drishaus, 199 Cal. 369, 249 P. 515; 15 Cal.L.Rev. 399. The question there presented was whether the amended section could constitutionally apply to property owned by a husband in a common law state and brought by him to this state when he and his wife became domiciled here prior to 1917. The court held that when the property was brought here prior to 1917 the husband's rights therein were unlimited, and that to abridge those rights by attempting retroactively to convert the property into community property was unconstitutional. Thereafter the court was called upon to determine the constitutionality of the section where the change of domicile to California took place after the 1917 amendment. It was held that to attempt to thus convert separate into community property, even prospectively, was an unconstitutional impairment of the husband's vested rights. Estate of Thornton, 1 Cal.2d 1, 33 P.2d 1, 92 A.L.R. 1343. Thus ended the Legislature's attempts to directly convert separate property into community. In a dissenting opinion in the Thornton case Mr. Justice Langdon suggested a way in which the purpose of the statute could be in part accomplished without contravening constitutional principles. He urged that since the Thornton case involved a problem of succession, and since it is well settled that there is no vested right to have property descend in any particular manner, § 164 should be construed as valid to the extent of regulating succession to property of the kind described in the section. Although Mr. Justice Langdon was unable to convince a majority of the court that § 164 of the Civil Code was valid as a statute of succession, the Legislature in 1935, at the very next session after the decision in the Thornton case, passed § 201.5 of the Probate Code. It is perfectly clear that § 201.5 was adopted to accomplish what the dissenting opinion in the Thornton case had correctly indicated could be done lawfully, and what the author of the dissent thought had been done by § 164. There is also no doubt that by § 201.5 the Legislature was attempting to accomplish everything that lawfully could be done to carry out its fundamental purpose, so clearly indicated by the prior history of § 164, of equalizing the rights of husband and wife in marital property.

In drafting § 201.5 the Legislature was faced by the rule of the Thornton case that property acquired by a married couple domiciled in a common law state remains the husband's "separate" property when the parties become domiciled here, and with the further holding of that case that upon the death of the husband that property or its proceeds were governed by the laws of succession of this state relating to separate property. This meant that the husband by will could entirely exclude his wife from any interest in that portion of his estate which had its origin in property that had been acquired by their joint efforts in a common law state. The Legislature obviously desired to remedy this unfortunate and unfair situation. It did so by creating a special class of separate property as defined in the section and by providing that as to that property the wife's rights, so far as the laws of succession were concerned, should be governed by the same rules that apply to community property. So far as succession is concerned, this was clearly within the legislative power, and no contention is made to the contrary. But appellants say that the section only applies to personal property existing as such at the time of death, and does not apply to real property in the decedent's estate even though it had its source in personal property acquired while domiciled elsewhere. No reason has been suggested as to why the Legislature would want to so limit the section. In view of the history

of the section it is inconceivable that the Legislature intended to thwart its main purpose by so unreasonably and illogically restricting the operation of the section.

It is true that § 164 of the Civil Code in attempting to fix the rights of living husbands and wives in such marital property provided that the section applied to "real property situated in this State and personal property wherever situated," while the comparable phrase in § 201.5 is "personal property, wherever situated." Why the Legislature omitted the express reference to real property does not appear. But the decisive question is what was meant by the phrase "personal property, wherever situated"? If the adjective "personal" be interpreted as referring to the source of the property existing at the time of death, then the section refers to all property regardless of whether it has been transmuted into real or personal property if its source was "personal property" of the type described in the section. Such an interpretation results in practically all marital property of the type here involved becoming subject to the section. Such an interpretation, particularly in view of the history of the section, makes effective the demonstrated intent of the Legislature, and is fair, just, and equitable. In our opinion this is the proper interpretation of the section.

Appellants now admit that the section applies to personal property acquired in a common law state and brought to California when the parties become domiciled here, and here transmuted into another form of personal property. That concession is in accord with a common sense interpretation of the section. But, say appellants, § 201.5 is a statute of succession which by its terms relates only to personal property and of necessity relates only to property as it exists at the time of death, and that such property must, therefore, be personal in character at that time. If this technical limited interpretation be given to the section then, by the same token, the property in the form in which it existed at death must have been acquired "while domiciled elsewhere." Such a technical limited interpretation would defeat the fundamental purpose of the section, by limiting it to that relatively rare situation where personal property is brought from a common law state and where such property retains its precise form until death. The estate of John H. Way consists of real property purchased with the proceeds of personal property after the Ways came to California to live, of notes secured by deeds of trust from loans made here, and of cash received here. If the section requires not only that the property be personalty, but also that it must have been acquired while domiciled elsewhere, then the section has no application in this case at all. Yet this is the necessary conclusion if appellants' contention that the section refers to personal property as it exists at the time of death and not to the source of such property is sound. There is no middle ground. Yet, even appellants concede that the section applies to personal property that in California has been transmuted into another form of personalty. This concession is compelled by the realities of the situation. If it was the intent of the Legislature, as it obviously was, that marital property acquired elsewhere and thereafter brought to California when the parties became domiciled here should be disposed of on death in the same manner as community property, it would be anomalous indeed that property acquired in this state from the proceeds of such property should not also be included. This would be in direct contradiction of the fundamental tenet of our community property system that the nature of property as community or separate depends on the nature of the property which is its source. For these reasons the real question involved is whether the property at the time of death must be personal property acquired elsewhere, or whether the words "personal property" refer to the origin of the property. We think that the only reasonable interpretation of the section is to hold that the requirements that the property must be personalty and must have been acquired elsewhere refer to the source of the property that is before the court for distribution. Stated another way, if personal property is acquired by a husband or wife while domiciled elsewhere under such circumstances that it would have been community had it been acquired in this state, and the parties afterwards become domiciled here and the husband dies, then § 201.5 is applicable to such property whether it be in its original form or whether it be transmuted into other property, real or personal, after the parties become domiciled here. In such event the rights of the husband or wife in such property, upon the death of either, are similar to their rights in community property, in that either may dispose of only one-half by will, the other one-half going

to the survivor. In the absence of a will the survivor takes all.

After the briefs were filed in this case the case of Estate of Schnell, Cal.App., 154 P.2d 437, was decided and called to our attention. The facts there show that the husband and wife lived together for many years in New York where the husband ran a coffee business; that he "made" most of his money in that business; that he bought three parcels of real property apparently with the profits so earned; that in 1918 or 1919 they became domiciled in California; that he sold the New York realty and brought the proceeds to California which he invested and re-invested. It was properly held that § 201.5 applied to this transmuted property. The case supports the concession made by appellants herein that transmuted property is covered by the section, and for that reason supports, for reasons already stated, the conclusion that when the source property is personalty the section is applicable regardless of whether the property is transmuted into personalty or realty.

Appellants next contend that respondents failed to prove facts necessary to bring § 201.5 into operation, in that it was not shown that the estate of decedent did not have its origin in part in property owned by him before his marriage or acquired thereafter by gift, devise, bequest or descent. The estate consisted of property, both real and personal, that had been acquired in California with funds brought from Connecticut and Colorado. It stood in the name of the husband at the time of his death. The evidence shows that he had worked for the Waterbury Clock Company two years before his marriage. After marriage he worked for that company twenty-six years at increasing compensation before retiring.

[3, 4] It was not incumbent upon respondents to prove that the property standing in the husband's name at the time of his death was within § 201.5. It is the law of this state that upon the death of the husband there is a presumption that property acquired during marriage and standing in his name is community property. Estate of Duncan, 9 Cal.2d 207, 70 P. 2d 174; Estate of Bryant, 3 Cal.2d 58, 43 P.2d 529; Fountain v. Maxim, 210 Cal. 48, 290 P. 576; Estate of Jolly, 196 Cal. 547, 238 P. 353; see 3 Cal.Jur.Supp. p. 553, § 61. This presumption is not based upon statutory declaration but upon the reasonable probabilities. When a husband dies after many years of married life, and here the parties were married 58 years, it is reasonable to presume that the estate left by the husband was acquired as the result of the joint efforts of the spouses. The burden of proof in such a case is and should be upon the party contending that the estate is separate. The presumption is in the nature of a protection to the surviving wife, whose rights are so favored as to place the burden of proof upon the one claiming the property is separate. While it is true that the property here involved is not community but separate property, because acquired in a common law state, so far as the right of the wife to succeed is concerned the property is treated the same as community property. The same reasons that have induced the courts to indulge in the presumption in reference to community property exist as to property governed by § 201.5. Under such circumstances we think the burden was on appellants to show what part of the source property, if any, was owned by decedent before marriage, or was acquired thereafter by gift, devise, bequest or descent. In the absence of such showing we think the presumption is that the Connecticut source property would have been community property if the parties had been domiciled in California when it was acquired.

[5, 6] Appellants failed to sustain this burden. They failed to make a showing that would have supported a finding that any specific portion of the estate had its source in property acquired by him before marriage or was thereafter acquired under circumstances that it would have been his separate property had the parties been domiciled here at the time of acquisition. The only evidence on the issue was that decedent was thirty years of age when he married, and at that time had worked two years for the clock company. Perhaps it can be inferred that he worked prior to that time, although there is no evidence on this point. Perhaps it can be inferred in view of the evidence of his demonstrated capacity to save during his married life, that he had accumulated something before his marriage. But whatever this undisclosed amount may have been it must have been small compared to what was accumulated during his fifty-eight years of married life, twenty-six of which were spent with the clock company after marriage at ever

increasing compensation. It is the rule in this state, that, where community and separate funds are intermingled, at least where the community funds are not small in proportion to the separate funds, the burden is on the one claiming rights in separate property to offer proof to support his claim. Fountain v. Maxim, 210 Cal. 48, 290 P. 576; Estate of Fellows, 106 Cal.App. 681, 289 P. 887; Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714; see 3 Cal. Jur.Supp. p. 524, § 40. For reasons already stated a similar rule should prevail when § 201.5 is invoked. Appellants did not meet this burden by evidence which indicated merely a possibility that some small undefined portion of the decedent's estate may have been acquired before marriage.

Appellants cite Scott v. Austin, 57 Cal. App. 553, 207 P. 710, for the point that there is no presumption as to the time when property is acquired. In that case the question was as to the validity of a gift of property made by the husband. The present case does not involve any question as to where lies the burden to show the date of acquisition of property with reference to the amendment of § 172, Civil Code, prohibiting gifts without the consent of the wife. Insofar as the case may seem to imply that the burden is on the wife where she is plaintiff or petitioner to show that property standing in the name of the husband is community, and to that end show that it was acquired after marriage, the language is dicta and is inconsistent with the long line of decisions cited above, where the point was directly involved.

There remains appellants' contention that § 201.5 is not applicable because the undisputed evidence shows an oral agreement between decedent and his wife that each should have the right to do as he or she pleased with his or her property, including the right to dispose of it by will as he or she saw fit.

Appellants contend that such an agreement was made in Denver about 1915, when the wife received property of a value of $40,000 upon the death of her mother, and that the agreement continued in effect after the Ways moved to California. Appellants testified that in addition to this inheritance their mother in 1915 owned securities worth $30,000 which she had acquired with her savings from money which their father had given her to run the household, and it is assumed by appellants, although no direct evidence was offered on the issue, that these savings constituted a gift by decedent to his wife to which the agreement of 1915 would relate.

[7-10] Appellants quote in their briefs a provision of Colorado law that neither husband nor wife could will away more than one-half of his or her property unless there be filed in the estate written consent of the other executed after death of the testator or testatrix. Session Laws of 1913, Chap. 164, p. 636. In 1915 the provision was amended to provide that the survivor might elect in writing to take as survivor and failure to elect was conclusive evidence of consent to the will. Session Laws of 1915, Chap. 178, p. 513. It is not stated when the 1915 amendment became effective with reference to the date of the alleged contract. The courts of this state take judicial notice of the laws of another state. § 1875, sub. 3, Code of Civ.Proc.; see, 3 Cal.Jur.Supp. p. 723, § 10a. Notwithstanding the oral agreement may not have been effective in Colorado if the Ways had continued to reside there, if they intended it to regulate their rights upon becoming residents of California, their continuing understanding would be operative as a contract made in this state if valid under our laws. Here oral contracts whereby the spouses mutually agree to release rights in the estate of the other are valid. Doxsee Co. v. All Persons, 3 Cal.2d 609, 45 P.2d 192; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190; Estate of Patterson, 46 Cal.App. 415, 189 P. 483; 13 Cal.Jur. p. 848, § 47. But in this state there is a further problem with reference to the agreement. It has already been held that in the absence of an agreement such as appellants contend was made here, Mrs. Way, under California law, had rights in the separate property of her husband because it was of the type to which § 201.5 applied. But Mr. Way did not have a corresponding right in the separate property of his wife, since it was not of the type to which the section related. Her property had been acquired by gift and bequest from her mother and gift from her husband, and was not, therefore, property which would have been community if she had been domiciled in California when she acquired it. The consideration for her release of rights guaranteed her by § 201.5 would be her husband's release of a mere expectancy to succeed to one-half

his wife's estate if she happened to die intestate. There would be a serious question as to the validity of so unequal a bargain to the profit of the husband, especially since there is no evidence that either was aware of their succession rights under California law. However, the trial court found against the existence of the agreement, and, since we are of the view that the trial court was justified in so finding, it is unnecessary to determine its validity either in Colorado or here.

There is no doubt evidence in the record that would support a finding that such an agreement existed, but, after reading the record, it cannot be held that such evidence established such agreement as a matter of law. Appellant Geraldine Wetherell testified that her father was worth $50,000, at least, when he retired in 1910, at the age of 56 and moved to Colorado. This estimate she based on his statements to her that he would not retire until he had that amount. It was not shown how decedent invested his savings during the years he worked. A broker through whom Mr. and Mrs. Way invested their funds in Denver testified to their purchase of irrigation and school district bonds and to their loaning funds through him on notes and mortgages. They maintained separate accounts with the broker. When Mr. Way left for California he owned securities of a value of about $81,000, according to the witness. As bonds and notes were retired or paid off apparently the Ways made their investments locally in California.

The practice of keeping their property affairs strictly separate was adhered to after they came to California. They kept separate bank accounts. Mr. Way paid all household expenses. At one time after coming to California they lived in a house owned by Mrs. Way. Mr. Way paid his wife rent of $75 a month. The appellant Geraldine Wetherell and her child seem to have been largely supported by the Ways, each contributing one-half. Bills for repairs on houses were rendered in the name of the spouse owning the house. At one time the household included seventeen dogs. The record in the form of an account book shows that their expenses were divided equally. Upon two occasions they bought real property in both their names and each contributed to the purchase price. The statement of the title company issued when one of these parcels was resold by the Ways shows that two separate checks were made out, paying one-half the net proceeds to Mr. Way, and one-half to Mrs. Way. The conclusion is inescapable that money occupied a large place in their thoughts, and that both must have been of an exceedingly thrifty and economical disposition.

[11] This evidence clearly established that Mr. and Mrs. Way were scrupulous in keeping their financial affairs separate, both in Colorado and in California. It may also be admitted that there was positive and uncontradicted evidence that this arrangement was pursuant to an oral agreement. Such agreement, of course, was in exact accord with their legal rights in such property under California law since the property of each was admittedly their separate property. However, the fact that the parties had agreed to keep their respective properties separate while each was alive does not even support the inference, far less prove as a matter of law, that they had agreed that neither should inherit from the other, or that the benefit of statutory provisions restricting the testamentary power of either or both had been waived. Appellants do not contend for such an inference. It is their position that they proved without contradiction that there was an express oral agreement that Mr. and Mrs. Way should have the right to dispose of all of their property by will as he or she saw fit. The great bulk of the testimony introduced on this issue falls far short of proving the existence of such an agreement. Most of it simply proved that the parties had agreed, largely upon the insistence of Mrs. Way, that each should have full control of their separate properties free from the control of the other. An examination of the evidence on this point will demonstrate the correctness of this conclusion.

The testimony of appellant Geraldine Wetherell is that it was the understanding of her parents that their affairs were to be kept separate, that each could do what they pleased. Her account of the arrangement is as follows: "She [Mrs. Way] said that she wanted her affairs separate, that she said she wanted to be able to do as she pleased, and that he could do the same, that she was independent, that she had plenty of money, and that her grandfather always felt that a husband and wife's affairs should be separate, and she said that he could do what he pleased, and she wanted to do the same.

"Q. And what was your father's reaction to that statement? A. Well, it was

agreeable to him, he always said that he never wanted anything of mother's, that he felt that was * * * agreeable to her. It was always that way. They never had a joint account, they never had their affairs together. But they did not agree upon having their affairs separate until after she inherited this money from my grandmother."

This appellant is the daughter of Mr. and Mrs. Way, and the evidence shows that she came to California shortly after her parents, and resided near them, and part of the time in their home. Yet this witness failed to mention that she had ever heard of any agreement relating to testamentary control over the property.

Mrs. Louise Walker, daughter of appellant Geraldine Wetherell, testified that when her grandfather would question an expenditure made by her grandmother she would reply that she would do what she pleased with her property. Burnett Walker, husband of Louise Walker, recalled conversations of the same tenor.

Mrs. Eva MacDonald, who nursed Mr. Way for eight months at his home in 1941, said that Mrs. Way talked about her personal affairs very frequently and almost daily repeated that she did not care what her husband did with his money because his money was his own and hers was hers, and that she had an agreement with her husband that he could do as he liked with his property. The testimony of Mrs. Fulk, another nurse, was to the same effect. A builder who built one of the houses in which the Ways lived in San Mateo, had heard Mrs. Way say that she had her estate and her husband had his.

The witness, Donald Larke, owner of the Hot and Cold Shop, did considerable repair work for the Ways on their property commencing in 1928, and was very friendly with, and fond of, both of them. He had heard Mrs. Way say to Mr. Way many times when he disagreed with what she proposed to do in connection with her property, as he often did, "that his money was his own and he could do as he pleased with his own and for him not to interfere with her." That she said over and over again that "what was his was his and hers was hers." Both Mr. and Mrs. Way had stated that they had an agreement or an understanding to that effect. There was introduced in evidence the deposition of Mrs. Jaquith, a Denver friend, who said that she often heard Mrs. Way in the presence of Mr. Way speak of their financial arrangement that each was to take care of his or her own property.

This testimony, above summarized, while proving the existence of an agreement to keep their affairs separate, falls far short of proving the existence of an agreement that either could make a will free of whatever statutory restrictions might exist. This was all the testimony introduced on this issue by appellants during the December, 1943, hearings. The trial was resumed on February 29, 1944. Apparently, during the interim, appellants realized the lack of evidence on this vital issue, because at this hearing three witnesses were produced who did testify as to the existence of such an agreement. Their testimony, if it had been believed, would have supported a finding favorable to appellants on this issue.

Mrs. Athelyn Wetherell, the other daughter of the Ways and an appellant herein, gave the following testimony as to an occurrence in Denver in 1915: "Well, I came in just in time, we were all in the home, and I heard my mother tell my father, they were having a discussion, and she said she wanted an agreement, she said that she wanted an agreement to where their affairs would be entirely separate, and that each would have full control over each of their affairs, and giving them the right to leave their money to whoever they pleased. Those were the words and I heard that.

"Q. Now, your father was there, is that true? A. Oh, my father, and my father said that, he said, 'If that is the way you wish to have it,' he said 'that is perfectly agreeable with me,' he said, 'I do not want any of my wife's money.' And that I have heard many times."

When she visited her parents in California she heard discussion between them as to the agreement, "that their affairs were separate and each had full control, and that they could each leave their money to whom they pleased, that it was agreeable to both." A week before her father's death she was present at a discussion which she recounted as follows:

"* * * she [her mother] said, 'Well, I have made my will the way I want it,' and she said, 'John is going to make his,' she said, 'That was our agreement,' and she said, 'It is none of your business.'

"Q. And what did your father say? A. My father said, 'No, I have no control what-

soever over your affairs, Clara, that was our agreement,' and he said, 'It is entirely up to you.'"

Her husband also recalled a conversation shortly after the grandmother died in which Mrs. Way said that she and her husband "had agreed that they each handle their affairs themselves separately, their investments and expenditures for the maintenance of their properties, and that they would also leave their assets to whomever they pleased."

[12-14] Lugene Daniels, nephew of Mrs. Way, resided in Denver in 1915. He testified that he often heard his aunt and her husband discuss financial matters, that he had heard them agree that "they were to do with their moneys as they saw fit, even as to willing it, or giving it away, each, in turn, to take their moneys and leave them to any one of us, as they cared to, and that was agreeable to both of them at that time." He called upon the Ways briefly when he came from Bakersfield in 1939 to visit the San Francisco Fair. The Ways were then getting ready to move to the house in San Francisco to the purchase of which both had contributed. Mrs. Way said she owned one-half, and her husband one-half. This prompted him to ask whether they were still living under the agreement and she said that they were. On cross-examination he said that the agreement was that his aunt was to handle her moneys, as she saw fit, and do what she pleased with hers. His uncle was to do as he pleased with his, that they were to leave their money to whom they cared to, in the event of the death of either. In response to the question, "Now they talked of disposing of their property by will and each to do as he saw fit?" he answered: "A. That is right, that was the gist of the conversation." The trial judge did not believe these witnesses. He found against the existence of such agreement. In weighing the testimony of those three witnesses the trial judge was entitled to consider many factors. He, of course, saw and heard the witnesses and observed them, very important factors in passing upon their credibility. He was entitled to consider the fact that Athelyn Wetherell has a financial interest in the outcome of the case, that one of the other witnesses who testified on this issue was Albion Wetherell, her husband, and that the third witness was Lugene Daniels, her cousin. He was entitled to consider the fact that the testimony of these three witnesses was in variance with the testimony of the many other witnesses who testified as to the existence of the alleged agreement but failed to mention that the agreement related to testamentary control of the property, the vital question at issue. He was entitled to consider the fact that one of the appellants, Geraldine Wetherell, who had lived with or near her parents all her life, failed to mention the existence of any agreement relating to testamentary control. He was also entitled to consider the fact that none of the testimony relating to this phase of the alleged agreement was produced at the first part of the trial, but was not produced until the last day of the trial after a several months' recess. Under such circumstances the trial judge acted well within his powers in refusing to believe these three witnesses. "The trier of the facts is the exclusive judge of the credibility of the witnesses. § 1847, Code Civ.Proc. While this same section declares that a witness is presumed to speak the truth, it also declares that 'This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony * * * or his motives, or by contradictory evidence.' In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. See cases collected 27 Cal.Jur. 180, § 154. Provided the trier of the facts does not act arbitrarily, he may reject in toto the testimony of a witness, even though the witness is uncontradicted. Blank v. Coffin [20 Cal.2d 457, 126 P.2d 868], supra; Hinkle v. Southern Pacific Co., 12 Cal.2d 691, 87 P.2d 349; Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 90 P.2d 371; Burke v. Bank of America, etc., Ass'n, 34 Cal.App.2d 594, 94 P.2d 58; People v. La Fleur, 42 Cal.App.2d 50, 108 P.2d 99; see cases collected in 27 Cal. Jur. 182, § 156; Kelly v. Jones, 290 Ill. 375, 125 N.E. 334, 8 A.L.R. [792], 796." Hicks v. Reis, 21 Cal.2d 654, 659, 134 P.2d 788, 790.

[15] No evidence was offered in this case on behalf of respondent widow except the testimony of the son as to his parents coming to California and residing in this state as husband and wife until the death of Mr. Way in 1943. Respondents, therefore, rely on the weakness of appellants' case. Appellants contend that since respondent widow did not testify it is to be

presumed that her testimony, if given, would have been adverse to her own position. Whether this presumption was rebutted was for the trial court. The evidence shows that the widow was 84 years of age at the time of trial, and at least incapacitated to the extent that a guardian of her estate had been appointed shortly before the death of her husband.

The order appealed from is affirmed.

KNIGHT and WARD, JJ., concur.




68 Cal.App.2d 529

**MILLER v. PACIFIC CONSTRUCTORS, Inc., et al.**

Civ. 7080.

District Court of Appeal, Third District, California.

March 27, 1945.

Rehearing Denied April 25, 1945.

Hearing Denied May 24, 1945.

**1. Negligence ⇐111(1)**

A complaint alleging that inspector for Bureau of Reclamation, while ascertaining temperatures of concrete in Shasta dam, sought to enter gallery through negligently secured bulkhead, which gave way, causing him to fall, was sufficient as against contractor's demurrer.

**2. Negligence ⇐111(2), 113(2)**

Federal inspector who, seeking to enter gallery in dam through lattice bulkhead, fell when bulkhead gave way, was not required to allege affirmatively that injuries resulted from latent defect or that defect was unknown to him and known to the defendant contractor.

**3. Negligence ⇐111(1)**

Negligence may be alleged in general terms, and complaint is sufficient if it discloses defendant's duty reasonably to protect plaintiff against the danger and injury complained of, failure to do so, and sustaining of injuries as a result.

**4. Negligence ⇐111(2)**
**Pleading ⇐11**

It is not proper to allege evidentiary matters, and all that is required, even as against special demurrer, is to allege essential facts informing defendant of parties' relationship and nature of cause which would create liability for negligence, especially as regards facts peculiarly within defendant's knowledge.

**5. Negligence ⇐113(1)**

Plaintiff need not allege freedom from contributory negligence.

**6. Negligence ⇐113(1)**
**Pleading ⇐67**

Complaint, as in personal injury case, need not anticipate matters of defense.

**7. Negligence ⇐111(2)**

Plaintiff need not specifically allege that defendant had knowledge of defects asserted to have caused injuries complained of.

**8. Negligence ⇐113(2)**

Where complaint alleges facts disclosing that defect causing injuries was plainly visible and obvious, plaintiff must allege facts to explain why he did not see or have knowledge of defect.

**9. Negligence ⇐67**

Defects which are ordinarily plainly visible do not necessarily preclude person injured thereby from recovering for negligence if reasonably prudent person exercising due precaution under similar circumstances would not have observed the defects.

**10. Negligence ⇐122(3)**

Where inspector, seeking to enter gallery of dam through lattice bulkhead, alleged that he fell when bulkhead gave way, but alleged no facts indicating that defect was visible or obvious, if it was the defendant contractor's duty to see that bulkhead was secure, burden was on defendants to show use of proper care.

**11. Appeal and error ⇐1002**

The jury's conclusion on conflicting evidence as to contributory negligence cannot be disturbed on review.

**12. Appeal and error ⇐1040(10)**

In personal injury case, defect in complaint consisting of omission to allege contractual relationship between defendants and plaintiff's employer, supplied by answer on which defendants went to trial on merits, was immaterial, and overruling of demurrer was harmless.

13. Negligence ⇐134(6)

Evidence that inspector for Bureau of Reclamation, while ascertaining temperatures of concrete in Shasta dam, sought to enter gallery through lattice bulkhead built with two horizontal green timbers, which had shrunk, and that bulkhead, secured only by wooden wedges between walls and timbers, gave way, causing him to fall, supported judgment against contractor and its superintendents.

14. Negligence ⇐32(2), 44

Inspector for Bureau of Reclamation, testing temperatures of concrete in Shasta dam, was not mere licensee, but relationship between him and contractor was equivalent to that of invitor and invitee for mutual benefit, and contractor was bound to exercise ordinary care to provide him with reasonably safe appliances and places to work.

15. Negligence ⇐32(1)

Generally, owner or occupier of premises, who by invitation induces or knowingly permits workman to enter for performance of mutually beneficial duties, must use reasonable care to furnish reasonably safe appliances and place to work.

16. Negligence ⇐48

A contractor is not ordinarily liable for injuries to workman resulting from defects which are clearly visible or obvious or are actually or constructively known to workman.

17. Master and servant ⇐234(4)
Negligence ⇐67

Workman is not charged with knowledge of latent or concealed defect and may recover for injuries resulting from such defect of which he has no knowledge, if employer or licensor knew or should have known of defect and failed to remedy it or give warning.

18. Negligence ⇐136(27)

In action against contractor, inspector who sought to enter gallery of dam through lattice bulkhead built with green timbers which had shrunk and which gave way, was not contributorily negligent as matter of law on theory that he was charged with knowledge of defect, since it was not visible or obvious, and he had frequently used bulkhead in same manner.

19. Negligence ⇐135

In action against contractor, evidence supported findings that inspector who, after climbing ladder in shaft within dam, sought to enter gallery through lattice bulkhead, which gave way had no notice that bulkhead was intended as absolute barrier or that workmen were prohibited from entering through it.

20. Negligence ⇐136(26)

In action against contractor by inspector who, to reach gallery through bulkhead, climbed short ladder in shaft within dam and grasped bulkhead, which gave way, contributory negligence in not using opening in outer wall on theory that outside entrance was safer was for jury.

21. Negligence ⇐67

Federal inspector who, while testing temperatures of concrete in dam, sought to enter gallery through bulkhead built with green timbers which had shrunk and which gave way, was not precluded from recovering against contractor on theory that he was a general inspector and should have discovered the defect.

22. Damages ⇐132(3)

$30,000 was not excessive for injuries including fractured spine, chipped vertebra, injury to spinal cord, broken pelvis and index finger, punctured elbow, and nervous shock, resulting in restriction of movements, pain, headaches, and dizziness, where condition was likely to grow worse.

23. Appeal and error ⇐1004(1)
Damages ⇐96

Amount of damages for personal injuries is largely within sound discretion of jury and may not be interfered with unless it appears to be result of passion or prejudice.

24. Negligence ⇐141(3)

In action against contractor by inspector who sought to enter gallery of dam through bulkhead built with green timbers which had shrunk and which gave way, giving instruction correctly defining a hidden or latent defect was not error.

25. Negligence ⇐141(3)

In action against contractor by inspector who sought to enter gallery of dam through bulkhead built with green timbers which had shrunk and which gave way, instruction that if injuries were proximately caused by latent defects, etc., of which inspector had no knowledge, he would not be required to conduct independent investigation to discover such defects, was not erroneous.

26. Appeal and error ⇐1060(1)

Assertion in opening statement to jury that plaintiff had been re-employed at "a soft job" and was then earning more money, and hence defendants might claim that he had lost nothing because of injuries, was not prejudicial, where court directed jury to disregard it.

27. Appeal and error ⇐1060(1)

In personal injury case, statement by plaintiff's attorney that employer was acting as a "Santa Claus" in re-employing plaintiff was harmless to defendants, where court promptly suggested that it was mere argument and not evidence, and in effect directed jury to disregard it.

28. Trial ⇐133(6)

In action against contractor by inspector who sought to enter gallery in dam through bulkhead and fell when bulkhead gave way, argument referring at least five times to fact that contract, which was in evidence, was a $35,000,000 contract, was not reversible error, in view of court's instructions each time to effect that jury should disregard argument that was not material or not borne out by evidence.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action for personal injuries by John A. Miller against Pacific Constructors, Inc., and others. From a judgment for plaintiff and orders denying motions for judgment notwithstanding the verdict, defendants appeal.

Affirmed.

Carr & Kennedy and Glenn D. Newton, all of Redding, for appellants.

John A. Spann and L. C. Smith, both of Redding, for respondent.

THOMPSON, Justice.

The defendants have appealed from a judgment of $30,000, which was rendered against them in a jury case, as damages for personal injuries received as the result of being thrown from a ladder to the bottom of a twenty-five foot concrete shaft in the structure of the Shasta Dam. While the plaintiff was engaged in the performance of his duties as an employee of the United States Bureau of Reclamation, after climbing a ladder to the top of the shaft to enter an adjoining gallery to obtain the temperature of the concrete walls, he grasped a horizontal beam attached to a wooden bulkhead built by the contractor and placed across the entrance to the gallery. The bulkhead had an opening through which the workmen passed. It was constructed of green timbers which evidently thereafter shrank. It was in the nature of a lattice structure. The two horizontal bars of the bulkhead were held to the side walls only by driving wooden wedges between the ends of those timbers and the concrete. It was not otherwise secured in place. The plaintiff had frequently entered the gallery in that manner. He had no knowledge of the fact that the timbers had shrunk and that the bulkhead had loosened from the walls. The wooden wedges were in place and the bulkhead appeared secure. As he seized the crossbar and attempted to pull himself up from the top of the ladder to the floor of the gallery, the entire bulkhead became dislodged and fell upon him, throwing him from the ladder to the bottom of the shaft, as a result of which he was seriously and permanently injured. The defect which rendered the bulkhead insecure and dangerous was not visible or obvious to him.

This suit was commenced against the contractor and his General Superintendent and Assistant Superintendent. The defendants demurred to the complaint for alleged uncertainties and because it failed to state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendants answered denying the material allegations and affirmatively supplied certain alleged defects of the complaint.

The defendant, Pacific Constructors, Inc., was engaged in building a large portion of the Shasta Dam pursuant to contract, dated July 6, 1938, with the United States Bureau of Reclamation, under the Department of the Interior. The structure is located in Shasta County in what is known as the Kennett Division of the Central Valley Project. The contract price exceeded $35,000,000. Article 6(a) of the contract reserved the right of the Government by its agents to inspect and test any and all portions of the structure at any time or place and to reject or replace defective materials or workmanship. Article 10 of the contract provides that: "The contractor shall, without additional expense to the Government, obtain all required licenses and permits and *be responsible for all damages to persons or property that occur as a result of his fault or negligence in connec-*

*tion with the prosecution of the work,* * * *." (Italics added.)

The defendants, Crowe and Bryant, were Superintendent and Assistant Superintendent, respectively, of the construction company.

At the time of the accident, on August 12, 1942, the plaintiff was performing his duties as an employee of the Bureau of Reclamation, as a "cooling inspector" with the duty to ascertain the temperatures of the concrete walls by attaching a portable meter to wires embedded in the concrete in various chambers of the dam. In the plan of construction of the dam numerous vertical shafts, called "stairwells," with connecting galleries were provided throughout the concrete walls, on each twenty-five foot level, from the elevation of 475 feet upward to the 950 foot level. Those levels were segregated into so-called "blocks". The concrete, vertical stairwells were six feet in diameter and 25 feet in height. At the tops thereof galleries six feet wide and six feet high were connected with the shafts. There were openings communicating with these galleries from the outside wall of the dam. The walls of the shafts and galleries were constructed of solid concrete. There were also entrances to the galleries from the inside.

On August 12, 1942, on which date the accident occurred, the plaintiff entered the vertical stairwell at the bottom on the 925 foot level in Block 14, through the inside lower gallery, according to his usual custom, for the purpose of ascending the stairwell by means of the ladder, to the upper gallery to test the temperatures of the walls therein. He carried a 15 pound meter suspended on a strap thrown over his shoulder. That stairwell was equipped with a wooden ladder supplied by the contractor for the use of workmen. It extended from the floor upward toward the gallery a distance of 23½ feet. It was too short to reach the floor of the gallery. It lacked a foot and a half of reaching that level. It was braced against the wall of the shaft by means of two timbers attached midway to the ladder and extending at right angles to the opposite wall of the shaft. The ladder was not otherwise fastened to the wall. The floor of the upper gallery consisted of smooth concrete. Across the inside entrance to that gallery there was constructed and maintained by the defendants the wooden bulkhead previously mentioned, which was built with green timbers. It extended from wall to wall across the entrance to the gallery at a distance of a foot and a half from the edge of the stairwell. That bulkhead was built with two horizontal cross timbers two by six inches in size extending from wall to wall on either side and nailed to two upright timbers about five feet in height. The lower horizontal bar was about a foot and a half from the floor. This left an opening in the center of the lattice bulkhead about two and a half feet in size, large enough for a man to pass through into the gallery. The bulkhead was held in position, as we have previously said, only by driving wooden wedges between the ends of the two horizontal timbers on either side and the concrete walls. It was not otherwise fastened to the walls. It is contended the plans prohibited the use of nails or bolts with which to fasten the bulkhead to the walls of the gallery. The appellants also assert that plaintiff was guilty of contributory negligence in failing to use a safe way to enter the gallery by means of an opening in the outer wall of the dam which made it unnecessary for plaintiff to enter the gallery by climbing the ladder in the stairwell and passing through the opening in the lattice bulkhead. There is evidence of the existence of an outer entrance, although the evidence is conflicting as to whether plaintiff had knowledge of that fact or whether it was reasonably safe. Mr. Crowe testified that the ladder was not placed in the stairwell or the bulkhead in the gallery for use of workmen as a means of entering the gallery. He said: "The bulkhead was there as a barrier to keep people out of that well;" it was intended as a complete barrier. He did however admit that he did not know that workmen had been instructed not to use the ladder or the bulkhead.

The plaintiff testified that he had always previously used that ladder and bulkhead in entering the gallery; that he had used them at least fifteen previous times; that other workmen used them for that purpose; that he had never been told not to use them, and that he had no knowledge that the other outer opening was intended for that purpose or that it provided a safe entrance to the gallery. Mr. Henry G. Bozovich, who was employed by the construction company as an engineer and pipe fitter, testified to the frequent use of the ladder and bulkhead by himself and other workmen as a means of entering the gallery. He said he had discussed that subject with plaintiff. Witnesses for the

defendants testified that the bulkhead was placed in the gallery to prevent people from walking off the floor and falling into the stairwell. The plaintiff testified that he had reported to defendants that the ladder was too short to reach the gallery and that the opening through the lattice bulkhead was not large enough for convenient access to the gallery, but that he had never discovered that the bulkhead was loose or insecure; that while he had seen the wedges at the ends of the horizontal timbers he supposed the bulkhead was otherwise securely fastened to the walls. Bozovich testified that he had entered the same gallery in the same manner the day before the accident and that it then seemed perfectly secure. The plaintiff also said, in effect, that he did not know the bulkhead or wedges were constructed with green timbers. When the plaintiff grasped the lower horizontal bar of the bulkhead and attempted to pull himself up to the floor of the gallery, the entire bulkhead was dislodged and fell upon him. Both the bulkhead and the plaintiff fell to the bottom of the stairwell. The props which supported the ladder against the wall were dislodged, and the ladder tipped over against the opposite side of the shaft. The plaintiff was seriously and permanently injured.

The jury returned a verdict in favor of plaintiff for the sum of $30,000. Defendants' motions for nonsuit, for judgment notwithstanding the verdict, and for a new trial were denied. From the judgment which was rendered pursuant to the verdict and from the orders denying the motions for judgment notwithstanding the verdict the defendants have appealed.

The appellants contend that the judgment is not supported by the evidence for the chief reasons that it does not appear they were negligent in performing or in failing to perform any duty toward plaintiff which the law requires, and because the alleged defects in the ladder and the bulkhead, which may have proximately caused the accident, were visible and obvious to plaintiff, and therefore rendered him guilty of contributory negligence precluding him from the right to recover damages. The appellants also assert that the court erred in giving to the jury and in refusing certain instructions, and that plaintiff's attorneys were guilty of prejudicial misconduct in their opening statement to the jury and in disclosing to the jury on examination of a witness the magnitude of the contract for constructing the dam. It is also claimed the complaint fails to state facts sufficient to constitute a cause of action and that the court therefore erred in overruling the demurrer and in denying defendants' motions for a nonsuit, for judgment notwithstanding the verdict and for new trial. Finally, it is insisted that the amount of damages for which the verdict was returned is excessive.

[1, 2] We are of the opinion the complaint sufficiently states a cause of action for damages against the defendants, and that the demurrer was properly overruled. It was not necessary to affirmatively allege that the injuries sustained were the result of a *latent defect* in the structure on the gallery at the top of the vertical tunnel from which the plaintiff fell, or that the defect was known to the defendants and unknown to plaintiff. The relationship existing between the plaintiff and the defendants is sufficiently alleged. If there be an omission in that regard it is supplied by the allegations of the answer and the case was tried on the theory that the answer presented that issue. The complaint alleges that Pacific Constructors, Inc., was engaged as a contractor in constructing the Shasta Dam and that the co-defendants Crowe and Bryant were employed by that company as Superintendent and Assistant Superintendent, respectively, with control and supervision over the structure in question; that the plaintiff was employed by the Bureau of Reclamation and was engaged in the course of his employment at the time of the accident, and that while so employed in "the use of said ladder and bulkhead and said stairwell and tunnel", on account of defendants' negligence in constructing and maintaining the same "said bulkhead and braces * * * gave way and broke loose while plaintiff was using the same, causing plaintiff to fall from the top of said stair-well at the 950 foot level to the 925 foot level," causing the injuries described in the complaint.

Regarding the relationship of plaintiff to his employer, United States Bureau of Reclamation, as alleged in paragraph V of the complaint, the answer recites that: "The ladder and the wooden bulkhead mentioned and described in said paragraph [III of the complaint] *were constructed and maintained* by the defendant Pacific Constructors, Inc., under the supervision,

direction and control of the Contracting Officer of the Government of the United States *and the employees of the Bureau of Reclamation having charge of the supervision and inspection of the work to be done by said defendant under the contract aforesaid.*" (Italics added.)

The appellants concede that the plaintiff was employed by the Bureau of Reclamation "to read thermometers in the galleries throughout the dam," and to report to that Bureau. The answer further alleges that the bulkhead, the dislodging of which caused the accident, was constructed "for the purpose of protecting and guarding persons passing through said gallery from the danger of falling into the shaft * * *." It is contended by the appellants that it was a part of plaintiff's duty to inspect that structure and to report to the Bureau any defects that may have existed.

The pleadings therefore adequately allege in general terms that the plaintiff was rightfully on the premises in the performance of his duties as an employee of the Bureau of Reclamation for which Bureau the defendants constructed and maintained the bulkhead and ladder.

[3-10] Negligence may be alleged in general terms. It is sufficient if the complaint discloses a duty on the part of the defendant to reasonably protect the plaintiff against the danger and injury complained of, his failure to do so and that the injuries were sustained as a result of that omission. It is not proper to allege evidentiary matters. All that is required of the plaintiff, even as against a special demurrer, is to allege in the complaint the essential facts with such particularity and definiteness as to inform the defendant of the relationship of the parties and the nature of the cause which would create his liability for negligence. Goldstein v. Healy, 187 Cal. 206, 201 P. 462; 4 Bancroft's Code Pleading, 3534, sec. 2037; 38 Am.Jur. 951, sec. 261; 19 Cal.Jur. secs. 91 and 96. That rule is particularly applicable with respect to facts peculiarly within the knowledge of the defendant. Tietke v. Forrest, 64 Cal.App. 364, 221 P. 681; 38 Am.Jur. 954, sec. 262. It is not necessary for the plaintiff to allege that he was free from contributory negligence, or to anticipate matters of defense, or to specifically allege that the defendant had knowledge of the defects which are asserted to have caused the injuries complained of. Pigeon v. W. P. Fuller & Co., 156 Cal. 691, **105 P.** 976; 4 Bancroft's Code Pleading, 3541, sec. 2041. When the complaint does allege facts from which it appears that the defect which caused the injuries was plainly visible and obvious then the plaintiff must allege appropriate facts to explain why he did not see or have knowledge of such obvious defect. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793. Defects which are ordinarily plainly visible do not necessarily preclude a party who is injured thereby from recovering damages for negligence provided a reasonably prudent person exercising due precaution under similar circumstances would not have observed the defect. Locke v. Red River Lumber Co., 65 Cal.App.2d 322, 150 P.2d 506. In the present case the defect or omission to securely fasten the bulkhead, the dislodging of which caused the accident, was not visible or obvious. The complaint alleges no facts from which it could be deemed to be visible and obvious. If it was the duty of the defendants who constructed and maintained that bulkhead in the exercise of reasonable care to see that it was securely fastened, either by inspection or otherwise, then the burden was on them to show, as a matter of defense, that such ordinary care was used by them in order to relieve them from liability. The evidence indicates that the defect which caused the bulkhead to be dislodged was the shrinking of the horizontal bars and the wedges which were inserted between the ends of the parallel timbers and the concrete walls on either side. The wedges were in place at the time of the accident and the defect was not visible or obvious. In the Shanley case, supra, upon which the appellants rely in support of their contention that the complaint is insufficient because it failed to excuse the negligence of plaintiff in failing to see and appreciate a danger which is plainly visible, the facts related were radically different from those of the present action. In that case judgment for the defendant was rendered on the pleadings after the answer had been filed. On appeal that judgment was affirmed. The defendant constructed a warehouse 40 feet wide and 38 feet long, so close to the track of the Pacific Railway Company, for whom the plaintiff worked as a switchman, that it left a clearance between the adjacent wall of the building and the side of a passing car of only four to six inches. It was broad daylight. The plaintiff knew the danger of that situation. He had been em-

ployed by the railway company on that track for some time. He was caught between the wall of the building and the moving car while he was climbing a ladder upon the side thereof. The danger was visible, obvious and known to the plaintiff. The court quite properly said that, under such circumstances "one would have to shut his eyes, or fail to look in that direction, to avoid seeing it," and that the owner of the building "is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses." In that case the answer did not supply allegations or tender issues which cured necessary omissions of the complaint. The case was not tried. The defendant stood upon the pleadings as they were filed and moved for judgment, which was granted. We assume that complaint was defective for the reasons stated by the Supreme Court. That authority is not determinative of the issue of defective pleadings in this case, in which a visible and obvious defect did not exist and which therefore was not alleged.

The only defect of substantial merit in the complaint in this case is the failure to allege the contractual relationship between the defendants and the United States Bureau of Reclamation for which the plaintiff worked in testing and reporting to the Bureau the temperatures of the tunnels connected with the dam to determine the state of the curing or cooling of the concrete. The complaint alleges that plaintiff was an employee of the Bureau of Reclamation, and that he was engaged in the course of his employment at the time of the accident. If the omitted allegation of relationship of the parties is deemed to be a necessary allegation to state a cause of action for negligence against the defendants, it was supplied by paragraph V of their answer and the cause was tried on the theory that the defendants were building the dam as contractors for the United States Bureau of Reclamation which reserved the right and authority to hire representatives who were entitled to enter the tunnels to secure and report to the Bureau the temperatures as stated. That contractual relationship is alleged in the answer. Indeed, the defendants alleged that the bulkhead in question was "constructed and maintained by the defendant Pacific Constructors, Inc., under the supervision, direction and control of the Contracting Officer of the Government of the United States and the employees of the Bureau of Reclamation having charge of the supervision and inspection of the work to be done by said defendant under the contract aforesaid."

The case of Hauser v. Pacific Gas & Electric Co., 133 Cal.App. 222, 23 P.2d 1068, relied upon by appellants, involved injuries sustained by plaintiff when electricity was transmitted to his body from a high power wire through the boom of a hay derrick which he was driving beneath the wire alleged to have been negligently maintained by the defendant at an insufficient height from the ground to safely permit the passage of the derrick. The undisputed facts of that case are substantially the same as those of Royal Insurance Company v. Mazzei, 50 Cal.App.2d 549, 123 P. 2d 586. The wire was clearly visible and obviously so close to the ground as to warn a reasonably prudent person that it was dangerous to attempt to drive beneath it. The plaintiff was therefore guilty of contributory negligence.

[11] In the case of Murphy v. St. Claire Brewing Co., 41 Cal.App.2d 535, 107 P.2d 273, relied upon by appellants, a judgment for plaintiff was affirmed on appeal. The principle that visible, obvious defects will bar a plaintiff from recovery of damages was correctly stated in that case. The question of whether plaintiff was guilty of contributory negligence under the circumstances of that case was held to be a matter for the determination of the jury, with which conclusion the reviewing court may not interfere when there is a conflict of evidence regarding that subject. The plaintiff was a motorman employed by the street car company. He was riding as a passenger on a street car when the accident occurred. In the middle of a block defendant's beer truck was parked diagonally opposite a loading zone contrary to the provisions of a city ordinance, with the end of the truck dangerously near the track. The plaintiff was standing on the rear platform of the car preparatory to leaving the car. Without knowing of the presence of the truck he extended his head beyond the side of the car and was immediately struck by the rear corner of the truck. While the truck was obviously dangerously close to the moving car, the plaintiff was unaware of that fact. The appellate court correctly held that the implied finding of the jury that plaintiff was not guilty of contributory negligence was sup-

ported by the evidence. That case is not favorable to the appellants in this action.

The cases cited and relied upon by the appellants, including the case of Royal Insurance Co. v. Mazzei, supra, are based upon pleadings which disclosed visible and obvious defects which should have been readily seen by the plaintiffs. That is not the situation in the present case. In the Royal Insurance Company case, supra, judgment of dismissal of the action in favor of the defendant was affirmed on appeal. In that case the complaint alleged that the defendant negligently maintained a high power electric wire across a lane on his property within dangerous proximity and at an insufficient height from the ground, and that plaintiff was moving a derrick across the corral when the boom extending upward therefrom came in such close contact with the wire as to cause a circuit of electricity through the boom, from which he was injured. That judgment was affirmed on the ground that the wire was visible and obvious to the plaintiff who, by the exercise of reasonable care, should have avoided bringing the boom of his derrick in contact therewith. There was neither pleading nor proof that the wire was maintained at a height from the ground in violation of either an ordinance or statute. That case is not in point. No such obvious defect was alleged or proved in the present case.

[12] The defendants were not misled or prejudiced by the omission in the complaint to state the relationship between them and the Bureau of Reclamation, for they supplied that defect by affirmatively alleging in their answer that they were constructing the dam under contract with the United States Bureau of Reclamation. The defendants did not elect to stand upon the pleadings as they existed after the demurrer was overruled. They elected to answer the complaint and to go to trial on the issue as to whether they were liable to plaintiff for the injuries he sustained. The jury was instructed at the request of defendants upon the essential issues presented by the complaint and the answer. A verdict and judgment were rendered on the merits. The defect of the complaint therefore became immaterial. Noakes v. City of Los Angeles, 179 Cal. 38, 175 P. 409; Hunceker v. Lutz, 65 Cal.App. 649, 224 P. 1001; Martin v. Southern Pacific Co., 44 Cal.App. 3, 14, 185 P. 1030; Fay v. Cox, 45 Cal.App. 696, 699, 188 P. 623.

In the Martin case, supra, it is said in that regard, quoting with approval from Daggett v. Gray, 110 Cal. 169, 172, 42 P. 568: "'The rule is well settled that a complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment of the fact in the answer as to uphold the judgment thereon, * * * even though a demurrer to the complaint for the want of this fact had been erroneously overruled.'" [44 Cal. App. 3, 185 P. 1035.]

In the Noakes case, supra [179 Cal. 38, 175 P. 410], the Supreme Court said: "We need not follow counsel for appellants in their discussion of the alleged infirmities of the complaints, because by their answers, their proposed instructions, and the testimony offered they put squarely in issue the matters which, according to their present contention, were not set up by the complaints."

Likewise, it is said in the Hunceker case, supra [65 Cal.App. 649, 224 P. 1003]: "The defendants, however, after the overruling of their demurrers, proceeded to file answers, not simply denying the allegation of the plaintiff's complaint, but, proceeding to set up affirmative defenses, * * * and then prayed judgment of the trial court, * * * thus tendering issues for the trial court to hear and determine. Under such circumstances and in this state of the pleadings, the error of the court in overruling the appellants' demurrers became immaterial."

For the foregoing reasons the failure of the plaintiff to allege in his complaint the relationship of the parties, and the error of the trial court in overruling defendants' demurrer, are harmless and immaterial.

[13-15] We are of the opinion the judgment is adequately supported by the evidence. The plaintiff was not a mere licensee on the premises. He was an employee of the Bureau of Reclamation and engaged in the actual performance of his duty in testing and procuring the temperatures of the concrete in the walls of the galleries, to determine the state of the curing. The contract with defendants specifically reserved the right of the United States Bureau of Reclamation and its agents at all times and places to inspect and test all portions of the structure. The contract provides that the contractor shall become "responsible for all damages to persons or property that occur as a result of

his fault or negligence in connection with the prosecution of the work." The defendants knew of plaintiff's employment and of his duties and they acquiesced in his free access to the premises for that purpose. In effect, the relationship between the contractor and the plaintiff was equivalent to that of invitor and invitee for the mutual benefit of both parties. Under such circumstances the contractor was bound to exercise ordinary care to provide the plaintiff with reasonably safe places in which to perform his work, and with reasonably safe appliances for him to use in connection with such employment. The general rule in that regard is that an owner or occupier of premises, who, by invitation express or implied, whether the invitation is pursuant to a written contract or otherwise, induces, or knowingly permits, a workman to enter the premises for the performance of duties mutually beneficial to both parties, is required to use reasonable care to protect the workman by supplying him with a reasonably safe place in which to work and to furnish and maintain appliances in connection therewith which are reasonably safe for the purposes embraced therein. Mayes v. Splitdorf Electrical Co., 94 N.J.L. 460, 111 A. 10.

[16, 17] It is true that a contractor is not ordinarily liable for injuries sustained by a workman as a result of defects which are clearly visible or obvious to him, or when he has actual or constructive knowledge of the existence of such defects. Numerous cases so hold. Many are cited by the appellants. That principle is so well established that it requires no authorities to support the doctrine. But it is equally well settled that a workman is not charged with knowledge of a latent or concealed defect and that he may recover damages resulting from such latent defect of which he has no knowledge, provided the employer or licensor knew, or by the exercise of reasonable care should know of such defect and fails to remedy or warn the workman of that danger.

We may assume that the plaintiff in this case did have actual knowledge of the fact that the ladder in the stairwell where the accident occurred was too short to reach the floor of the gallery he attempted to enter, and that, if the ladder of inadequate length was the sole proximate cause of the accident, he could not recover damages, on account of his own contributory negligence in using that defective ladder. But we assume that was not the immediate cause of the accident. The implied finding of the jury, and there is substantial evidence to support that finding, is that the proximate cause of the accident was defendants' failure to reasonably secure the bulkhead, at the entrance into the gallery, to the side walls. There is evidence that it was negligently constructed of green lumber which shrank. It was held in position by merely driving wooden wedges into the spaces between the ends of the horizontal bars and the concrete walls. The shrinking of the timbers and the wedges was not visible or obvious to the plaintiff nor could that defect have been reasonably anticipated by him. The wedges filled the spaces at the ends of the timbers, and concealed the gradually widening crevices. The contractor, under whose supervision the bulkhead was built and maintained, should have anticipated that green lumber would naturally shrink in time. The defendants made no inspection of that bulkhead to ascertain whether it remained securely fastened to the walls.

There is a sharp conflict of evidence regarding the cause for the insecurity of the bulkhead, but we think there is sufficient proof to support the implied finding of the jury that the defendants were negligent in constructing the bulkhead and wedges of green lumber and in failing to properly inspect that structure to determine that it remained reasonably safe.

[18] For the foregoing reasons it follows that the plaintiff may not, as a mere matter of law, be held to be guilty of contributory negligence. He testified that he had no knowledge of the insecurity of that bulkhead. He had previously frequently ascended the ladder and entered that same gallery in the same manner he attempted to do at the time of the accident. Before the time of the accident he had discovered no evidence of the insecurity of the bulkhead. He said that he observed the wedges but believed that the structure was otherwise securely fastened to the wall. He did not know that it was built of green lumber or that it had loosened by the shrinking of the timbers. We may not hold as a matter of law that he was charged with knowledge of that defect. The defect was not visible or obvious to him.

[19] The appellants earnestly contend that the bulkhead was constructed and maintained as an absolute barrier to prevent workmen from entering the gallery from the stairwell, and that its presence was notice to that effect. The implied findings of the jury were adverse to the appellants on that issue. There is substantial evidence to support such implied findings. In support of the judgment and those implied findings it may be suggested the plaintiff and other workmen, with the knowledge of defendants, and without objection, previously and repeatedly used the ladder in the stairwell and the lattice bulkhead as a means of access to the gallery. Mr. Bozovich so testified. Mr. Crowe testified that it was constructed to prevent workmen from walking from the floor of the gallery and falling into the stairwell. If the bulkhead had been intended as an absolute barrier to prevent workmen from entering the gallery from the stairwell it might have been reasonably built solidly of boards so as to prevent a person from passing through the bulkhead. Or additional horizontal bars could have been inserted to accomplish that same purpose. Moreover, the fact that it was built in lattice form with a convenient opening large enough for a workman to pass through it, and that it was placed a foot and a half from the edge of the floor of the gallery, furnishing a person with a convenient landing shelf in ascending the ladder from the stairwell, warranted the jury in finding that it was not intended as notice of an absolute barrier to prevent access to the gallery in that manner. There is a conflict of evidence upon that issue, but we are of the opinion there is adequate evidence to support the judgment and the findings of the jury to the effect that plaintiff had no notice or knowledge that the bulkhead was intended as a barrier or that workmen were prohibited from entering the gallery in that manner. The presence of the ladder and the lattice bulkhead furnish some evidence of an invitation to use them just as the plaintiff and other workmen customarily did use them.

[20] Nor do we think the plaintiff should be held guilty of contributory negligence for failure to use the opening from the outer wall at the other end of the gallery, instead of the manner in which he did approach it, on the theory that he elected to use a dangerous passageway when a safe entrance had been provided. He had neither been told of the other opening to the gallery nor had he been instructed to use it. He, and other workmen, on many occasions, had used the stairwell and lattice bulkhead as a means of access to the gallery. He did say that he once went to that other opening from the gallery and discovered that there was a little plywood door leading to a "catwalk" or platform outside. He said he had not been told he could or should use that entrance to the gallery, and he never did so. Regarding his knowledge of that alleged safe entrance, this colloquy occurred:

"Q. It was a door? A. Well, the end was sealed up and the portion of it was movable there so a person could go out.

"Q. Did you ever go out there in the 950 [level], outside of the gallery itself onto any platform? A. No sir, I did not.

"Q. Did you ever go out onto any platform at the end of the 900 foot gallery? A. No sir. I say that I opened the door to see what was out there and there was all this material being thrown over there and so much water coming out there I didn't go out."

It was solely the province of the jury to determine from the evidence whether the outside entrance to the gallery was in fact safer than the inside passage which was used by the plaintiff. There is evidence that the outside entrance was reached by climbing ladders and walking along a "catwalk" or platform which was obstructed by materials and water. The plaintiff had not been told of that means of access. We may not hold, under the circumstances of this case, that the plaintiff was guilty of contributory negligence in failing to use that outside passage to the gallery.

[21] The appellants contend that plaintiff was acting as a general inspector for the Bureau of Reclamation, whose duty required him to investigate and report all defects of appliances and that he may therefore not complain of the defect in the security of the bulkhead which he should have discovered. We think there is no merit in that contention. The implied findings of the jury infer that it assumed he was not a general inspector, but that he was only employed to obtain temperatures of the concrete walls. He did report the fact that the ladder was too short to reach the gallery and that the opening in the lattice bulkhead was not as large as it might have been for easy access to that gallery. But

he did not discover that the structure was insecure. He said that he supposed it was securely fastened to the walls by means other than the mere use of the wedges. There is evidence to support the implied findings in that regard.

[22] We may not hold as a matter of law that the verdict which was returned in this case is excessive. The plaintiff was rendered unconscious from the fall to the concrete floor of the shaft. The evidence indicates that his spine was fractured in several places. One vertebra was chipped. The spinal cord was injured. His pelvis was broken. His right index finger was fractured. His elbow was punctured. He received numerous bruises and contusions, and severe nervous shock. He suffered great pain. He still has pain in his neck, spine, lumbar region and muscles of the lower limbs. He is unable to turn his head or body without pain. The movements of his head, body and limbs are restricted. He is unable to perform hard manual work. He is afflicted with headache and dizziness. The physician testified that he was permanently and seriously injured, and that his condition was likely to grow worse. The doctor said: "His condition is permanent. * * * I think that it will probably get worse. * * * I don't think he will be able to do hard work, no manual labor. I think he probably can do light work but I don't think he will be able to resume his usual occupation."

[23] The rule is well established that the amount of a verdict for damages for personal injuries is largely within the sound discretion of the jury, and that it may not be interfered with unless it appears from the record that it is the result of the passion or prejudice of the jurors. Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Scaletta v. Silva, 52 Cal.App.2d 730, 739, 126 P.2d 898; Armstrong v. Ford, 30 Cal.App. 2d 347, 351, 86 P.2d 385; Rannard v. Harris, 121 Cal.App. 281, 8 P.2d 864; Even v. Pickwick Stages System, 109 Cal.App. 636, 641, 293 P. 700; 20 Cal.Jur. 101, sec. 65. In the present case there is no indication that the verdict was not the result of the honest convictions of the jurors. It does not appear that it was the result of passion or prejudice on their part. We may therefore not hold that the amount is excessive.

[24, 25] We have carefully examined the instructions which were given to the jury and refused, and find no substantially erroneous or prejudicial error therein. The jury was very fully and fairly charged upon all essential issues in the case. The defendants offered forty instructions, fifteen of which were given to the jury. The appellants chiefly challenge plaintiff's instructions numbers 26 and 27, which were given to the jury. The first one correctly defines a hidden or latent defect. The other one merely declares that if the jury finds that the plaintiff's injuries were proximately caused as a result of latent defects of the ladder or the bulkhead, and that they were owned or maintained for use of the plaintiff in his assigned work, by the Pacific Constructors, Inc., or by that company and the Bureau of Reclamation, jointly, and that plaintiff had no knowledge of such latent defects, and possessed no information or facts with relation thereto which would place a reasonable person on inquiry, he would not be required to conduct an independent investigation to discover the latent defects. That instruction appears to contain a correct statement of the law, under the circumstances of this case. There is no substantial evidence that the defect in the method of fastening the bulkhead to the side walls of the gallery was either visible or obvious. The insecurity of that bulkhead was concealed by the presence of the wooden wedges inserted between the ends of the horizontal timbers and the concrete walls. The plaintiff had no knowledge of the fact that the timbers were constructed of green lumber or that they might shrink. We think those instructions were neither erroneous nor prejudicial. Certainly they do not constitute reversible error. The jury could not have been misled or prejudiced thereby.

[26-28] Finally, the appellants charge plaintiff's attorney with prejudicial misconduct in their opening statement to the jury and in the examination of witnesses in the course of the trial. The first challenged statement was made by one of plaintiff's attorneys in his opening statement to the jury. It was in the nature of an outline of evidence which he expected to adduce. It related to plaintiff's reemployment after he had partially recovered from his injuries. The attorney said the fact that plaintiff had been given "a soft job", and was then "earning more money" might induce the defendants to "come in here and tell this jury that this man has not lost anything"

on account of his injuries. That statement anticipated a possible defense, and it may have been improper. The court properly stated that it was mere argument, and directed the jury to disregard it. In examination of plaintiff at the trial, the defendants having brought out the fact that plaintiff was then employed in doing some light work for the construction company, his attorney asked him on redirect examination if he had any assurance of how long he might expect to keep that job. Defendants objected to that question. In replying to argument in support of that objection, plaintiff's attorney asserted that the Bureau was acting as a "Santa Claus" in providing that job for the plaintiff. That assertion was assigned as prejudicial misconduct. The court promptly suggested that it was mere argument and not evidence, and, in effect, directed the jury to disregard the statement. We think it was harmless. In his closing argument to the jury, one of plaintiff's attorneys referred several times to the fact that the Pacific Constructors, Inc., held a "Thirty-five million dollar" contract to construct the Shasta Dam, the inference apparently being that it could therefore afford to exercise due care in supplying and maintaining safe appliances for the protection of the workmen. Somewhat similar statements were made at least four times. The first time the statement was made defendants' attorney objected on the ground that the consideration for the contract was not in evidence. Plaintiff's attorney correctly replied that the contract which was admitted in evidence "provides that it is a thirty-five million dollar contract." Defendants' attorney then said the contract price was not an issue, and assigned the statement as prejudicial misconduct. Each similar reference was objected to by the defendants. Each time the court directed the jury to disregard such statements made by counsel in his argument "that is not borne out by the evidence, or is not material to the case". Once the court instructed the jury in that regard to "disregard anything except what refers to this particular case, and not to any other case." We are unable to perceive the logical application of the repeated references to the "thirty-five million dollar contract." We assume that statement was made in an excess of zeal. It is true that the contract, which was in evidence, disclosed that fact. The attorney merely called attention to a fact which was in evidence. We assume he may have applied that fact illogically. The legal requirement that an employer or an invitor shall exercise reasonable care to protect workmen or invitees against injuries does not depend on the magnitude of the contract or even the profits therefrom. But there is no rule of law which requires attorneys to be absolutely logical in their arguments. While we do not approve the repeated references to the magnitude of the contract, we may not assume that the emphasizing of that fact which was in evidence would mislead or prejudice the jury. In view of the repeated cautionary instructions of the court on that general subject, we are of the opinion those remarks do not constitute reversible error.

For the reasons previously assigned, the motions for judgment notwithstanding the verdict were properly denied.

The judgment and the orders are affirmed.

ADAMS, P. J., and PEEK, J., concur.




68 Cal.App.2d 456

## WALTON v. EVANS.

Civ. 14201.

District Court of Appeal, Second District, Division 3, California.

March 19, 1945.

**1. Evidence ⇐589**

Trial court was not bound to accept plaintiff's testimony which was contradicted by defendant.

**2. Mortgages ⇐25(6), 319(3)**

In action to quiet title to realty acquired by foreclosure of trust deed given to secure payment of plaintiff's note given when plaintiff and defendant separated after living together five years in contemplation of marriage, conflicting evidence sustained finding that plaintiff was indebted to defendant in the amount evidenced by such note and that note was executed in payment thereof and that note had not been paid.

**3. Mortgages ⇐529(10)**

In action to quiet title to realty acquired by foreclosure of trust deed given to secure payment of plaintiff's note, evidence, including attorney's letters to plaintiff, refuted plaintiff's contention that foreclosure judgment was rendered against him inadvertently or that he thought attorney who conducted foreclosure proceeding for defendant was representing plaintiff.

**4. Appeal and error ⇐110**

Order denying motion for new trial in a civil case was not appealable.

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Appeal from Superior Court, of Los Angeles County; Charles B. MacCoy, Judge.

Action by Folanders Walton against Mrs. Hester Hill Evans to quiet title to realty wherein defendant filed a counterclaim. From a judgment for defendant and order denying motion for new trial, plaintiff appeals.

Appeal from order denying a new trial dismissed, and judgment affirmed.

Thomas L. Griffith, Jr., and Lloyd Cornelius Griffith, both of Los Angeles, for appellant.

Marshall Stimson and Noel Edwards, both of Los Angeles, for respondent.

DESMOND, Presiding Justice.

The defendant in this case acquired by foreclosure of a trust deed an income-producing parcel of real estate which the plaintiff had furnished as security for payment of his promissory note executed on June 16, 1936, in favor of the defendant in the sum of $500. The note was given when plaintiff and defendant separated after living on defendant's property for some five years in contemplation of marriage. The commissioner's deed conveying this property to the defendant was dated September 19, 1941, and two months later the plaintiff filed the action, upon which the present appeal is predicated, seeking to quiet title in himself to the real estate involved, alleging that "there was no lawful consideration for the said Promissory Note secured by said deed of trust, and that the consideration, if any at all, failed and became valueless prior to the proceedings herein." The trial court found that proceedings in connection with the foreclosure were regular as detailed in the defendant's answer and, accordingly, entered judgment on the question of title adversely to the plaintiff and in favor of Hester Hill Evans; also ordering judgment in favor of the defendant in the sum of $1,038, based upon her counterclaim for use and occupation by the appellant and collection of rentals made by him. The appeal is claimed by the plaintiff from the entire judgment and also from the order of the trial court denying his motion for new trial.

[1] Appellant contends that the court's finding that he refused to pay the promissory note or any part thereof is not supported by the evidence "where the evidence shows that the consideration for the promissory note was the Defendant's interest in the home and the sole interest of Defendant in the home was the furniture she contributed funds to purchase and which she later took from the possession of the Plaintiff at the time when he was making installment payments on the note in the sum of $20.00 per month." The trial court, however, heard defendant's testimony that the only furniture which she removed from the premises belonged to her, was bought by her and that she had no agreement with appellant to leave it in the house. This was sufficient evidence, coupled with other testimony given by defendant as to the circumstances of the giving of the note, to warrant the finding of which appellant complains, even though he testified to the contrary. The judge, of course, was under no obligation to accept his version. The record indicates that during the five year period while the plaintiff and defendant lived together certain repairs and alterations were made on the buildings on the lot in question and that the defendant contributed largely to the cost thereof. Defendant testified that she applied practically all her earnings toward the support of their home and alterations made thereon. She also testified that she advanced the sum of $120 to meet payments as they fell due upon a Ford automobile which the appellant was then buying and that he agreed to repay her that sum at the rate of $20 per month.

[2] The court found that plaintiff was indebted to defendant in the sum of $500 and that he had executed the note in payment thereof. The testimony of defendant was that she claimed to have "put more than $500.00 in the place," that there was a disagreement as to the amount and that it was settled by the execution of the note.

The finding has ample support in the evidence.

At the trial the plaintiff produced five checks in the sum of $20 each, dated, respectively, July 9, 1936, September 8, 1936, November 2, 1936, December 9, 1936, and January 26, 1937, claiming that Mrs. Evans knew at the beginning that the "money was on that note." However, being asked, "With reference to the checks for $20.00 each, Did you have any conversation with Mrs. Evans whatsoever with reference to applying that on any automobile?" appellant answered, "No," although he at the same time reiterated, "The money was paid on the note each month." Defendant testified that the five checks constituted repayment to her of sums of money she had paid toward the purchase of the Ford automobile and that they were not in payment of the $500 note.

It does not appear that any additional checks were delivered by the appellant to Mrs. Evans and, finally, approximately three years after the note was executed, she filed her action on June 27, 1939, seeking to foreclose the deed of trust which appellant had delivered to her. Mr. Edwards, the attorney whom she selected to prosecute this suit, had acted as attorney for the appellant three years previously at a time when appellant was taking over the property in question as the surviving joint tenant of his brother. At that time a foreclosure was under way on the property and the appellant paid approximately $400 to the Pacific States Savings & Loan Association for an extension which his attorney obtained. When the appellant was served with the summons and complaint in the foreclosure action of 1939, he called at the office of Mr. Edwards, and concerning that call testified as follows:

"Q. By Mr. Edwards: After you were served with the summons and complaint, you came up to see me at the office? A. I did.

"Q. At that time I told you I was representing Hester Hill Evans and that I could not represent you. Is that not a fact? A. I did not hear you say that. You said you would take care of everything."

At another point he testified concerning this call: "A. I said, 'Will you take care of this for me?' He said, 'I will.' He was employed as my attorney. * * * He said, 'We would work out a way and fix this thing up.' I figured he was my attorney all the time."

Mr. Edwards testified that "after I filed the complaint and had Mr. Walton served, he came to my office, showed me these checks that have been offered in evidence. He told me these checks were in payment of the note, and I told him that, if they were in payment of the note, he should have credit for it, and I would take it up with Hester Hill. I did take it up with her and afterwards reported to him that she claimed that these checks were not in payment on the note, but were in payment on an automobile transaction. I had several conversations with him after that time, and finally it wound up in reducing the amount of the loan, of the amount of the demand.

"Q. By the Court: Demand at the bank? A. At the bank, yes. I sent that down to the bank with Mrs. Evans' consent, and the demand was not paid, and the papers were returned to me, and she instructed me to go ahead with the foreclosure, as I had continuously notified Mr. Folanders Walton and suggested to him as often as I possibly could, to take care of the matter."

The testimony showed without contradiction that shortly after the visit to Mr. Edwards' office the appellant undertook to negotiate a loan at his bank upon the real estate involved in this action, which would enable him to clear his obligations to the Pacific States Savings & Loan Association and to the defendant, as well as to make certain improvements upon the property. The assistant cashier of the bank testified that the loan, in a sufficient amount to accomplish that, would have been made but for some reason the appellant declined to complete the transaction, with the result that all papers in connection with the deal were returned to him. The transaction with the bank was summarized by the trial court in the following language: "Mr. Miller [the assistant cashier] says 'the application was for $1060.00, and we were ready to make the loan. The reason it wasn't closed was because he thought Mrs. Evans was asking too much money and it should be reduced about $100.00.'" A definite effort was made to clear the appellant's misapprehension in regard to the amount of Mrs. Hill's claim, as shown by a letter addressed to him on January 5, 1940, reading as follows:

"January 5, 1940

"Folanders Walton
"1319 East Walnut
"Los Angeles, California

"Dear Sir:

"On December 11th, at your request, I mailed to the bank the demand of Hester Hill Evans for $576.35. The amount of your indebtedness to her with costs and expenses was $676.35. I therefore allowed you a credit for the $100.00 which you had paid to Hester Hill Evans.

"I called the bank this morning and they advised that you were stalling because you believed you had not been given credit for the $100.00 you paid to Hester Hill Evans. I am calling your attention to the fact that you have been given credit for the $100.00 you paid. The other items making up the amount are interest, attorney's fees and expenses of foreclosure, and cannot be further reduced. The bank advises me that money will be loaned to you to satisfy this obligation. It is to your interest to work this problem out but if you do not care to do so, kindly advise me and I will immediately proceed with the foreclosure.

"Very truly yours,
"(Signed) Noel Edwards
"NE/M Noel Edwards"

Notwithstanding this notice, which should have satisfied the appellant that the defendant was willing to give him credit for $100 payment on the note instead of on the automobile transaction as originally claimed, he still refused to complete the bank loan, resulting in the return of his papers to him in the following March. The bank advised him at that time, "We are returning the following papers which you left with us to be used in connection with your recent application for real estate loan which you have since cancelled out." Since appellant owed the defendant the sum of $500, according to his note, plus accruals thereon, which obligation he refused to pay although the bank was ready and willing to advance the necessary funds, it is apparent that his claim of lack of consideration has no foundation in fact.

[3] The additional claim that the judgment of foreclosure was rendered against appellant inadvertently or that he thought Mr. Edwards represented him is effectively offset by the testimony in this case and, particularly, by the letters which Mr. Edwards wrote him and which were introduced in evidence. We quote two of them as follows:

"Air Mail September 11, 1939

"Mr. Folanders Walton
"Akron, Alabama

"Dear Sir:

"I have your letter of September 8th and immediately called Mr. Miller at the Bank of America. He advised me that you had not completed your application for a loan and that, in effect, nothing had been done.

"Mrs. Evans is very anxious that this matter be taken care of and she also tells me that the checks which you showed me were not to apply on payment of the mortgage, but were in payment of an automobile transaction which you had with her.

"Please give this matter your immediate attention, or I shall be compelled to finish the foreclosure.

"Very truly yours,
"NE:PS Noel Edwards"

"November 28, 1939

"Folanders Walton
"Akron, Alabama

"Evans vs. Walton

"Dear Sir:

"You have utterly failed me in every promise you have made and now I understand you have used your money to buy an automobile. I have entered your default and intend to take judgment and proceed with the sale unless you immediately take care of this obligation.

"Very truly yours,
"(Signed) Noel Edwards
"NE/M Noel Edwards"

Notwithstanding the suggestion of summary action in the latter communication, Mr. Edwards wrote him again in January, as we have seen, and the sale under foreclosure did not take place until September 17, 1940, more than a year after entry of judgment in defendant's favor.

[4] The purported appeal from the order denying motion for new trial is dismissed, since such an order entered in a civil case has not been appealable since 1915. Gray v. Cotton, 1917, 174 Cal. 256, 162 P. 1019. See, also, 2 Mck. Dig., Appeal and Error, Sec. 74; Cal.Pac.Digest ⇦ 780(1).

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.

26 Cal.2d 184

**GARTNER et al. v. ROTH, County Auditor, et al.**

**L. A. 18944.**

**Supreme Court of California.**

**March 30, 1945.**

**1. Taxation ⇐695**

It is the established policy of the state to give delinquent taxpayer every reasonable opportunity to redeem his property.

**2. Evidence ⇐11**

Court could take judicial notice of change in economic conditions and general improved financial status of inhabitants of state incident to increased industrial activity in connection with maintenance of war effort following United States' entry into war in December, 1941

**3. Taxation ⇐696**

The 1943 act "postponing" and "suspending" until June 1, 1945, the "operation" of a prior act terminating right of redemption of property deeded to state for taxes on and after June 1, 1942, raised the redemption bar not only as to property tax-deeded to state between the effective date of the 1943 act and June 1, 1945, but also as to property so deeded between June 1, 1942, and the effective date of the 1943 act and retained by the state. St.1941, p. 1425, § 3511.3 et seq.; St.1943, p. 2804, §§ 2, 3476.

See Words and Phrases, Permanent Edition, for all other definitions of "Operation", "Postpone" and "Suspend".

**4. Constitutional law ⇐190**
**Taxation ⇐696**

The Legislature has the power to make retroactive changes in the method of disposition of property acquired by state because of nonpayment of taxes and to extend to delinquent owner an opportunity to redeem his property before sale by the state.

**5. Statutes ⇐181(1), 184**

A statute is to be given the interpretation which will, if possible, give effect to legislative intent as implied in terms of statute evidencing its real purpose.

**6. States ⇐119**

The 1943 act postponing and suspending until June 1, 1945, the operation of a prior act terminating right of redemption of property deeded to state for taxes on and after June 1, 1942, construed as applicable to property tax deeded to state between June 1, 1942, and the effective date of the 1943 act, does not make a gift of property of state contrary to Constitution. St.1941, p. 1425, § 3511.3 et seq.; St.1943, p. 2804, §§ 2, 3476; Const. art. 4, § 31.

**7. Taxation ⇐696**

Legislature has power to regulate procedure to be followed in securing to the state its tax revenues and in expediting return to tax rolls of property which has been sold to state for taxes in order that such property may again support general governmental functions in public interest.

**8. Taxation ⇐696**

Where declared purpose of legislation adopted in 1943 relating to real property taxes was to avoid conflict between state laws and federal Soldiers' and Sailors' Civil Relief Act, that declared purpose did not constitute the measure of purpose of another 1943 act postponing and suspending until June 1, 1945, the operation of a prior act terminating right of redemption of property deeded to state for taxes on and after June 1, 1942. St.1941, p. 1425, § 3511.3 et seq.; St.1943, pp. 1598, 2804, §§ 2, 3476, 3490 et seq.; Soldiers' and Sailors' Civil Relief Act of 1940, § 1 et seq., 50 U.S.C.A.Appendix § 501 et seq.

EDMONDS and TRAYNOR, JJ., dissenting.

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In Bank.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Mandamus proceeding by Henry A. Gartner and others against V. L. Roth, as Auditor, and Ray E. Williams, as Treasurer, of San Bernardino County, and others, to compel the defendant auditor and the defendant treasurer to issue an estimate of and permit redemption of certain real property upon payment of tax delinquencies and penalties. From an adverse judgment, plaintiffs appeal.

Reversed with directions.

Prior opinion 150 P.2d 557.

C. E. Crowley, of Ontario, for appellants.

Robert W. Kenny, Atty. Gen., John L. Nourse and Daniel N. Stevens, Deputy Attys. Gen., and John P. Knauf and R. J. Farrell, both of San Bernardino, for respondents.

SPENCE, Justice.

In this proceeding plaintiffs sought, and were denied, mandamus to compel the defendant auditor and the defendant treasurer of the county of San Bernardino to issue an estimate of, and permit, redemption of certain real property upon payment of tax delinquencies and penalties as computed by said county officials.

In 1941 the Legislature provided by section 3511.3 of the Revenue and Taxation Code that "On and after June 1, 1942, and prior to January 1, 1947, on execution of the deed to the State, the right of redemption is terminated as to all property * * * [with an exception not here material]." Stats.1941, ch. 290, p. 1425. Then in 1943 an act was passed which read, in part, as follows: "Sec. 2. The operation of Section[s] 3511.3 [and ten other sections] of the Revenue and Taxation Code shall be postponed and suspended until June 1, 1945." Stats.1943, ch. 932, p. 2804. The propriety of plaintiffs' claim for relief depends upon the import of this later enactment, which became effective on August 4, 1943.

From the agreed statement on file herein the following facts appear: Certain real property in the city of Upland, county of San Bernardino, was assessed to J. Julius Gartner for the year 1936, but taxes for that year were not paid. Said Gartner died in 1937, and the property was distributed to plaintiff Henry A. Gartner, who sold said property under contract to plaintiffs James and Allie Harrison, who have been in possession since 1937. On August 3, 1942, the property was deeded to the state for nonpayment of the 1936 taxes. Plaintiffs first discovered that said taxes had not been paid in November, 1942, which was after the deed to the state had been recorded. They immediately made application to defendants for an "estimate of redemption" and offered to pay said taxes with all penalties and interest. Defendants refused to proceed, however, upon the ground that the provisions of sections 3476 and 3511.3 et seq. of the Revenue and Taxation Code prevented them from permitting said property to be redeemed. Plaintiffs have ever since stood ready and have repeatedly offered to pay all delinquent taxes with all penalties and interest. Since November 15, 1942, they have paid rental on the property to the state, and the rent which has been paid nearly equals the amount of taxes, interest and penalties that would be due in the event of redemption.

On October 8, 1943, plaintiffs filed a petition for a writ of mandate and secured the issuance of an alternative writ. At the hearing of said matter it was stipulated that the above facts were admitted by all parties; that there was no question of fact to be determined; and that the only issue to be decided was the question as to whether or not plaintiffs had the right to redeem said property. Thereupon findings were made to the effect that the 1943 enactment, supra, had no retroactive application so as to authorize a redemption of property deeded to the state for taxes between June 1, 1942, and August 4, 1943, and that during that period section 3511.3 of the Revenue and Taxation Code was in full force and effect. An order was entered accordingly quashing the alternative writ and denying the petition for a peremptory writ of mandate. Plaintiffs have appealed from that order.

[1] Appellants contend that it was the express and implied intent and purpose of the Legislature, in adopting the 1943 act, supra, to raise the bar to redemption theretofore imposed by section 3511.3 of the Revenue and Taxation Code, supra, and to permit the redemption of all property deeded to the state for taxes, *and not sold by the state,* at any time up to June 1, 1945. On the other hand, respondents argue that said section 3511.3 instantly and finally terminated any right of redemption with respect to the property here in question when it was deeded to the state on August 3, 1942; that the 1943 act contains no provision for its retroactive application; that certain constitutional objections arise unless the later enactment is construed to operate "prospectively only," covering the limited period of August 4, 1943, to June 1, 1945; and that since chapter 362, also adopted in 1943, Stats.1943, pp. 1598, 1599, sets forth that its purpose is to avoid any conflict between the laws of this state and the federal Soldiers' and Sailors' Relief Act of 1940, as amended 54 Stats. 1178, 50 U.S.C.A.Appendix, § 501 et seq., it must be assumed that the sole purpose of adopting the 1943 act here in question, Stats.1943, ch. 932, p. 2804, was the same. Consideration of the language of the 1943 act, cited by appellants as the basis for their claim to relief, sustains appellants' position as consistent with the established policy of this state "to give the delinquent taxpayer every reasonable opportunity to redeem

his property." Lachmund v. Johnson, 47 Cal.App.2d 377, 380, 117 P.2d 920, 922.

[2, 3] In the act adopting section 3511.3, Stats.1941, ch. 290, p. 1423, the Legislature declared a policy of using the revenues derived from tax-deeded property "for the primary purpose of restoring tax-deeded property to the rolls", Stats.1941, p. 1429, and to expedite this object it was provided that the act should "take effect immediately." In Mercury Herald Co. v. Moore, 22 Cal.2d 269, 272, 138 P.2d 673, 674, 147 A.L.R. 1111, this court observed that other provisions for the termination of the right of redemption, adopted in 1941, were "an integral part of a plan to classify and rehabilitate tax-deeded property" and were designed "to expedite the restoration of real property to the tax rolls." With the change in economic conditions and the general improved financial status of inhabitants of this state incident to the increased industrial activity in connection with the maintenance of the war effort following the United States' entry into war in December, 1941—facts of which this court may properly take notice (City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912; Calihan v. Yellow Cab Co., 125 Cal.App. 649, 13 P.2d 931; Weaver v. Grunbaum, 31 Cal.App.2d 42, 87 P.2d 406—it would appear that the 1943 act here in question, which raised the 1941 statutory bar § 3511.3, to the delinquent taxpayer's exercise of the right of redemption so as to make possible and more probable an early restoration to the assessment rolls of large numbers of parcels of tax-deeded property, was adopted as a progressive step in furtherance of the state's declared tax rehabilitation program. And the plain language of the 1943 act would indicate that the redemption bar was raised not only as to property tax-deeded to the state between August 4, 1943, and June 1, 1945, but also as to property so deeded between June 1, 1942, and August 4, 1943 (the effective date of the 1943 act) and retained by the state. Thus, the 1943 act provides that the *"operation of"* section 3511.3 and other sections "shall be *postponed and suspended* until June 1, 1945." According to Webster's New International Dictionary, 2d Ed., the word "postpone" carries with it the idea of deferring the doing of something or the taking effect of something until a future or later time, while the word "suspend" conveys the *additional* thought of causing to cease for a time *an effect which has already been operative.* Accordingly, the Legislature evidenced its intent that the *entire operation* of section 3511.3 should be "postponed and suspended"—its past operation as well as its future operation—and that the right of redemption should be available "until June 1, 1945" as to *all* tax-deeded property retained by the state.

[4, 5] As above noted, section 3511.3 provided that within the dates designated "on execution of the deed to the State, the right of redemption is terminated as to *all* property * * *." In interpreting the 1943 act as applying to *all tax title property* held by the state on the effective date of the act, August 4, 1943, as well as to any property deeded later to the state but before June 1, 1945, the 1943 act is given an application commensurate in scope with that of the 1941 statute, the effect of which is both "postponed and suspended." The 1943 act contains no reservation in its general language which would give it only prospective operation, and if it had been so intended, it would have been the simple procedure for the Legislature to have so provided by express recital. Within the principle of Mercury Herald Co. v. Moore, supra, the Legislature had the power to make retroactive changes in the *method of disposition of property* acquired by it because of the nonpayment of taxes and to extend to the delinquent owner an opportunity to redeem his property before sale by the state. Analogous in concept is the observation with regard to the right of redemption from a tax sale as stated in Anglo California National Bank v. Leland, 9 Cal.2d 347, 353, 70 P.2d 937, 939, quoting from Walker v. Ferguson, 176 Ark. 625, 3 S.W.2d 694: "The title acquired by the state, or an instrumentality thereof, at a tax sale is not the same as that vesting in a private purchaser, since the object of the purchase is not the acquisition of the property, but rather the collection of the taxes. (Citing authorities.) Hence the rule that a statute extending the time to redeem from a tax sale is not constitutionally applicable to sales made before its enactment is subject to an exception where the state or one of its instrumental subdivisions was the purchaser." Moreover, it would be unreasonable to assume that the Legislature, in granting in 1943 general relief to taxpayers whose lands had been deeded to the state and had not yet been sold by the state, intended a different treatment for those taxpayers whose

lands had been deeded between June 1, 1942, and August 4, 1943—the period when section 3511.3 was in effect—so that particular group should be denied the rights and privileges of redemption enjoyed by all the others whose property was tax-deeded to the state either prior or subsequent to that period. In according retroactive force to the 1943 act, such discrimination is avoided, and the phraseology of the act is given its full breadth of meaning in achievement of the manifest legislative design. In line with the cardinal rule of statutory construction requiring an interpretation of a statute which will give effect to the legislative intent as implied in the terms of the statute evidencing its real object and purpose (23 Cal.Jur. § 107, p. 725), the Legislature's choice of language in the 1943 act compels the conclusion that it was thereby intended to suspend the entire operation and effect of section 3511.3, so that it would be ineffective for any purpose until June 1, 1945.

[6, 7] Nor is there any merit in the argument of respondents that the 1943 act, if construed to have retroactive force, might be unconstitutional because the right of the state to the proceeds of taxation, when once vested, cannot be impaired by subsequent legislation, since to do so would constitute the making of a gift of the property of the state contrary to section 31, article IV of the California Constitution. Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788; Trippet v. State, 149 Cal. 521, 86 P. 1084, 8 L.R.A.,N.S., 1210; Estate of Potter, 188 Cal. 55, 204 P. 826; Estate of Lander, 6 Cal.App. 744, 93 P. 202. The cases relied upon involved the state's right to the inheritance tax vesting at the date of the taxable transfer and the constitutional objection to the Legislature's reduction of the rate of taxation thereon by subsequent enactments. But the situation here rests on a wholly distinguishable concept where the state, as part of the tax rehabilitation program affecting real property assessments, would not be giving away property but would be simply restoring a right which all delinquent taxpayers originally possessed and which had been lost to a part of them for a time. All that the state is justly entitled to have is its tax money, and the 1943 act merely effected a change in the method of disposition of tax-deeded property whereby certain former owners were again given the opportunity, before an actual sale by the state, to regain their property by redemption without impairing the right of the state to proceed to sell in case the owners should fail to avail themselves of that opportunity. It is within the power of the Legislature to regulate the procedure to be followed in securing to the state its tax revenues and in expediting the return to the tax rolls of property which has been sold to the state for taxes in order that such property may again support general governmental functions in the public interest. Buck v. Canty, 162 Cal. 226, 121 P. 924. As so analyzed, the retroactive application of the 1943 act does not impair the state's vested right to the payment of delinquent taxes so as to violate the constitutional prohibition, but involves only a change in the *method of collecting* the state's tax claims. The Legislature has not manifested an intention that the state should go into the real estate business to acquire property from delinquent taxpayers during depression years for a small fraction of its value and to insist on a forfeiture of such property when, under improved economic conditions, the former owners are able and willing to pay the full amount of their taxes and penalties. Rather it is the settled policy of the state to afford delinquent taxpayers ample opportunity to redeem their property (Anglo California National Bank v. Leland, supra), and the 1943 act as here construed fully harmonizes with that policy while protecting the state's tax claims.

[8] Likewise without merit is respondents' contention that the declared purpose of certain other legislation adopted in 1943, Stats.1943, ch. 362, pp. 1598, 1599, relating to real property taxes, must be the measure of the purpose of the 1943 act here in question. Without reciting respondents' detailed argument as to the design of that other legislation to avoid conflict between the laws of this state and the federal Soldiers' and Sailors' Relief Act of 1940, as amended, suffice it to say that the object of that comprehensive plan would seem to have been accomplished by that enactment and without thought of correlation with the 1943 act here involved, which was placed in an entirely different chapter of the 1943 statutes (ch. 932, p. 2804) and presumably was adopted for an independent purpose. As so viewed the language of the 1943 act *postponing and suspending the operation* of section 3511.3 of the Revenue and Taxation Code sustains its interpretation as designed to enable delinquent taxpayers,

whose financial status had been improved by wartime conditions, to redeem their property in furtherance of the state's general tax rehabilitation program. It therefore follows that appellants were entitled to the relief demanded by virtue of the provisions of said act of 1943.

The order from which this appeal was taken is reversed, with directions to the trial court to grant the peremptory writ as prayed.

SHENK, CARTER, and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).—I cannot join in the determination of my associates that an enactment which postponed and suspended the operation of a statute nullified retroactively the prior legislation. Long approved rules of statutory construction require a contrary conclusion.

By definition, "postpone" means to defer, to put off, delay; "suspend" to postpone, to defer till later. Webster's New International Dictionary, 2d Ed. 1941. The courts have followed these dictionary definitions, and have added others such as "held in abeyance, temporarily inoperative, arrested, interrupted, stopped for a time." Olds & Whipple v. United States, 22 F.Supp. 809, 819, 86 Ct.Cl. 705; see cases collected in 33 Words & Phrases, Perm.Ed.1940, Postpone, pp. 128, 129; 40 Words & Phrases, Perm. Ed. 1940, Suspend, Suspended, p. 917 et seq. Certainly in every day usage "postpone" means to defer until later something which has not yet occurred. "Suspend," on the other hand, indicates that something already is in operation which is to be stopped for a time. But neither word has any retroactive connotation, and the plain meaning of the legislative declaration is that the sections of the 1941 legislation specified in the enactment of 1943 would have no further effect until June 1, 1945, and that the effectiveness of those sections not yet in operation would be postponed until that time.

Moreover, it is a fundamental rule of decision that a law will not be construed as having retroactive effect unless the act clearly, by express language or necessary implication, indicates that this was the legislative intention. Estate of Childs, 18 Cal. 2d 237, 246, 115 P.2d 432, 136 A.L.R. 333; Krause v. Rarity, 210 Cal. 644, 655, 293 P. 62, 77 A.L.R. 327; Berg v. Traeger, 210 Cal. 323, 325, 292 P. 495; Callet v. Alioto, 210 Cal. 65, 67, 290 P. 438; In re Cate, 207 Cal. 443, 448, 279 P. 131; East Bay Mun. Utility Dist. v. Garrison, 191 Cal. 680, 692, 218 P. 43; Estate of Potter, 188 Cal. 55, 65, 204 P. 826; Estate of Frees, 187 Cal. 150, 156, 201 P. 112; O'Dea v. Cook, 176 Cal. 659, 662, 169 P. 366; Gurnee v. Superior Court, 58 Cal. 88, 91; American States W. S. Co. v. Johnson, 31 Cal.App.2d 606, 613, 88 P.2d 770; Bank of America v. Burg Bros., 31 Cal.App.2d 352, 88 P.2d 196; 59 C.J., Statutes, §§ 692, 694, 696, pp. 1159-1171; 50 Am.Jur., Statutes, § 478, pp. 494-501; 23 Cal.Jur. 629. Yet the decision in this case is based upon a statement directly to the contrary. It is said: "The 1943 act contains no reservation in its general language which would give it only prospective operation, and if it had been so intended, it would have been the simple procedure for the Legislature to have so provided by express recital." This can only mean that a statute is now to be construed as having retroactive effect unless the Legislature expresses a contrary intention.

Also, in my opinion, the decision in the present case violates another well settled rule of statutory interpretation. If a statute is susceptible of two constructions, one of which will raise serious and doubtful questions as to its constitutionality, a court must presume that the Legislature intended the construction which will render the statute free from doubt as to its validity. Shealor v. City of Lodi, 23 Cal.2d 647, 653 145 P.2d 574, quoting from Miller v. Municipal Court of City of Los Angeles, 22 Cal.2d 818, 828, 142 P.2d 297; and see cases collected in 16 C.J.S., Constitutional Law, § 98, pp. 234-246. The Constitution of this state expressly prohibits the Legislature from making a gift of any public money or thing of value. Const. art. IV, § 31. After title to the property in question was transferred to the state, the petitioners had no right of redemption § 3511.3, supra; the deed of the county tax collector had conveyed "the absolute title to the property, free of all encumbrances" except liens for certain taxes Revenue and Taxation Code, § 3520, St.1941, p. 2463. See, also, Mercury Herald Co. v. Moore, 22 Cal.2d 269, 273, 138 P.2d 673, 147 A.L.R. 1111. For present purposes, it is sufficient to point out that for the Legislature to allow private individuals to obtain property to which the state had acquired title for an amount generally less than its present market value

is prima facie within the constitutional prohibition. The rule is well established that the right of the state to the proceeds of taxation, when once vested, cannot be impaired by subsequent legislation, and the decisions holding that the Legislature may not retroactively reduce the amount of the inheritance tax (Estate of Potter, supra, 188 Cal. page 60, 204 P. 828; Trippet v. State, 149 Cal. 521, 86 P. 1084, 8 L.R.A., N.S., 1210; and Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788) rest upon the same principles as those governing the present one.

My associates distinguish the inheritance tax cases upon the theory that the court is now concerned only with "a change in the method of disposition of tax-deeded property," involving nothing more than a preference of the former owner over a third party purchaser. But to retroactively apply the statute of 1943 would, in many cases, require the state to return property to its former owners for far less than would be derived from sales to third persons. Although it may be conceded that the Legislature did not enact the 1941 rehabilitation provisions for the purpose of establishing the state in the real estate business, and the state's primary concern is for the collection of taxes, the fact remains that in carrying out the plan to expedite the return of tax-deeded property to the rolls, the incidental effect, in many instances, would be to vest absolutely in the state title to property the value of which greatly exceeds outstanding tax claims. The mere fact that the Legislature expressed no policy or purpose to avail itself of the overage is immaterial.

Further doubt as to the constitutionality of the statute as it is now construed arises from the fact that to give the enactment a retroactive effect would render uncertain the validity of sales made by the state of property deeded to it from June 1, 1942, the effective date of section 3511.3 of the Revenue and Taxation Code, and August 4, 1943, when the legislation now before the court took effect. For example, had the state, after the petitioners, for the purpose of redemption, offered to pay all taxes, interest and penalties due, sold the property in question to a third person, the latter's title would be impaired by the present decision for the reason that, according to such determination, the state was bound to allow a redemption and, therefore, did not have "absolute title to the property" as provided in section 3520 of the Revenue and Taxation Code. Nor is this defect aided by the judicial limitation that the 1943 statute shall not operate retroactively as to property sold by the state prior to an exercise of the right of redemption. It would seem clear that the Legislature, if it had intended a retrospective effect, would have expressly protected third party purchasers taking title in reliance upon sections 3511.3 and 3520, supra; its omission in this connection can only be attributed to its clearly expressed intent that the 1943 enactment be only of prospective operation. But certainly, under these circumstances, the court should adopt that construction of the statute which without doing violence to the language used, will remove all doubt concerning its constitutionality even though another interpretation is equally reasonable. Miller v. Municipal Court of City of Los Angeles, supra.

Furthermore, statutes in pari materia enacted by the Legislature of 1943 clearly show the purpose of enacting chapter 932 and an intention that it should be prospectively applied. By an amendment to the federal Soldiers' and Sailors' Civil Relief Act of 1940, effective October 6, 1942, Congress unqualifiedly prohibited the sale of property owned by military personnel to enforce the collection of taxes. 50 U.S. C.A. Appendix, § 560. Legislation having the effect of in part avoiding conflict between the federal act and the Revenue and Taxation Code provisions was enacted by the Legislature in 1943, Stats. 1943, chap. 362, for that express purpose. It is reasonable to assume that chapter 932 was also enacted with the same end in view. My associates, however, declare that the legislative purpose in postponing and suspending the termination of the right of redemption was in furtherance of the state's general tax rehabilitation program. To me, such reasoning is untenable for if, in 1941, the Legislature enacted section 3511.3 and the other related code provisions in order to restore tax-deeded property to the rolls, it would not later suspend the operation of those provisions for the same purpose. The reasoning is contradictory, and may not be justified upon the assertion that in 1943 the economic status of delinquent taxpayers was different from what it was in 1942, the effective date of section 3511.3. If the purpose of that section was to restore property to the tax rolls, the subsequent suspension and postponement of its operation would limit that purpose.

As I read the statutes now before the court, the Legislature, by provisions enacted in 1941 and effective in 1942, for the purpose of establishing a comprehensive tax rehabilitation program, determined that the title to property upon which taxes should become delinquent was to vest absolutely in the state upon execution of the tax deed, the property owner thereby being relieved of all liability for the taxes assessed. In the later legislation I find no purpose to favor the former owner regardless of loss thereby to the state consequent upon its inability to realize the full value of its "absolute title." In my opinion, the conclusions of a majority of the court rest upon an overcomplication of the controversy. They are based upon an asserted uncertainty in the meaning of a statute the terms of which, to me, are clear and unmistakable and a determination of the effect of that uncertainty contrary to well settled rules of statutory construction.

TRAYNOR, J., concurred.




26 Cal.2d 245

**GREENE v. HAWAIIAN DREDGING CO., Limited, et al.**

**L. A. 19209.**

Supreme Court of California.

March 30, 1945.

**1. Appeal and error ⇐1011(1)**

Supreme Court will not interfere with trial court's findings on conflicting evidence.

**2. Master and servant ⇐40(3)**

Evidence supported finding that employee on construction project in Midway Island did not willfully refuse to obey "check-in check-out" rule established by employers or urge other employees to do so, and that employers acted arbitrarily and without legal cause in discharging employee.

**3. Master and servant ⇐30(5)**

An employee has right without breaching his implied obligations to his employer to protest regarding working conditions and rules of his employer and request that they be altered, and to that end he may discuss subject with his fellow employees and join with them in a peaceful and orderly presentation of their grievances. Const.Cal. art. 1, § 11; U.S.C.A.Const. Amend. 1.

SPENCE and SHENK, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Victor Fenemore Greene against Hawaiian Dredging Company, Limited, and others to recover damages for breach of a contract of employment. From a judgment for plaintiff, the defendants appeal.

Affirmed.

Prior opinion 151 P.2d 560.

Thelen, Marrin, Johnson & Bridges, Cedric L. Brash, and Bruce Walkup, all of San Francisco, for appellants.

J. P. Nunnelley and William C. Ring, both of Los Angeles, for respondent.

CARTER, Justice.

Plaintiff was employed by defendants under a written contract dated October 30, 1940, and executed in Los Angeles, calling for services as an iron worker on a construction job on "Pacific Islands." His wages were fixed at a stipulated sum per month. Paragraph 8 of the contract read: "If for cause the services of the Employee are not satisfactory to the Employer, or if he is not or does not show himself qualified for the position for which he is hired, or is negligent in his duties, or displays bad temper, or in the case of the immoderate use, in the opinion of the Employer, of alcoholic drinks, or the contraction or development of venereal disease, the Employee may be discharged without any further obligation resting upon the Employer. In such case his term of service will then end and he forfeits his right to salary and expense allowance for returning to the United States. It is understood that the Employee may be dismissed if requested by any Government official." It was agreed that plaintiff would pay his own expenses and transportation costs back to the United States "if he does not complete this contract, or if he is discharged in accordance with Paragraph 8." Defendants admitted the execution of the contract and that plain-

tiff commenced the performance thereof and continued to perform the same until April 21, 1941, but denied that he completely performed the contract or was prevented by defendants from further performance on that date, and alleged that they discharged plaintiff at said time pursuant to Paragraph 8 of the contract.

Pursuant to the provisions of the contract plaintiff was transported to and worked on Midway Island, a part of the Territory of Hawaii. The court found that plaintiff performed all of the terms of the contract to be by him performed until prevented by defendants when they "arbitrarily and without just cause, contrary to Paragraph 8, or any other provision in said contract, refused to permit the plaintiff to continue performance of said contract."

Judgment for damages for breach of contract was rendered in favor of plaintiff and defendants have appealed.

Defendants contend that the evidence is insufficient to support the judgment, and that they had just cause to discharge plaintiff under the provisions of the contract.

Viewing the evidence most favorably to plaintiff and resolving all conflicts in his favor, it appears from the record that the following facts were established.

Defendants are construction contractors holding contracts for construction work for the United States Navy. When plaintiff arrived at Midway Island on November 13, 1940, there were about 700 employees, and the crew with which he worked numbered from fifteen to eighteen. Mr. Sheik was the general superintendent of the work on the island. Plaintiff had no trouble with any of his fellow employees or superiors. He first contacted Sheik when he called at the latter's office to offer suggestions for the improvement of the morale of the employees. To plaintiff's statement of the purpose of his visit, Sheik replied that the camp was excellently operated, and he made inquiry of plaintiff as to whether he had any trouble of which he desired to complain. Plaintiff replied in the negative. On Saturday evening, April 19, 1941, defendants posted a bulletin on the board provided therefor, announcing that commencing Monday morning, April 21, 1941, a "check in-check out" system would be followed under which the employees would stop at a booth about two and one-half blocks from the center of the construction camp, the place of work, and the mess hall, to obtain a metal disc before commencing their duties, followed by the same procedure, and leaving the disc, after quitting work. On the night of April 20, 1941, defendants moved the booth to a point near the mess hall. Defendants assert that the system was installed upon the request of the Navy to facilitate accounting. Plaintiff was one of a group of employees who read the bulletin Saturday evening. Remarks were made by some of the employees that they "would not follow it—the booth was too far away." The bulletin was generally discussed by the employees and they expressed dissatisfaction with the system.

A petition to the employers was suggested, and plaintiff and several other employees prepared one which was exhibited to, discussed by, and finally signed by about 175 employees, including the foreman of plaintiff's crew. Posted on the bulletin board on the morning of April 20, 1941, it read:

"April 19, 1941

"Mr. N. B. Sheik,
"General Supt.,
"NOy 3550
"Copy to
"Commander Bentrees, USNR
"Officer in Charge,
"Naval Construction Camp,
"Midway Island

"Dear Sir:

"We, the undersigned, understand that the new check-in and check-out plan requires the employee to be on the job when the whistle blows, both at starting and quitting time. Also, that he be required to check in and out on his own time.

"If this interpretation be correct, please be advised that we believe the plan to be both unfair and unwarranted. However, if, in your opinion, we have misinterpreted the plan, we stand to be corrected.

"While it is not our intention or wish to, in any way, impede the preparedness program or to embarrass the management, *we find it necessary to reject the plan as we understand it.*

"A bulletin on the bulletin board will be sufficient to clarify the situation.

"Signed" (Italics added.)

The evening of April 20, 1941, plaintiff prepared and posted on the board a notice reading:

"Notice to All Those Men Who Signed the Answer to the Bulletin in Reference to

the Check-in and Check-Out System. You are Expected to Report for Work Monday, April 21, as per Usual With No Change in the Procedure.

"Signed V. F. Greene"

In reply to the question as to what he "meant" by the above notice plaintiff testified: "Well after we had * * * I say 'we', the group * * * after this had been talked about we didn't know exactly what to do, and it was suggested that some kind of a notice be placed on the bulletin board to inform the men as to what they should do the next morning, whether they should report to work or not report to work, in view of this stand we had taken in this little answer (the petition) we had given them to their bulletin. So several of us got together and decided the smart thing to do would be for the most of them, all that wanted to, to just go ahead and go to work the next morning and forget about it. They had moved time check shanty from where they had originally placed it up next to the mess hall so the men could make the check-in and check-out system without walking this three blocks.

"So this was posted to let them go on back to work, that is, these that wanted to do so."

And further that "* * * it was our thought not to embarrass the people or to in any way obstruct the defense program, and mainly we wanted to carry on. Q. Did you mean by that second notice for the men to go ahead and work and cooperate with the employer whatever system was used? A. I did." Plaintiff also testified that he did not influence or try to influence the other employees. On the morning of April 21, 1941, all the employees followed the new system. Although plaintiff stated in his deposition that he stood by and watched the others obtain the metal disc in conformity to the new system, he testified in court that he "couldn't get it" (the disc) because "They had a jack sticking over the top of it and said they could not give it to me." The trial court evidently accepted the latter statement as true.

Plaintiff testified that on Monday afternoon, April 21, 1941, he was summoned to Sheik's office and the following occurred: "He (Sheik) said, 'Are you the man that put that article (the petition of protest) on the bulletin board?' I said, 'I am.' He said, 'Well, for your information, this plan has been in effect for many years in the United States, and it is a written Naval order and it is going to be worked out here whether you like it or not.' I said, 'Well, for your information I just came off my job with one of these contractors and the system was not in effect there. That was in Los Angeles. Again, for your information, if you would have put on your bulletin that this was a written Naval order, this article would not have been put on the bulletin board and we probably couldn't have gotten a dozen signatures on it if we had tried.' He said, 'Well, just what is your objection to the plan?' I said, 'In the first place, there was not very much consideration given to several hundred employees on this island. In the second place, if you can't trust me to go out and do an honest day's work I see no reason why I should trust you.' He said, 'It is 2:30. You are now off the payroll.' I said, 'Thank you, sir.'"

[1] There is no evidence that plaintiff lacked efficiency, failed to perform his duties properly, or that his employers were dissatisfied with his work. There is a sharp conflict on some of the points, but as heretofore stated, the trial court has resolved those conflicts in favor of plaintiff and it is not within our province to interfere with its findings.

[2] Assuming that the rule establishing the "check in-check out" system was reasonable and did not impose burdens upon plaintiff in excess of his obligations under the contract of employment, and that an employee is under an implied obligation of obedience, loyalty, and to exercise diligence, it is our opinion that the trial court was justified in concluding that plaintiff did not wilfully refuse to obey the "check in-check out" rule or urge other employees to do so, and that defendants acted arbitrarily and without legal cause in discharging plaintiff.

On the issue of plaintiff's refusal to obey the above mentioned rule, it is to be noted that the petition which plaintiff posted is both conciliatory and reasonable. It shows due respect for and submission to the employers' authority. It was the result of the cooperation of several employees including plaintiff, and was made after the rule was announced but before it was to become effective, and was the result of a general feeling that it was unfair. The thought is expressed therein that if the employees were wrong in their attitude toward the new rule they were willing to be corrected.

They expressly stated that there was no intent to embarrass the employers. With all those factors present, it cannot be said as a matter of law that the use of the word "reject," made the petition an unequivocal refusal in advance to obey the rule. The more reasonable interpretation is that the word "reject" conveyed the thought of an objection or protest. Moreover, when the time came for compliance with the rule on Monday, the location of the booth had been changed and all of the employees complied with the rule. The notice posted by plaintiff on Sunday night is not an unequivocal refusal in advance to obey the rule or to request that the other employees do so. On the contrary, it may well mean that the rule should be followed. Evidently the other employees so interpreted it. They obeyed the rule the following morning. We have plaintiff's testimony heretofore quoted as to the meaning of the notice which supports that interpretation. According to plaintiff's testimony he did not violate the rule on Monday morning. He could not obtain the check or metal disc apparently because the employers' agent in charge would not let him have it.

The activities of plaintiff did not constitute disloyalty or insubordination. It is evident from the foregoing discussion that plaintiff was doing nothing more than protesting or complaining to his employer concerning the "check in-check-out" system. He did not incite his fellow employees to disobey the rule. There was a general feeling of resentment toward the rule and the most serious thing that occurred was a general discussion on the subject which led to the petition which plaintiff posted. The notice posted on Sunday night may, as we have seen, be interpreted as not suggesting that the rule be ignored.

[3] The days when a servant was practically the slave of his master have long since passed. In order that the dignity of the employer-employee relation be maintained and that present-day fundamental social concepts be preserved, the employee has the right without breaching his implied obligations to his employer to protest regarding working conditions and rules of his employer and request that they be altered. To that end he may discuss the subject with his fellow employees and join with them in a peaceful and orderly presentation of their grievances. Broadly viewed, such conduct is beneficial rather than detrimental to the employer's interests. It tends to improve the morale of the employee, ultimately resulting in the exhibition of greater diligence and fidelity on his part. The wisdom and importance of the right to petition is not new. The right of the governed to petition those exercising the powers of government is secured by the Constitution of the United States and this state. U. S. Const. First Amend., Cal. Const., art. I, § 10. The obligations of the employee in the instant case are those implied in law because considered wise policy. That policy must be applied in the light of the policy insuring the right to petition.

Such cases as Darst v. Mathieson Alkali Works, C.C., 81 F. 284, and In re Nagel, 2 Cir., 278 F. 105, relied upon by defendants are not in point. They involve the conduct of an employee in inciting other employees to disobey the employer's reasonable orders, not to protest against such orders.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concurred.

EDMONDS, J., concurred in the judgment.

SPENCE, Justice (dissenting).

I dissent. Plaintiff brought his action upon a written contract of employment. He sought certain added compensation and transportation expenses provided for in the contract, alleging that he had fully performed his contract until discharged by defendants on April 21, 1941, "without just cause." Defendants denied that plaintiff had been discharged without just cause and affirmatively alleged that plaintiff had been discharged "pursuant to Paragraph 8 of said contract and for the reason that the services of the plaintiff were not satisfactory to these answering defendants." The trial court found that on April 21, 1941, defendants "arbitrarily and without just cause" refused to permit plaintiff to continue performance of the contract. The sole question presented is whether the evidence was sufficient to support this finding.

The evidence was highly conflicting in some particulars, but even accepting plaintiff's testimony as true, such testimony affirmatively showed that there was just cause for plaintiff's discharge. The conclusion reached in the majority opinion that "plaintiff was doing nothing more than protesting or complaining to his employer con-

cerning the 'check in-check out' system" and that "the activities of plaintiff did not constitute disloyalty or insubordination" cannot be reconciled with the admitted facts.

The notice posted by defendants on April 19th ordered the employees to follow a new procedure, known as the "check in-check out" system, commencing on April 21st. It is conceded that the adoption of such procedure by defendants had been ordered by the United States Navy and that defendants' order to the employees to follow the new procedure was a reasonable order.

On the same day, plaintiff drew up and caused to be signed by himself and other employees the notice which was dated April 19th, and which was posted on the morning of April 20th. Said notice was addressed to defendants' superintendent and a copy was sent to "Commander Bentrees, U.S. N.R., Officer in Charge, Naval Construction Camp, Midway Island." While this notice was in part in the nature of a protest, it went much further. It stated that plaintiff and the others who signed found it necessary "to reject the plan." On the evening of April 20th, plaintiff prepared, signed and posted a further notice reading as follows:

"Notice to All Those Men Who Signed the Answer to the Bulletin in Reference to the Check-In and Check-Out System. You are Expected to Report for Work Monday, April 21, as per Usual With No Change in the Procedure.

"Signed V. F. Greene"

There can be no question concerning the import of these notices posted by plaintiff. Defendants' notice of April 19th had ordered a change in procedure commencing on April 21st. Plaintiff's notice which bore the same date and which was posted on the morning of April 20th, constituted an unequivocal expression of an intention "to reject the plan." Plaintiff's notice which was posted on the evening of April 20th, constituted an obvious attempt to incite his fellow-signers of the first notice to carry out their expressed intention "to reject the plan" by reporting to work on April 21st "as per usual with no change in the procedure." There is only one reasonable interpretation which plaintiff's employers, his fellow-employees or any other person could have given to the words used by plaintiff in these notices, and the admitted posting of these notices constituted just cause for plaintiff's discharge. Labor Code, § 2856, St.1937, p. 259; May v. New York Motion Picture Corp., 45 Cal.App. 396, 187 P. 785; Bank of America v. Republic Productions, Inc., 44 Cal.App.2d 651, 112 P.2d 972; In re Nagel, 2 Cir., 278 F. 105; Darst v. Mathieson Alkali Works, C.C., 81 F. 284.

But aside from these written expressions of plaintiff's attitude toward defendants' order, plaintiff's testimony concerning his attitude as orally expressed on the afternoon of April 21st, showed ample ground for the discharge which followed. He was still doing more than merely objecting to the new procedure despite his knowledge at that time that the United States Navy had required the adoption of such procedure. He testified: "He (defendants' superintendent) said, 'Well, just what is your objection to the plan?' I said * * * 'if you can't trust me to go out and do an honest day's work, I see no reason why I should trust you.'" Thereupon plaintiff was discharged.

An attempt is made in plaintiff's briefs to explain away these definite expressions of plaintiff's defiance of a reasonable order of his employers by reference to certain testimony of plaintiff which purported to show that he did not intend to "reject the plan" and did not intend to encourage others to do likewise. But defendants were entitled to act upon the only reasonable interpretation which could be placed upon the written notices posted by plaintiff, and were also entitled to act upon plaintiff's continued attitude of defiance which was orally expressed by him to defendants' superintendent immediately before his discharge. The testimony of plaintiff to which he refers and which purports to show that his real attitude and intentions were contrary to his expressed attitude and intentions, can have no bearing upon the right of his employers to discharge him.

In conclusion, it should be stated that this case concerns none of the broad questions relating to the rights of employees "to protest regarding working conditions" or to make "a peaceful and orderly presentation of their grievances" as indicated in the majority opinion. The existence of these rights cannot be questioned but neither these rights nor the rights of employees to organize, to bargain collectively, to strike, to picket, or to boycott are involved. This case presents only the limited question of the right of an individual employee to recover certain benefits under a

written contract of employment, by the terms of which contract said benefits were to be denied in the event of the discharge of the employee for cause.

I am of the opinion that the undisputed evidence shows that the plaintiff was discharged for just cause and that the judgment should therefore be reversed.

SHENK, J., concurred.




26 Cal.2d 213

## MOSLEY v. ARDEN FARMS CO.
L. A. No. 19154.

Supreme Court of California.
March 30, 1945.

**1. Municipal corporations ⇐819(1, 4)**

Where defendant left its wooden crates on the parking lot for a month or more, unguarded and not inspected, and two of the crates had been moved across sidewalk and had become hidden in the weeds between sidewalk and property line where they were struck by a mowing machine operated by city employee, resulting in injuries when he was thrown to the sidewalk, finding that defendant was negligent and that such negligence was the proximate cause of the accident was justified.

**2. Negligence ⇐10**

A test for determining the issue of negligence is whether a person of ordinary prudence should have foreseen or anticipated that some one might be injured by his action or nonaction.

**3. Negligence ⇐136(14)**

Whether a person of ordinary prudence should have foreseen or anticipated that some one might be injured by his action or nonaction is generally a question of fact.

**4. Municipal corporations ⇐800(6)**

Where defendant permitted its wooden crates to remain on parking lot for a month or more, unguarded and without further inspection, defendant should have anticipated that some of the crates might be moved across sidewalk where they were hidden in the weeds and that another might be injured thereby, and that some intervening agency caused the boxes to be so moved did not break the chain of causation between defendant's negligence and the injury.

**5. Negligence ⇐62(3)**

If the realizable likelihood that a third person may act in a particular manner is the hazard which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious or criminal, does not prevent the actor from being liable for harm caused thereby.

**6. Negligence ⇐136(25)**

The issue of proximate cause is essentially one of fact.

**7. Negligence ⇐62(1)**

An intervening agency will not always relieve defendant of responsibility for negligence.

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In Bank.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Sam R. Mosley against the Arden Farms Company for personal injuries sustained as the result of being thrown to a sidewalk when the wheel of a mowing machine operated by plaintiff struck boxes of defendant which were in the space between sidewalk and property line. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, 149 P.2d 887.

Monroe & McInnis, of San Diego, for appellant.

Johnson & Johnson, E. L. Johnson, and C. Ashley Johnson, all of San Diego, for respondent.

CARTER, Justice.

Defendant appeals from a judgment awarding damages to plaintiff for personal injuries suffered in a fall when he was dislodged from a tractor which collided with some milk crates owned by defendant. The case was tried before the court without a jury.

The injury occurred in National City on Highland Avenue, a north-south street about 25 feet south of its intersection with 10th Street, an east-west street. Highland Avenue is a paved street. There is a curb along the west side thereof. Adjacent to the curb on the west and parallel there-

with is an unpaved strip 8½ feet wide, which is commonly called the parking. Next to the parking is a 5-foot paved sidewalk. Along the west side of the paved sidewalk and between it and the property line there is a 2-foot unpaved strip. The lot fronting on Highland Avenue at the point in question is vacant. A school ground is located on the west side of Highland Avenue commencing at the northwest corner of the intersection of Highland and 10th Street and extending north for a block. A tree stands in the parking about 25 feet south of 10th Street. There is considerable traffic on the sidewalk on Highland Avenue.

Defendant for a year prior to the accident had been in the retail milk business in National City, and during the course thereof, its employees, without authority or right, piled milk crates containing empty milk bottles on the parking about three feet south of the tree. About a month prior to the accident defendant ceased to do business in National City, leaving about eighteen crates unattended and unguarded at the above mentioned place. The crates were about 2 feet long by 1½ feet wide by 12 to 14 inches high, and were usually stacked 3 or 4 high. The 2-foot strip adjacent to the sidewalk was grown up with weeds and wild oats to a height of 2½ to 3 feet. Some time prior to the accident, according to the findings of the trial court, two of the crates became "displaced, and hidden in the aforesaid growth of weeds in the space between the cement walk and the property line and across the five foot pavement from where the pile of the defendant's crates was kept and stacked. It is not in evidence that any agent of defendant moved said boxes." The two crates were directly across the sidewalk from the main pile on the parking. Prior to the accident one of defendant's drivers had seen glass from broken bottles on the 2-foot strip or nearby.

The court also found that plaintiff, an employee of National City, while engaged in mowing the weeds along Highland Avenue at the direction of his employer, and using a tractor therefor, drove in a northerly direction "on the cement walk, and at times to put the left wheels of this rubber tired tractor over into the aforesaid two foot space; it is true that while so operating said tractor, plaintiff, in order to avoid the pile of boxes or crates, operated and ran the aforesaid tractor upon one or more of the boxes so hidden in the aforesaid two foot space, and that thereby the aforesaid tractor was suddenly, and without warning, lifted from the ground and tilted at an angle which caused plaintiff to lose his balance, fall from the seat of said tractor and strike his head upon the aforesaid cement pavement."

National City has an ordinance reading "An ordinance prohibiting the displaying for sale, offering for sale, or selling of goods, wares or merchandise of any kind upon any public street or alley within the City of National City, California, and prohibiting *the obstruction of any street* or alley, *or portion thereof*, or the sidewalk's face thereof, within said City, by placing or permitting thereon any signs, boxes, or other thing or article which will in any way obstruct or hinder the use thereof or travel thereon within the limits of said City." The court found that defendant violated the ordinance; that the maintenance by defendant of the pile of crates constituted a nuisance; and that defendant negligently left the crates on the parking and proximately caused the injury to plaintiff.

Defendant concedes it had no right to place the crates on the parking and that it was a trespass and probably negligence to do so, but it urges, that the acts and omissions on its part were not the proximate cause of the accident because the trial court found that it did not move the two crates which caused the accident to the two-foot strip and it is unknown how they got there; that if some independent intervening agency caused them to reach that place defendant is not liable for the reason that the chain of causation was broken; and that the maintenance by it of the pile of crates on the parking was not a nuisance or a violation of the ordinance.

[1] Disregarding the ordinance and the finding by the court of the existence of a nuisance, the trial court was justified in concluding that the defendant was negligent and that such negligence was the proximate cause of the accident. Leaving those crates on the parking for a month or more unguarded, unattended and not properly inspected would be such conduct as would justify a finding of negligence by the trier of fact. Under the circumstances here presented the question of negligence and legal or proximate cause are closely related, assuming the test for both is whether a man of ordinary prudence should

have foreseen or anticipated that the two crates might reach the spot where they were located on the two-foot strip. See Prosser on Torts, pp. 364 et seq.

[2] It is well settled that one test for determining the issue of negligence is whether a person of ordinary prudence should have foreseen or anticipated that someone might be injured by his action or nonaction. 19 Cal.Jur. 583, 563-4; 1 Shearman & Redfield on Negligence, § 24. Or as stated in different terms: "Negligent conduct may be either: (a) an act which the actor as a reasonable man should realize as involving an unreasonable risk of causing an invasion of an interest of another; or, (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do." Rest., Torts, § 284. And "The actor should recognize that his conduct involves a risk of causing an invasion of another's interest, if a person, (a) possessing such perception of the surrounding circumstances as a reasonable man would have, or such superior perception as the actor himself has, and (b) possessing such knowledge of other pertinent matters as a reasonable man would have or such superior knowledge as the actor himself has, and (c) correlating such perception and knowledge with reasonable intelligence and judgment would infer that the act creates an appreciable chance of causing such invasion." Rest., Torts, § 289. The actor is bound to know "the qualities and habits of human beings and animals and the qualities, characteristics and capacities of things and forces insofar as they are matters of common knowledge at the time and in the community." Rest., Torts, § 290.

[3] Whether or not the test has been met is generally one of fact for the trier of fact. As recently expressed by this court:

"In other words, the actor's conduct must always be gauged in relation to all the other material circumstances surrounding it and if such other circumstances admit of a reasonable doubt as to whether such questioned conduct falls within or without the bounds of ordinary care then such doubt must be resolved as a matter of fact rather than of law." Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848, 852. See, also, 19 Cal.Jur. 719, 723.

Looking at the circumstances in the case at bar, we find crates piled three or four high on a parking near a sidewalk without right or authority, and left there for at least a month without regard to the condition of the pile. The sidewalk has considerable pedestrian traffic upon it. There is a school ground nearby. The two crates which caused the accident were directly across the sidewalk from the pile of crates, only five or six feet away. Under those circumstances we cannot say as a matter of law that the trial court was not justified in deciding that defendant as a person of ordinary prudence should have anticipated or foreseen that the crates might become scattered, that some might fall off of the pile during the course of time, and possibly on the sidewalk, from whence a passerby might naturally push them aside to their ultimate resting place, or that they might be moved by school children. Presumably defendant's delivery man knew of the presence of the school, having served the community for some time. The evidence shows that one of defendant's employees saw glass along the two-foot strip which would indicate that the crates or the contents had been tampered with. If defendant had used due care and inspected the pile of crates or removed it (it having left them there for over a month), the two displaced crates probably would have been discovered. When the crates became scattered and hidden in the weeds they would be a danger to anyone lawfully using the area.

[4, 5] Viewing the issue as one of proximate or legal cause, and conceding there was some intervening agency in the chain of causation, such agency was not a superseding one exonerating defendant, because, as we have seen, what occurred was reasonably foreseeable, and should have been anticipated. Certainly, when that is true the intervening agency does not break the chain of causation. The consequences of defendant's acts were natural and probable. In Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001. Defendant, a contractor engaging in erecting a structure on a city lot, pursuant to a permit from the city, placed a box of lime partly on the sidewalk and partly on the street. Two boys playing with the lime threw some of it at a passing streetcar injuring the plaintiff who was a passenger thereon. Judgment for plaintiff was affirmed, this court stating at page 451 of 215 Cal., at page 1002 of 10 P.2d:

"This practice [placing building materials in the street], under ordinary circum-

stances, is recognized as lawful by custom and judicial decision. But, if experience had demonstrated that the placing of building materials in public streets and sidewalks was likely to be attended by accidents to persons lawfully using said streets and sidewalks, *whether by virtue of wrongful acts of interference of young children or otherwise,* we might expect to find the matter regulated by statute, and in the absence of statutory prohibitions *it would be the duty of courts and juries to declare such conduct wrongful if a reasonably prudent man would have foreseen that injury would probably result, for the acts of a defendant are deemed the proximate cause of such consequences as a reasonably prudent man would anticipate as likely to result* therefrom. * * * Intervening wrongful acts of third persons, but for which injuries complained of would not have been received ordinarily break the chain of causation, because they are not to be anticipated as probable consequences, but are occasional and exceptional results. But this is not always the case, especially where the acts of children of a nonresponsible age are involved. * * *

"Tested by these principles, we think the record sufficiently supports the jury's verdict against the defendants. The box containing the lime was on the sidewalk and street, unguarded and practically uncovered. There were no warning signs on or near it, and there was no watchman at the building. * * *

"In our opinion, however, it is not essential to the liability of any of the defendants that they have had actual knowledge of the activities of the children. We think there is no doubt that the conduct of the parties who were responsible for allowing this highly dangerous material to remain on the sidewalk uncovered, unguarded, and with no precautions taken to prevent injury to members of the public, was negligent. We think it may also be said that the box with its material was attractive to small boys, and that defendants were charged with notice of the possibility of boys being allured by it and using it in a manner dangerous to others. Even if defendants knew nothing of the acts of the children in the instant case, they should have known, both from general experience and from the fact that the children had played with the material for days prior to the accident. Under all of the circumstances, the jury might certainly find, as may be implied from the verdict, that the consequences in this case should have been foreseen." (Emphasis added.) See, also, Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L.R.A.,N.S., 559, 139 Am. St.Rep. 134; Catlin v. Union Oil Co., 31 Cal. App. 597, 161 P. 29; Pastene v. Adams, 49 Cal. 87; Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 67 P.2d 678; Rest.Torts, §§ 447-9, 452. It has been tersely stated that:

"If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby." Rest. Torts, § 449. It has been held that the rules on the subject in the Restatement of Torts, sections 442–453, are applicable in this state. Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 67 P.2d 678.

[6] Finally, the issue of proximate cause is essentially one of fact. Fennessey v. Pacific Gas & Electric Co., 20 Cal.2d 141, 124 P.2d 51; 19 Cal.Jur. 732-3.

[7] Particular reliance is placed by defendant upon Schwartz v. California Gas & Electric Corp., 163 Cal. 398, 125 P. 1044, where defendant negligently dropped an insulator on plaintiff's land and the latter's horse was injured when he came in contact with it. The court reversed a judgment for plaintiff on the ground of an alleged erroneous instruction. The opinion contains the erroneous statement that: " 'an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause.' " 163 Cal. at page 402, 125 P. at page 1046. While there are distinguishing factors in the case at bar, the Schwartz case is out of harmony with the rules heretofore stated. It is not always true that an intervening agency will relieve defendant of responsibility. For that reason it must be overruled. Likewise, Solomon v. Red River Lumber Co., 56 Cal.App. 742, 206 P. 498; and Royal Ins. Co. v. Mazzei, 50 Cal.App.2d 549, 123 P.2d 586, are distinguishable, but appear to approve the rule in the Schwartz case. In that respect they are disapproved.

For the foregoing reasons the judgment is affirmed.

GIBSON, C. J., and SHENK, SCHAUER and SPENCE, JJ., concurred.

TRAYNOR, Justice (concurring).

I concur in the judgment. It is my opinion that defendant's liability depends entirely upon whether it violated a duty of protecting the plaintiff from unreasonable risk of harm (See, Restatement: Torts, § 282) and that consideration of the case in terms of proximate cause obscures the real issue. Moreover, I do not believe that "the issue of proximate cause is ordinarily one of fact."

That plaintiff's harm was in fact caused by defendant's conduct there can be no doubt. Whatever the means by which the milk crates were moved from one place to the other, defendant's leaving them in the parking was a substantial factor in bringing about the harm. See, Restatement: Torts, § 431. With that determined, the question of causation is settled. It remains to determine only whether the harm falls within the limits of defendant's legal responsibility for the consequences of its conduct. In my opinion that determination is made once it is established that defendant's conduct was or was not wrongful with respect to the plaintiff; for the risk reasonably to be foreseen not only creates the liability but defines its limits. Palsgraf v. Long Island R. R. Co., 248 N.Y. 339, 344, 346, 162 N.E. 99, 59 A.L.R. 1253; Tullgren v. Amoskeag Mfg. Co., 82 N.H. 268, 276, 133 A. 4, 46 A.L.R. 380; see, Polemis v. Furness, Withy & Co., [1921] 3 K.B. 560; Green, The Rationale of Proximate Cause, pp. 88, 118; Seavey, Mr. Justice Cardozo and The Law of Torts, 52 Harv.L.Rev. 372, 381–390; Gregory, Proximate Cause in Negligence—A Retreat from "Rationalization," 6 U. of Chic.L.Rev. 36.

It must be recognized, however, that the question of legal responsibility is commonly considered in terms of "proximate cause," which is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct. See, Prosser, Torts, pp. 311–313. Although the doctrine of proximate cause is designed to fix the limitations upon liability, it has not yet been so formulated as to have a fair degree of predictability in its application in marking the boundary between liability and nonliability. The vagueness of the doctrine has been candidly admitted in the dissenting opinion of Judge Andrews in Palsgraf v. Long Island R. R. Co., 248 N.Y. 339, 352, 162 N.E. 99, 103, 59 A.L.R. 1253: "A cause, but not the proximate cause. What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." It may well be that any case can be analyzed more clearly without applying the doctrine of "proximate cause." See, Green, Merlo v. Public Service Company—A Study in Proximate Cause, 37 Ill. L.Rev. 429. In any event, application of the doctrine to cases like the present one only leads to confusion, for the considerations that determine whether a defendant was negligent with respect to a plaintiff define the limits of his responsibility. "Almost invariably these cases present no issue of causation in fact, since the defendant has created a situation acted upon by another force to bring about the result; and to deal with them in terms of 'proximate cause' is only to avoid the real issue. The question is one of negligence and the extent of the obligation: whether the defendant's responsibility extends to such interventions, which are foreign to the risk he has created. It might be stated as a problem of duty to protect the plaintiff against such an intervening cause. A decision that the defendant's conduct is not the 'proximate cause' of the result means only that he had not been negligent at all, or that his negligence, if any, does not cover such a risk." Prosser, Torts, p. 367; Palsgraf v. Long Island R. R. Co., supra; Sinram v. Pennsylvania R. Co., 2 Cir., 61 F.2d 767, 770; Waube v. Warrington, 216 Wis. 603, 613, 258 N.W. 497, 98 A.L.R. 394; Bourhill v. Young [1942], 2 All Eng. Rep. 396; Dulieu v. White & Sons [1901], 2 K.B. 669, 685.

When defendant in the present case left its crates unattended on the parking, it created an unreasonable risk that they would be scattered and result in harm to persons whose passage they obstructed. The risk reasonably to be foreseen included the possibility that the crates, left readily accessible to the passing crowd day after day, would be moved about and become a hazard to persons not only on the street and sidewalk but on the other property in the vicinity of the parking. "The kind of harm which in fact happened

might have been expected, though the precise manner in which it happened was determined by an extraneous accident." Pollock, Law of Torts, 9th Ed., pp. 50, 51; Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 637, 638, 67 P.2d 678; Reithardt v. Board of Education, 43 Cal.App.2d 629, 635, 111 P.2d 440; Guinan v. Famous Players-Lasky Corp., 267 Mass. 501, 517, 167 N.E. 235; see, Bohlen, Studies In The Law of Torts, p. 8. It is immaterial that an intervening force moved the crates and brought about the result, for defendant's responsibility extended to such intervention. The possibility that third persons would move the crates was not so remote that it could not be regarded as part of the risk. Defendant's negligence consisted in failing to protect plaintiff against that risk. See, Prosser, Torts, pp. 355–357; Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825; Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 505, 111 P. 534, 31 L.R.A.,N.S., 559, 139 Am.St.Rep. 134; Nason v. Lord-Merrow Excelsior Co., 92 N.H. 251, 253, 29 A.2d 464; Guinan v. Famous Players-Lasky Corp., supra, 267 Mass. at page 517, 167 N.E. 235; Sycamore Preserve Works v. Chicago & N. W. R. Co., 366 Ill. 11, 7 N.E.2d 740, 111 A.L.R. 1133; City of Lawrenceburg v. Lay, 149 Ky. 490, 149 S.W. 862, 42 L.R.A., N.S., 480, Ann.Cas.1914A, 1194; Shanley v. Hurley, 96 Vt. 119, 117 A. 250, 23 A.L.R. 261; cf. Stultz v. Benson Lumber Co., 6 Cal.2d 688, 695, 59 P.2d 100; see, Restatement: Torts, § 302, comment (1), §§ 447–449, 452; 25 Cal.L.Rev. 247; 38 Am.Jur., Negligence, § 70. This course of reasoning departs from the accustomed one only because of the continuing confusion engendered by the doctrine of proximate cause. No rules of property are disturbed: this field of law is not one in which people enter into transactions in reliance on past decisions. In all probability the general expectation is the reasonable one that in time the courts will dispel the mists that have settled on the doctrine of proximate cause in the field of negligence.

If, however, the extent of defendant's liability is determined in terms of "proximate cause" it should be recognized that the issue presented is one of law. Whether a defendant's conduct is an actual cause of a plaintiff's harm is a question of fact, but the existence and extent of a defendant's liability presents a question of law. See, Restatement: Torts, § 453. The distinction is important in determining the respective functions of court and jury and the scope of review by an appellate court. Ordinarily, the jury decides questions of fact and the court questions of law, but there are sometimes variations. See, Thayer, Preliminary Treatise on Evidence At The Common Law, pp. 185, 202; 9 Wigmore, Evidence, 3d Ed., p. 500. With respect to questions of fact the court reserves the power of deciding whether an issue should be presented to the jury: if reasonable men could not differ as to whether the evidence does or does not establish the existence of a fact, the court will not submit the issue to the jury. The determination of the standard of reasonable conduct by which a defendant's conduct is to be measured involves a question of law, a determination whether or not liability should be imposed. This question is nevertheless commonly left to the jury, although sometimes the formulation of the standard of reasonable conduct is taken over by an appellate court or provided for by legislation. See, Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777; Sioux City & Pacific R. Co. v. Stout, 84 U.S. 657, 664, 17 Wall. 657, 664, 21 L. Ed. 745; Grand Trunk Ry. Co. v. Ives, 144 U.S. 408, 417, 12 S.Ct. 679, 36 L.Ed. 485; Restatement: Torts, § 285; Holmes, The Common Law, pp. 120–129; Holmes, Law in Science and Science in Law, 12 Harv.L.Rev. 443, 457. Insofar as the issue of "proximate cause" is concerned with the existence of a duty or with limitations imposed upon liability as a matter of public policy, the issue is for the court. Insofar as it is concerned with the foreseeability of the particular risk or the reasonableness of defendant's conduct with respect thereto in doubtful cases, the issue is for the jury in the absence of standards imposed by the Legislature or an appellate court. See, Restatement: Torts, § 453; Prosser, Torts, pp. 373–375; Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 638, 67 P.2d 678.

EDMONDS, J., concurred.

68 Cal.App.2d 652

**PEOPLE v. LA ROCCA.**

**Cr. 3849.**

District Court of Appeal, Second District, Division 3, California.

**April 4, 1945.**

Hearing Denied May 3, 1945.

**1. Larceny ⇐19**

The essential elements of grand theft from the person are the taking and asportation of property of another from his person with felonious intent.

**2. Larceny ⇐65**

Evidence authorized conviction of grand theft from the person.

**3. Criminal law ⇐254, 260(11)**

A judge sitting without a jury has same right as jury to draw inferences from facts proved, and his conclusions may not be lightly disturbed.

**4. Criminal law ⇐260(11), 1159(2)**

The District Court of Appeal will not attempt to determine weight of evidence, but will decide only whether on face of evidence sufficient facts could not have been found by trier of facts to warrant inference of guilt.

**5. Criminal law ⇐1159(2)**

Before a conviction can be set aside on appeal on ground of insufficiency of evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conviction.

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Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Frank La Rocca was convicted of grand theft from the person, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

The defendant in this case was convicted in a jury-waived trial of grand theft from the person, a felony. He appeals from the judgment and also from the order of the court denying his motion for new trial. He contends that the evidence is insufficient to support the judgment. A survey of the record does not sustain his contention. This record consists of the transcript of testimony taken at the preliminary hearing in this case, which it was stipulated the court might read, and also a transcript of additional testimony taken in the superior court.

One Marksbury testified that on August 28, 1943, at about 6:15 p. m., he boarded a crowded street car headed north on Main Street, at the corner of Fifth Street, in the city of Los Angeles; that he had upon his person a wallet or billfold containing a number of bills. Almost immediately after boarding the car he was jostled from behind and he missed his wallet from the left rear pocket of his trousers. Noticing the defendant just stepping off the car, he followed in a hurry, and as he reached the ground called to the defendant, saying he wished to speak to him. The defendant, however, ignored the call and started to run in a southerly direction. Marksbury pursued him and they ran diagonally across the street to the west sidewalk and south upon the sidewalk and then through a parking lot where the defendant disappeared from view. As they were racing across Main Street, two officers in a police car were traveling south upon that thoroughfare, immediately behind the two men, and when they arrived at the parking lot, parked their car and began a search for the defendant. He was found in a rest room at the rear of a restaurant at 549 South Main Street, arrested and taken to jail. Upon being searched he was found to have currency in three different pockets of his trousers: In the left hand pocket he had bills totaling the sum of $200; in the watch pocket, bills totaling $37; in the right hand trouser pocket, two crumpled dollar bills.

Marksbury, at the preliminary hearing in this case, testified that his wallet at the time his pocket was picked contained bills aggregating $37. The record reads as follows:

"Q. At the time that you claim you had $39.00 in that billfold, what were the denominations of the money? * * * A. I am not exactly certain. I do know there was $37.00 not $39.00.

"Q. You told the police officers you had five five's, didn't you? A. I told the police officers I had some tens and fives. * * *

"Q. Isn't it true you told the police officers you had five five dollar bills? A. It is not.

"Q. How many tens did you tell them you thought you had? A. I told them I thought I had three tens.

"Q. And one five? A. And one five.

"Q. And the rest was in one dollar bills? A. Yes, ma'am."

Officer Tyndall, who searched the defendant, testified as follows:

"Q. The denomination you found on the defendant as to the $37.00 in one pocket, was a twenty and a ten, wasn't it, and then the rest were in one dollar bills? A. It was $37.00 in one pocket and two one dollars separate.

"Q. But that denomination was a twenty dollar bill and a ten dollar bill and the rest in ones, wasn't it? A. I wouldn't swear to it.

"Q. Well, do you recall what the denomination was? A. No, I wouldn't want to say."

The other officer, Mr. Swan, testifying in the superior court, stated that the money found upon the defendant was held for evidence, one package containing $200 in bills and the other $39, consisting of one $20 bill, a $10 bill and nine $1 bills. He testified that Marksbury told him that the $37 in his wallet consisted of three $10 bills, one $5 bill and two $1 bills. The officer stated: "At the time I talked to Mr. Marksbury I didn't know the denominations of the money that was booked in the property clerk's office so then I checked on that and found that there was $39.00 over there, consisting of one twenty dollar bill, a ten dollar bill and nine one dollar bills. * * * I asked him [Marksbury] again if he was sure what the denominations of the money was that was in the billfold. He said he absolutely knew exactly what the denominations were because he had been to the Thrifty store and made some purchases and when he got his money back he put his money in his billfold and he knew exactly and he was positive that he had three ten dollar bills, a five dollar bill and two one dollar bills."

At the trial in the superior court, Mr. Marksbury was asked:

"What is your recollection as to how it was formed, that is, in what size of bills? A. Well, as near as I can recollect, the currency was the same as Mr. Swan stated it was, three ten dollar bills, a five dollar bill and two one dollar bills. Now it could have been other money, could have been other denominations."

In this statement Marksbury was mistaken for, as we have seen, Mr. Swan did not state that the currency was in three $10 bills, a $5 bill and two $1 bills, he merely quoted Marksbury as having made that statement and testified that upon his own examination of the package containing currency, he found one $20 bill, a $10 bill and nine $1 bills.

It is apparent from this review of the testimony concerning the denomination of various bills that the matter was somewhat confusing, but it is to be noted that in his very first answer on this subject at the preliminary hearing Marksbury stated that "I am not exactly certain" of the denominations, and in the last inquiry, which took place in the superior court, while repeating his original impression as to the denominations, completed his statement by saying, "Now it could have been other money, it could have been other denominations."

The trial court's view on this subject appears from his comment: "The only thing which is stressed here particularly is the denominations of money, which, so far as I can determine, the victim has never been categorically certain of—he thinks that it was a certain sum, which apparently varies from that *that* [which?] was found; he never did vary from the fact that he had $37 and he didn't have $39."

The defendant did not testify at the preliminary hearing, but took the stand in the superior court. He stated that on August 28th he had $200 in a secret pocket, $37 in his right hand watch pocket and $2 and some change. He denied that he took Marksbury's billfold or any money from him. He admitted that he had served time in the State Penitentiary for grand theft from the person and also a term for grand larceny. He stated that he was getting on the street car at Fifth and Main Streets and being asked, "what was your purpose in getting off the street car immediately this incident happened," stated that he saw somebody taking Marksbury's pocketbook and "I figured if the man turned around and accused me I would have a hard time convincing him I didn't take it." He admitted that he told Officer Tyndall that the reason he got off the street car was because he thought he was being pursued by a "bunch of pachuchos." He further testified that he told this story to Tyndall

because he did not want to expose his record and for the same reason denied that he had suffered a previous arrest. He testified he did not attempt to advise Marksbury that somebody was taking his pocketbook;

"I was scared when I seen what went on there I got off the car. * * * after I had gotten on the street car and the man looked at me, I was scared then and I ran.

"Q. And you passed right near the spot where the pocketbook was later found, didn't you? A. I don't know where the pocketbook was found, but I ran down south on Main Street."

Testimony had previously been given by Tyndall that shortly after the defendant was taken to the police station this officer made a search in the neighborhood of Fifth and Main Streets and found Marksbury's wallet, containing identifying papers but no currency, lying in the gutter in front of 535 South Main Street, at a point where the defendant was running, just north of the parking lot which has been mentioned.

[1-5] The appellant, arguing that there was a failure to prove by credible evidence that the theft had been committed, cites us to People v. Edwards, 1925, 72 Cal.App. 102, 236 P. 944, where the court discourses upon the essential elements of the crime of larceny, namely, the taking and asportation of property of another with felonious intent. Under that rule, and the additional element that in this case the theft was charged to have been committed from the person of Mr. Marksbury, can it be said that the judgment was without evidence to support it? We think not. Just as a jury is entitled to draw inferences from the facts proved in a criminal case (People v. Megladdery, 1940, 40 Cal.App.2d 643, 653, 105 P.2d 385), so a judge sitting without a jury has the same right and his conclusions may not be lightly disturbed. In People v. Newland, 1940, 15 Cal.2d 678, at page 681, 104 P.2d 778, at page 779, the court said: "The rule applicable where there is evidence, circumstantial or otherwise, that a crime has been committed and that the defendant was the perpetrator thereof, has been many times reiterated by the reviewing courts of this state as follows: The court on appeal 'will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground' of insufficiency of the evidence, 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.'" Somewhat the same idea was expressed in People v. Mercado, 1922, 59 Cal.App. 69, 209 P. 1035. In that case the appellate court stated its position in the following language (page 70 of 59 Cal.App., page 1036 of 209 P.): "This court, as we often have said, will not weigh the testimony of witnesses where there is sufficient evidence, if believed by the jury, to justify the verdict. We will reverse a judgment on the ground of the insufficiency of the evidence only when, giving full credence to all the inculpatory evidence, it falls short of that which the law requires. In view of this well-settled rule, we think there was ample evidence to justify the conviction."

As applied to the facts and circumstances of the instant case, we might well adopt the closing sentence of this statement.

Judgment and order affirmed.

SHINN and PARKER WOOD, JJ., concur.




## BURROUGHS v. BEN'S AUTO PARK, Inc., et al. (two cases).*

Civ. 14670.

District Court of Appeal, Second District, Division 2, California.

March 27, 1945.

Rehearing Denied April 13, 1945.

Hearing Granted May 24, 1945.

**1. Landlord and tenant ⇐169(10)**

In action for injuries sustained when parking lot patron attempting to walk around rear end of automobile fell into the light well which was not discernible because of poor illumination, instruction

* Subsequent opinion 164 P.2d 897.

regarding liability of lessor of parking lot was not objectionable.

**2. Appeal and error ⇐1010(1)**

Negligence of defendant is question of fact for determination of trier of facts whose finding will not be disturbed by an appellate court if there is substantial evidence to support it.

**3. Landlord and tenant ⇐169(8)**

In action for injuries sustained when parking lot patron attempting to walk around rear end of automobile fell into the light well which was not discernible because of poor illumination, evidence sustained implied finding that patron's injury was not due to any negligence of lessor of parking lot, but was due to use to which lessee had put the leased property.

**4. Landlord and tenant ⇐167(1)**

Lessor is not liable for injuries resulting from misuse of leased property by lessee.

**5. Landlord and tenant ⇐167(4)**

Where rear end of automobile, parked on parking lot, extended over light well of adjacent hotel property and parking lot patron attempting to walk around rear end of automobile fell into the light well which was not discernible because of poor illumination, lessor of parking lot was not liable for the patron's injuries.

**6. Trial ⇐260(8)**

In action for injuries sustained when parking lot patron attempting to walk around rear end of automobile fell into the light well which was not discernible because of poor illumination, refusing patron's requested instruction regarding liability of lessor of lot was not error, where patron admitted that condition of lot was same at time of accident as when it was first leased, and jury had been fully advised regarding condition of lot at time it was leased and lessor's responsibility for such condition.

**7. Negligence ⇐42, 44**

An erection or excavation already existing and not otherwise unlawful does not become unlawful when abutting landowner creates a dangerous condition by altering the character of his property.

**8. Negligence ⇐126(1)**
**New trial ⇐35**

In personal injury action when parking lot patron attempting to walk around rear of automobile fell into the light well of adjacent hotel property which was not discernible because of poor illumination, refusing to permit owners of hotel property to show that dangerous condition was created by lessee or owner of parking lot in removing wall was error, requiring new trial as to owners of hotel property.

**9. Appeal and error ⇐790(3)**

Where order granting certain defendants' motion for a new trial was affirmed, question presented on their appeal from judgment against them became moot and their appeal would be dismissed.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Personal injury action by James Burroughs against Ben's Auto Park, Inc., Ben Sirota, Clancy Killgore, Pacific Electric Railway Company, Bessie E. Peery, and J. J. Peery and others. From a judgment for the Pacific Electric Railway Company, and from an order granting a new trial to defendants Bessie E. Peery and J. J. Peery, the plaintiff appeals, and from judgment rendered against them, Bessie E. Peery and J. J. Peery appeal.

Judgment for defendant Pacific Electric Railway Company affirmed, order granting new trial to defendants Peery affirmed, and appeal from judgment against defendants Peery dismissed.

McLaughlin & McGinley, of Los Angeles, for appellant.

Parker, Stanbury & Reese, Harry D. Parker, and Peery Price, all of Los Angeles, for respondents Peery.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondent Pacific Electric Ry. Co.

McCOMB, Justice.

These are appeals by:

A. Plaintiff, from a judgment in favor of defendant, Pacific Electric Railway Company, after trial before a jury in an action to recover damages for personal injuries received by plaintiff when he fell off a parking lot of which defendant Pacific Electric Railway Company was the lessor;

B. Plaintiff, from an order granting a new trial to defendants Bessie E. Peery and J. J. Peery; and

C. Defendants Peery from the judgment rendered against them.

The following is a picture of the scene of the accident hereinafter described.




The evidence being viewed in the light most favorable to the defendants (respondents Pacific Electric Railway Company, Bessie E. Peery and J. J. Peery), the material facts are:

In January, 1940, defendant Pacific Electric Railway Company, the owner of a vacant lot located at 417 South Olive Street, Los Angeles, hereinafter referred to as the Auto Park, leased the same to defendant Ben Sirota for the term ending December 31, 1942. On July 16, 1942, at the request of Mr. Sirota, the lessor extended the term of the lease for three months, on a month to month basis. The Trenton Hotel owned by defendants Peery is a seven story building located adjacent to the southerly boundary of the surface of the auto park. The elevation of the surface of the auto park is approximately

twelve feet above the surface of the ground floor of the Trenton Hotel. Between the south side of the auto park and the north wall of the Trenton Hotel, a narrow areaway or light well extends from Olive Street to the rear of the lot, a distance of approximately 160 feet, entirely within the premises of the hotel. At the time of the accident, the auto park was equipped with two light standards erected on its south boundary each about 20 feet high. One of these was located between 45 and 50 feet from Olive Street, and the other was approximately 60 feet further to the rear of the auto park. Both were equipped with lighting facilities and reflectors at the top, but the one nearer the rear or the westerly side of the auto park was unlighted on the night of the accident leaving the rear of the lot in relative darkness. There were also two lights on the northerly boundary of the auto park, and one or two on the westerly boundary, but none of these was lighted when the accident occurred.

At about 8 p.m. on January 28, 1943, plaintiff drove his automobile into the auto park and after paying the parking fee and receiving a parking ticket, proceeded to a nearby theater. At about 11 p.m., plaintiff returned to the auto park and being unable to immediately locate the attendant, plaintiff found his car parked at the southerly side of the auto park with two other cars parked directly in front of it. Plaintiff then contacted the attendant, told him where his car was, and requested him to remove the cars in front so he could drive his car out.

As the attendant started to drive the first car, plaintiff proceeded toward his car, but as there was a second row of cars parked immediately to the east of that which included plaintiff's, he undertook to reach his automobile by walking south along the aisle to the east of the second row. It was plaintiff's intention to pass through the second row by walking in front of the rear vehicle, but on arriving there he discovered that there was no space between the two cars. The rear end of the last car in the second row extended over the light well. The illumination was poor and the light well was not discernible to plaintiff. As he proceeded to walk around the rear of the car he fell into the light well and received serious personal injuries.

Defendants concede that the auto park was in the same physical condition when it was leased in January, 1940, as when the accident occurred in January, 1943.

A.

Plaintiff relies for reversal of the judgment in favor of defendant Pacific Electric Railway Company on two propositions which will be stated and answered hereunder seriatim:

First: *The trial court committed prejudicial error in instructing the jury as follows:*

*"Insofar as the defendant Pacific Electric Railway Company is concerned you must determine its liability, if any, solely by considering the condition of the premises at the time Ben's Auto Park, Inc. or Mr. Sirota took possession. Anything that happened after that time is immaterial as to the Pacific Electric Railway Company, and if you find that considering the construction of the premises, together with the lighting facilities furnished, the property was reasonably safe for use as a parking lot at the time it was leased, the Pacific Electric Railway Company is not liable to plaintiff and you should under such circumstances return a verdict in favor of that Company, whether or not your verdict is against any other defendant or defendants."*

*"When a tenant enters into possession under a lease the owner parts with all his right to and control over the premises during the term of the lease and any extensions thereof. During the time the premises are occupied by the tenants the owner has no duty to make repairs to, or maintain the property so as to correct any defects or dangerous conditions arising after the tenant takes possession, and an owner is not liable for injuries resulting from defects or dangerous conditions in the leased property which occur after the tenant has taken possession."*

*"The evidence is undisputed in this case that prior to the expiration of the lease entered into between Ben Sirota and the Pacific Electric Railway Company covering the premises occupied by Ben's Auto Park, said lease was on December 16, 1942, extended and under such circumstances Pacific Electric Railway Company had no authority or right to enter upon the premises covered by said lease at the time originally fixed for the expiration thereof,*

*or during the period of the extension and the lessee had the exclusive right to the use and occupancy of the property leased by him without interference by the Pacific Electric Railway Company as to the manner in which he conducted or maintained said premises."*

*"If you find from the evidence that the parking lot was reasonably safe to be used for that purpose at the time it was leased, and that the danger, if any, to persons using those premises arose after the tenant took possession, the Pacific Electric Railway Company cannot be held responsible for such danger, if any. In other words, if the parking lot was reasonably safe to be used for that purpose before the tenant took possession, the Pacific Electric Railway Company is not liable for a dangerous condition, if any, which arose from the manner in which the premises were thereafter used or maintained by the tenant."*

[1,2] This proposition is untenable and is governed by an unbroken line of decisions in this state holding that negligence upon the part of a defendant is a question of fact for determination by the trier of fact, whose finding will not be disturbed by an appellate court if, as in the instant case, there is substantial evidence to support it. McWane v. Hetherton, 51 Cal. App.2d 508, 511, 125 P.2d 85.

[3-5] Applying this rule to the instant case the jury having heard the evidence, impliedly found that plaintiff's injury was not due to any negligence of defendant Pacific Electric Railway Company but was due to the use to which the lessee had put the leased property. The lessee's negligence consisted in parking cars so that the rear portions thereof extended over the light well without maintaining proper safeguards, lights, or barriers so as to prevent patrons from being injured. Since the lessor is not liable for injuries resulting from the misuse of leased property by a lessee, Kalis v. Shattock, 69 Cal. 593, 600, 11 P. 346, 58 Am.Rep. 568; Lucid v. Citizens Invest. Co., 49 Cal.App. 257, 260, 193 P. 161; Meloy v. City of Santa Monica, 124 Cal.App. 622, 627 et seq., 12 P.2d 1072, defendant Pacific Electric Railway Company was free from negligence in the instant case.

Dennis v. City of Orange, 110 Cal.App. 16, 293 P. 865; King v. New Masonic Temple Ass'n, 51 Cal.App.2d 512, 125 P.2d 559; Boothby v. Town of Yreka City, 117 Cal.App. 643, 4 P.2d 589, are not applicable to the facts in the instant case for in such cases the injury was not caused by the use which the lessee made of the leased premises, but was caused by a defect in the condition of the premises which defect existed at the time the lease was executed.

Second: *The trial court committed prejudicial error in refusing to instruct the jury as follows:*

*"You are instructed that if you find from the evidence that defendant Pacific Electric Railway Company, a corporation, and defendant Ben Sirota made a lease of the auto parking lot referred to in the evidence for a public or semi-public purpose, and further find that the Pacific Electric Railway Company, a corporation, renewed such lease prior to the date of the accident, and if at the time of renewal of said lease the leased premises were in such condition as to make its intended use dangerous to other persons, and if that condition then was known to the defendant Pacific Electric Railway Company, or if it should have been known to it in the exercise of ordinary care, then Pacific Electric Railway Company, a corporation, is liable to the plaintiff for any injury proximately caused by the unsafe condition of said premises, provided, of course, that the injured person is not guilty of contributory negligence."*

*"If you find from the evidence that the auto park premises were in an unsafe and dangerous condition either at the time the Pacific Electric Company leased the same to the defendant Benjamin Sirota or on the renewal of the lease for the period commencing January 1, 1943, then I instruct you that Pacific Electric Company cannot, by any provisions of said lease with defendant Benjamin Sirota, be relieved from the duties owed to an invitee as I have outlined in these instructions."*

[6] This proposition is likewise untenable since plaintiff admits on page 31 of his opening brief that the condition of the auto park was the same at the time of the accident as when it was first leased in 1940; therefore the jury was fully advised as to the condition of the auto park at the time it was leased, and defendant Pacific Electric Railway Company's responsibility for such condition.

Plaintiff also admits on page 35 of his opening brief that the only change in the

premises from November, 1942, until the date of the accident was that only one of the five lights was illuminated when the accident occurred. This difference being merely a difference in the use of the premises, would not sustain a finding of liability upon the part of the Pacific Electric Railway Company in view of the rule stated in the authorities hereinbefore cited.

B.

At the time of the trial, defendants Peery offered to prove that until 1920 the southerly wall of the auto park, separating it from the Trenton Hotel property, was five or six feet above the surface of the property now used as an auto park. This offer the trial court rejected; however, at the time of the hearing of the motion for a new trial, the trial judge believed the refusal to admit this testimony was error and granted defendants Peery a new trial. The trial court's ruling in granting the motion for a new trial was correct.

[7] It is the law that an erection or excavation already existing and not otherwise unlawful does not become unlawful when the abutting landowner creates a dangerous condition by altering the character of his property. Galiano v. Pacific Gas & Elec. Co., 20 Cal.App.2d 534, 542, et seq., 67 P.2d 388; Kleinberg v. Schween, 134 App.Div. 493, 119 N.Y.S. 239; Gordon v. Schween, 117 N.Y.S. 191.

[8] Applying this rule to the facts in the instant case the trial judge should have permitted the defendants Peery to show that the dangerous condition was created by the lessee or owner of the auto park, and having failed to do so after an offer of proof was made, a new trial was properly granted as to such defendants.

Hansen v. Southern Pacific Company, 105 Cal. 379, 38 P. 957, is not in point. In that case the liability of the defendant was predicated upon its permitting the public to use a footpath over its land for more than twenty years. In the instant case the record is devoid of any evidence that defendants Peery ever knew or permitted any person to walk or climb from the auto park into the areaway where the accident occurred.

In view of our conclusions it is unnecessary to discuss other authorities presented by counsel, since they are all factually distinguishable from the instant case.

C.

[9] Inasmuch as the order granting defendants Peery's motion for a new trial is affirmed, the questions presented on their appeal from the judgment against them have became moot and such appeal should be dismissed. North Confidence Mining & Development Co. v. Fitch, 58 Cal.App. 329, 336, 208 P. 328; Etchas v. Orena, 121 Cal. 270, 272, 53 P. 798; Ingalls v. Bell, 43 Cal.App.2d 356, 358, 110 P.2d 1068.

For the foregoing reasons the

A. Judgment in favor of defendant Pacific Electric Railway Company is affirmed;

B. Order granting a motion for a new trial as to defendants Bessie E. Peery and J. J. Peery is affirmed; and

C. Appeal by defendants Bessie E. Peery and J. J. Peery from the judgment against them is dismissed.

MOORE, P. J., concurs.






68 Cal.App.2d 657

**HART v. OLSON et al.**

**Civil 12771.**

**District Court of Appeal, First District, Division 2, California.**

**April 6, 1945.**

**Rehearing Denied May 5, 1945.**

**Hearing Denied May 31, 1945.**

**1. Gifts ⇐49(5)**

In action to recover funds represented by bankbooks in decedent's safe deposit box on ground of decedent's gift thereof to plaintiff, plaintiff's testimony, denying that he made statements testified to by deputy public administrator and another, merely created conflict and did not preclude trial court from inquiring into true facts presented by all circumstances surrounding alleged gift.

**2. Gifts ⇐49(5)**

In action to recover amount of decedent's bank deposits on ground of gift thereof to plaintiff, trial court was bound to receive with caution all evidence of

plaintiff and others as to statements by plaintiff concerning gift.

3. Appeal and error ⇐1011(1)

The trial court's fact findings on conflicting evidence are conclusive on appeal.

4. Gifts ⇐49(5)

In action to recover amount of decedent's bank deposits, evidence warranted trial court's finding that decedent made no gift of such deposits to plaintiff.

5. Appeal and error ⇐169

A point, which appellant did not raise, nor ask ruling on, in trial court, may not be made in appellate court for first time.

6. Appeal and error ⇐971(2)

The trial court has wide discretion in determining who are decedent's intimate acquaintances, qualified to testify as to his mental incapacity to make gift, and its ruling on such matter will not be disturbed by appellate court, in absence of showing of clear abuse of discretion. Code Civ.Proc. § 1870, subd. 10.

7. Evidence ⇐555

Where physicians, testifying as to decedent's insanity at time of alleged gift of bank deposits by him, based their opinions on what they observed, statement of facts on which opinions were based was unnecessary.

8. Appeal and error ⇐204(7)

A contention, not made in trial court by objection to hypothetical question asked expert witnesses, that such question contained recitals of fact not elicited as evidence, may not be made in appellate court for first time.

9. Appeal and error ⇐1011(1)

In action to recover amount of decedent's bank deposits on ground of decedent's gift thereof to plaintiff, conflict in testimony as to whether decedent was of sound mind, though suffering from strangulated hernia, at time of alleged gift, was addressed to trial court as trier of facts, not to District Court of Appeal.

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Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Frederick B. Brown, for whom Fred B. Hart was substituted as plaintiff, against Adolfine Olson, as administratrix of the estate of Hilmer Oscar Hanson, deceased, and others, to establish title to, and recover possession of, funds represented by certain bankbooks in deceased's safe deposit box on the ground of decedent's gift thereof to original plaintiff. Judgment for defendant administratrix, and substituted plaintiff appeals.

Affirmed.

Fred B. Hart, of Oakland, in pro. per., for appellant.

Alfred Nelson, of Piedmont, for respondent.

STURTEVANT, Justice.

Claiming that the defendant's decedent, H. O. Hanson, did by an alleged gift transfer the same to him, one Frederick B. Brown commenced this action to establish his title and to obtain possession of the funds represented by certain bank books contained in a certain safe deposit box. Later the defendant answered. Still later an order was made substituting Fred B. Hart as plaintiff. The action was tried before the court without a jury. The court made findings in favor of the defendant and the plaintiff has appealed and brought up a bill of exceptions. He attacks some of the findings.

Prior to November 9, 1939, the said Frederick B. Brown was a man aged 90 years or over. He resided in the house operated by Mary D. Martin in Oakland. At said time and for some years prior thereto he was an intimate acquaintance of H. O. Hanson. Frequently they exchanged visits. Said Hanson was, and had been for some years, afflicted with a hernia which caused him serious illness at times. He wore a truss but occasionally the intestines protruded through the hernia and caused him excessive pain. On the evening of November 8, 1939, he called on his friend Frederick B. Brown. It was one of his bad days. The hernia was then, and for some hours had been, what is called a strangulated hernia. Hanson remained that night as a guest of Frederick B. Brown. He suffered much pain during the night and planned to go to a hospital the next morning. As the morning approached he made arrangements to carry out that plan. He sent Mr. Brown to purchase some new underwear. While Mr. Brown was absent both Mr. and Mrs. Martin passed the room where Hanson was. Hearing him moaning each entered the room to see if assistance could be

rendered. While they were in the room Mr. Brown returned. Taking up the story as told by Mr. Brown on the witness stand it is as follows: "Hanson soon reached over, took up some keys, handed them to me, saying they were the keys to his safe deposit box, that he gave me the contents of the box, 'that everything in that box is yours'. I accepted them. Mrs. Martin and her husband left. Hanson was in full possession of his mental faculties and knew what he was doing." At about noon on November 9, 1939, Hanson and Brown went to Highland Hospital. Later they moved to Providence Hospital. There they arrived at about 4 p. m. on the same day. At about 8 p. m. Hanson was operated on by Dr. Hodgins and Dr. St. Clair. Basing his claims on said facts Mr. Brown alleged in his complaint: "IV. That on the 9th day of November, 1939, in contemplation of death, said decedent made a gift of said box and the property represented therein, and delivered the possession thereof, to plaintiff, who accepted the same, and ever since has been and now is the owner of and entitled to the possession of the said property." The defendant administratrix denied said allegation and in her amended answer alleged: "Further answering said complaint this answering defendant alleges that at no time on the 9th day of November, 1939, was said Hilmer Oscar Hanson, deceased, of sound mind and that at no time on said 9th day of November, 1939, was said Hilmer Oscar Hanson mentally competent to know and understand the nature, meaning or quality of a gift and at no time on said 9th day of November, 1939, was said Hilmer Oscar Hanson mentally able to know and understand his natural relation toward the natural objects of his bounty or the extent of his own property." The trial court made findings against the plaintiff and in favor of the defendant. The plaintiff contends no one of said findings was supported by the evidence. We think he is mistaken as to each of those claims. The attack on what was said in the conversation in Mr. Brown's room by Mr. Hanson, and the legal effect of those words under the allegation that he was then not of a sound and disposing mind, present two entirely different legal propositions. We will discuss them in the order stated.

The plaintiff quotes the testimony hereinabove set forth given by Mr. Brown and the testimony given by both Mr. and Mrs. Martin, and thereupon he asserts: "Here the facts are undisputed." However he omits many circumstances, the evidence of which was adduced at the trial, and which the trier of the facts was entitled to use in weighing the testimony. Some of those circumstances were the following: On November 14, Mr. Ober, a deputy county treasurer of Alameda County, by appointment met Mr. Bryant, deputy public administrator, Mr. Frederick B. Brown, Mr. P. A. Rothrock (Mr. Brown's attorney), and a representative of the Bank of America, at the safe deposit vault and at that time and place Mr. Ober borrowed the keys in the possession of Mr. Brown and opened the box. As Mr. Ober testified: "In it I found a deed, a statement from Gotsborg Bank of Sweden showing Mr. Hanson had on deposit in that bank 38,283.57 kroner, pass book No. 21,921 of Central Bank representing a deposit of $2034 in the name of Hilmer O. Hanson, one Y M watch and chain, a will and other papers of no value. Mr. Brown had, besides this, in his possession but not in the box, a pass book showing a deposit of $340 in some bank." The will mentioned by the witness was introduced in evidence. It was a formal holographic will written on three pages. It was written and dated at Oakland, September 5, 1935, and named Salem Lutheran Home as executor. It specified decedent's deposits and named Central Bank of Oakland, Bank of America, San Francisco Bank, Aktichbrolaget Gote Bank and Gothenburg Bank as the banks of deposit. It provided $300 for funeral expenses and $700 for a vault in the mausoleum, El Cerrito, Contra Costa County. It left a fund of $4000 to Salem Lutheran Home to care for Adolfina Olson, and it left the moneys deposited in Aktichbrolaget Gote Bank to the daughters of decedent's niece but made no other bequests.

Turning back to the testimony given by Mr. Brown, it is patent that the same was ambiguous. It was so brief as not to indicate fully and completely the intention of the donor. In other words, assume that Mr. Hanson stated the will was given to Mr. Brown, the question at once arises for what purpose, to enable the latter to probate it, to destroy it, or what? There was not a word contained in the statement of the decedent that he was dissatisfied with the will in any respect what-

soever. In passing it should be noticed that the plaintiff contends the estate amounted to $15,000. The record does not show that fact. The will mentions kroners. The plaintiff says the value of a kroner is equivalent to $.268 of our money. The record does not show that fact, nor does it show the value as of the date of making the will or as of any other date.

Both Mrs. Martin and Mr. Martin delineated the statements made by the decedent Hanson in almost the same words used by the witness Brown. However Mr. Martin made the statement, "He (the decedent) looked like he was about dead." Both Mrs. Martin and Mr. Martin testified that they never discussed with Mr. Brown what Hanson had said. Mr. Brown testified he had never discussed with Mr. and Mrs. Martin what Hanson had said. Bearing in mind that Mr. Brown was a roomer in the household of Mr. and Mrs. Martin, had been for a number of years, and continued as such roomer for a number of months after the death of Mr. Hanson, all of those statements were highly improbable.

Looking back at the testimony given by Mr. Ober, there were in the box "other papers of no value." At Highland Hospital, Mr. Brown testified: "He wanted me to take possession of the contents of his pockets and the hospital attendant searched his clothes, put the contents of his pockets in a bag and gave it to me. These consisted of a bank book showing a deposit of $340 and some papers. Hanson told me that that money was to be used to pay his expenses at the hospital and of sickness. I brought them back to my room when I left him and later gave the bank book to the public administrator, some of the papers to Stout (the undertaker) and destroyed the rest, I suppose, as they were worthless. I don't remember what became of them." No witness gave any evidence regarding any of said "papers," nor the contents of any one of them.

[1-3] Mr. Hubert D. Bryant, the deputy public administrator, testified: "When we went there (to the safe deposit vault) Brown told me Hanson had left him property. If my recollection is right he told me Hanson told him if anything happened to him to go to the bank and get the Swedish money." As such facts are of the utmost importance to a public administrator the trial court might well assume that Mr. Bryant carefully repeated the statements made to him.

Mr. Bergsten was in charge of the office at the Salem Home. He testified that he called on Mr. Brown, that the latter told him about opening the box and that they found a will and some of the money. Continuing the witness testified: "Now Mr. Brown said that when Hanson was brought to the hospital he had need of some money and for him to take the keys and get that in case he had any payments to be made. He said when they opened the box he thought Mr. Hanson had left something for him, that he did not find anything and that he would like to be reimbursed to the extent of $50 for things he had done." That statement contained a clear implication that Hanson turned over the keys to Mr. Brown for the sole purpose of allowing the latter to get moneys needed for immediate use. It also contained the implication that Mr. Brown was claiming the right to be reimbursed for services rendered, and was not at that time claiming a gift had been made to him by Hanson.

True it is that Mr. Brown took the stand and denied that he made the statements testified to by Mr. Bryant and those testified to by Mr. Bergsten. However that merely created a conflict and did not preclude the trial court from inquiring into the true facts presented by all of the circumstances surrounding the alleged gift. The trial court was bound to receive with caution all such evidence. Mutual Benefit Life Ins. Co. v. Clark, 81 Cal.App. 546, 254 P. 306; O'Shea v. Sicotte, 52 Cal.App. 331, 334, 198 P. 812; Estate of Reinicke's Estate, 44 Cal.App.2d 271, 277, 112 P.2d 311; Brooks v. Whitman, 122 Cal.App. 660, 10 P.2d 1007. Apparently it did so. Some of that evidence it believed and some it rejected and made findings accordingly. Such findings are conclusive in this court.

[4] Giving effect to all these circumstances it may not be said that the trial court erred in finding that the words used by Hanson did not constitute a gift of any bank deposit.

[5, 6] The plaintiff also attacks the findings that the decedent was of unsound mind at the time the purported gift was made. On pages 29 to 31 he recites facts claimed to be circumstances to be considered as proved. Many of said facts do not ap-

pear in the record. The plaintiff attacks the opinion of Mrs. Olson as not being worthy of consideration because she did not see her brother, Mr. Hanson, frequently. The record is clear that Mr. Hanson resided in Oakland and that Mrs. Olson resided in San Francisco. It is also clear that their relations were not unfriendly. How often they saw each other does not appear. However the plaintiff argues that Mrs. Olson was not an intimate acquaintance. Code Civ.Proc. sec. 1870, sub. 10. In the trial court the plaintiff made no objection to that effect and the trial court was not asked to rule on the point, therefore the point may not be made in this court for the first time. 2 Cal.Jur. 234. Furthermore, the trial court has a wide discretion in determining who are intimate acquaintances, C.C.P. sec. 1870, sub. 10, and its ruling will not be disturbed in the absence of a showing of a clear abuse of discretion. In re McKenna's Estate, 143 Cal. 580, 583, 77 P. 461. In Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L.R.A.,N.S., 818, Ann.Cas.1913B, 1230, the same contentions were made which this plaintiff makes. On page 385 of 161 Cal., at page 514 of 119 P., 38 L.R.A.,N.S., 818, Ann.Cas.1913B, 1230, the court said:

"In support of the allegations of the complaint, a number of witnesses, having first qualified as intimate acquaintances of Dunphy, expressed the opinion that he was of unsound mind. In accordance with the provision of the Code of Civil Procedure (sec. 1870, subd. 10), each of these witnesses gave 'the reason for the opinion.' The appellant undertakes to analyze the various reasons so given, and argues that they are not adequate to justify the conclusion drawn from them. Reliance is placed upon In re Dolbeer's Estate, 149 Cal. 227, 86 P. 695 [9 Ann.Cas. 795], where it was said that the opinion of an intimate acquaintance respecting the mental sanity of a person 'can have no weight other than that which the reasons' (upon which it is based) 'bring to its support.' We do not understand this to mean that the appellate court is to put itself in the position of the trial court, and, from an examination of the reasons assigned, determine as an original question whether the opinion of the witness is to be given any weight or is to be rejected." See also 14 Cal.Jur. 372, Insane Persons, sec. 25.

[7] The plaintiff also attacks the testimony given by Dr. Hodgins and Dr. St. Clair. The former was, and had been for some years, the doctor for the decedent. When the decedent was taken to the hospital Dr. Hodgins went to his assistance. Later in the day he called in Dr. St. Clair. About 8 o'clock in the evening Dr. St. Clair operated on Hanson and Dr. Hodgins administered the anesthetic. Basing their testimony on what they had observed, both testified that Hanson was of unsound mind when he entered the hospital and had been for some time previous thereto. As each witness based his opinion on what he had *observed* it was not necessary that either should state the facts on which he based his opinion before expressing it. 10 Cal.Jur. 970; 22 C.J. 527; 32 C.J.S., Evidence, § 459, p. 101. They both testified that Hanson was senile, that the rupture had been strangulated three or four days, that such strangulation produced intense pain and that Hanson's constitution was so affected that he could not be said to be of sound mind.

[8] The defendant also called Dr. Smith and Dr. Slavich as experts. To each a hypothetical question was addressed. In reply each witness testified that Hanson was of unsound mind at the time the alleged gift was made. The plaintiff now contends that the hypothetical question contained recitals not shown to have been elicited as evidence in the case. However an examination of the record discloses no objection of that kind was made in the trial court and it is settled law that such a contention may not be made in this court for the first time. Holland v. Kelly, 74 Cal.App. 576, 579, 241 P. 579.

[9] The plaintiff called some witnesses who gave testimony to the effect that although Hanson was suffering from a strangulated hernia, nevertheless he was of sound mind. That testimony created a conflict, but the conflict was addressed to the trier of the facts and not to this court.

The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.

68 Cal.App.2d 627

**In re HENSHAW'S ESTATE.**

**HENSHAW v. HENSHAW.**

**No. 12754.**

District Court of Appeal, First District, Division 2, California.

April 3, 1945.

Rehearing Denied May 3, 1945.

Hearing Denied May 28, 1945.

**1. Trusts ⇐61(1)**

The probate court has jurisdiction under statute to determine conflicting interests of rival beneficiaries of testamentary trust and their assignees on final or partial termination of trust after distribution decree. Probate Code, §§ 1120, 1240.

**2. Trusts ⇐61(1)**

The statute providing that superior court shall retain jurisdiction of testamentary trust estate after final distribution for purpose of determining to whom property shall pass on final or partial termination of trust gives probate court power to determine conflicting claims to present right of possession of estate, whether based on inheritance, descent or contract. Probate Code, §§ 1020.1, 1120.

**3. Assignments ⇐52**

Ordinarily, promise to pay obligation from proceeds of specific fund is not present assignment of any portion of fund, but such a contract is open to construction, and courts, in effort to see that equity is done, frequently relax such rule and permit evidence to show parties' intention beyond limited words of contract.

**4. Trusts ⇐61(1)**

In proceeding for distribution to petitioner of sum due him from testamentary trust beneficiary out of portion of trust fund allotted to such beneficiary, evidence supported finding that petitioner and beneficiary, by contract for beneficiary's payment to petitioner of sum sued for from proceeds of trust estate, created equitable lien on beneficiary's share of trust fund for such amount and intended assignment of such portion of trust to petitioner.

**5. Liens ⇐7**

Equitable liens are favored to do justice and prevent unfair results, so that trial court's finding on only reliable evidence presented, after full and impartial hearing, that parties to proceeding intended to create equitable assignment and lien, should not be disturbed on appeal.

**6. Appeal and error ⇐1050(1)**

In proceeding for distribution to petitioner of specified sum from portion of testamentary trust fund allotted to respondent in payment of advances made by petitioner to respondent, who claimed that part of them were for payment of gambling debts, admission of testimony of corporation's bookkeeper as to making of such advances out of corporation's funds was not prejudicial to respondent, in absence of testimony by such witness as to whether any advances were made in payment of gambling debts.

**7. Jury ⇐25(6)**

A demand for jury trial, filed by respondent over five months after cause was first set for trial on his request, was properly denied as not in compliance with statutory provisions. Code Civ.Proc. § 631.

**8. Gaming ⇐21(2)**

Generally, moneys paid out in discharge of gambling debt at loser's request may be recovered by payor.

**9. Gaming ⇐23**

The basic principle, on which gambling debts are held unenforceable, is that courts should not lend their aid to illegal transactions.

**10. Gaming ⇐49(3)**

In proceeding for distribution to petitioner of amount of respondent's note, payable to petitioner, from portion of testamentary trust fund allotted to respondent, evidence warranted inference that such amount represented money advanced to respondent by petitioner for other than gambling purposes, so as to entitle petitioner to recover entire amount as against contention that portion thereof represented moneys advanced for payment of gambling debts many years before parties' settlement, pursuant to which note was executed.

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Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Frederick W. Henshaw, deceased, by Griffith Henshaw for distribution to him of a specified sum out of the portion of a testamentary trust awarded to Stanley Henshaw. Judgment for petitioner, and respondent Stanley Henshaw appeals.

Affirmed.

Baldwin Robertson, of Los Angeles, for appellant.

Chickering & Gregory, of San Francisco, for respondent.

NOURSE, Presiding Justice.

In a proceeding under Section 1120 of the Probate Code the petitioner had a decree awarding him the sum of $26,000 out of the portion of a testamentary trust awarded to Stanley Henshaw, who is the appellant herein.

Frederick W. Henshaw died testate in June, 1929. By his will he left a large part of his estate in trust to his widow, the remainder, upon her death, to go to his three sons then surviving, Stanley, Frederick and Stuart. The widow deceased in April, 1943. The son Suart died in May, 1939. Frederick, Stanley and Griffith, a nephew of the testator, were named as trustees under the will. Upon the death of the widow Frederick and Stanley, without joining their co-trustee, petitioned for an equal division of the trust. Griffith then appeared as a petitioner for distribution to him of the sum of $26,000 out of the portion to be allotted to Stanley. By agreement of the parties the original petition, in so far as it related to Frederick, was granted and one-half of the estate was duly distributed to him. The controversy between Stanley and Griffith then went to trial on the issues raised by Stanley—that the probate court was without jurisdiction to hear the controversy, that the contract upon which respondent relied was procured by fraud, and that the claim of respondent was founded upon a gambling debt.

The contract which is the basis of the controversy was executed October 21, 1940. It was signed by Stanley Henshaw, Mooney Henshaw, his wife, and Griffith. For many years prior to that time Stanley had been in the habit of drawing on Griffith for large sums of money. Both were employed by the Riverside Cement Company and the practice had been to charge the advances made to Stanley on the books of the corporation to the account of Griffith. In 1937 Stanley owed Griffith because of these advances the sum of $46,000. In April of that year Griffith sought an adjustment of this indebtedness but had to write off $20,000 of the amount due and accept a promissory note from Stanley for the sum of $26,000. No payments of either principal or interest were made on this note. In June, 1940, Griffith wrote to Harry Isaacs, an attorney at law, and a mutual friend of the two parties, and requested him to endeavor to make some adjustment with Stanley. Negotiations were conducted with Stanley, his wife, and Isaacs until October 21, 1940, when the contract was executed by Stanley and his wife. The material portions of the contract after reciting the circumstances of the indebtedness of Stanley, the promissory note held by Griffith, and the ownership of thirteen shares of Hiram Tubbs Estate Company by Mrs. Mooney Henshaw, provided for the cancellation of the debt, the surrender of the note, and the transfer of the stock to Griffith, the income to go to Mooney for her life. It was then provided: "(2) Stanley Henshaw is the owner of an interest in the trust estate created by his father by will, such interest subject to being cut off by his death prior to the death of his father's widow. Stanley Henshaw agrees that in the event he should survive his father's widow and come into possession and enjoyment of his interest in the trust estate that he will pay Griffith Henshaw or his heirs from the proceeds of said trust estate the sum of twenty-six thousand dollars ($26,000.00), in which event Griffith Henshaw will reconvey to Mooney Henshaw his remainderman's interest in the thirteen (13) shares of Hiram Tubbs Estate Company."

The first question raised on the appeal touches the jurisdiction of the Probate Court. The respondent relies upon Section 1120 of the Probate Code which reads in part:

"When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution * * *." Attention is also directed to Section 1240 of the Probate Code which authorizes an appeal from an order determining "the persons to whom distribution should be made or trust property should pass."

Before discussing the cases cited by the respective parties it is well to look at the legislation upon which the question rests. Section 1699 of the Code of Civil Procedure, upon which Section 1120 of the Probate Code is based, provided that:

"Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof *for the purpose of the settlement of accounts under the trust.*" (Emphasis ours.) The section thus stood until the adoption of the Probate Code in 1931 when Section 1120 conferred jurisdiction under the same circumstances to determine "to whom the property shall pass and be delivered." At the same time, and by the same section, the power to retain jurisdiction for the purpose of settling the accounts of the trustee was made secondary to the power of determining to whom the property should pass.

In support of his argument that the court had no power to pass upon the rights of an assignee, a mortgagee, or a transferee, the appellant cites Martinovich v. Marsicano, 137 Cal. 354, 70 P. 459, decided in 1902; In re Estate of Davis, 136 Cal. 590, 69 P. 412, decided in 1902; In re Estate of Crooks, 125 Cal. 459, 58 P. 89, decided in 1899; In re Estate of Howe, 161 Cal. 152, 118 P. 515, decided in 1911; McAdoo v. Sayre, 145 Cal. 344, 78 P. 874, decided in 1904; and Parr v. Reyman, 215 Cal. 616, 12 P.2d 440, which was decided in June, 1932, after the Probate Code became effective, but upon a case made prior to the effective date and hence controlled by the old section because of the saving clause found in Section 2 of the Probate Code.

Cases following the enactment of Section 1120 and cited by appellant are not helpful to his cause. In re Estate of Smith, 4 Cal.App.2d 548, 41 P.2d 565; In re Estate of Smead, 12 Cal.2d 20, 82 P.2d 182; and In re Estate of Marre, 18 Cal.2d 184, 114 P.2d 586, all approve the direct statement found in the Smith case [4 Cal.App. 2d 548, 41 P.2d 567] that: "We believe the language employed in the present section of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust. This view is strengthened by a consideration of Section 1240 of the Probate Code, which provides for an appeal from an order settling an account of a trustee, from an order instructing a trustee, from an order 'determining heirship or the persons to whom distribution should be made or trust property should pass,' and from an order refusing to make any of said orders."

The Smith case was one to determine the legitimacy of an heir and a beneficiary under the testamentary trust. The Marre case was heard on the petition of a beneficiary to determine his right of payments under the trust. The Smead case really involved nothing more than the right to move for a new trial in proceedings brought under this section. Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 5 Cal.2d 35, 53 P.2d 127, did not involve this section and is applicable only in support of the general rule that probate proceedings are statutory and the jurisdiction of the court sitting in probate is limited. In re Estate of McLellan, 8 Cal. 2d 49, 63 P.2d 1120, involved a dispute between the trustees and a beneficiary and has no application here. In re Estate of Hubbell, 121 Cal. App. 38, 8 P.2d 530, was decided after the Probate Code was enacted but was heard and determined on Section 1699 of the Code of Civil Procedure. The court held that this section did not give the probate court jurisdiction to entertain a petition to terminate a testamentary trust. Finally appellant cites In re Estate of McLennan, 29 Cal.App.2d 666, 85 P.2d 499, where the trustee petitioned the probate court to determine the controversy over the identity of a beneficiary of the trust. A proceeding in equity was commenced in the superior court to determine the same controversy. Appellant states that the appellate court ruled that the superior court had concurrent jurisdiction with the probate court to decide the issue, but not the reverse. In this appellant is in error. The court held (29 Cal. App.2d at page 668, 85 P.2d at page 500) "A probate court which has jurisdiction over a testamentary trust has concurrent jurisdiction with the superior court sitting as a court of equity to determine upon termination of the trust conflicting claims to the corpus of the trust. Dowdall v. Superior Court, 183 Cal. 348, 353, 191 P. 685; McCaughna v. Bilhorn, 10 Cal.App.2d 674, 684, 52 P.2d 1025."

The case more nearly in point is Thomas v. Superior Court, 17 Cal.App.2d 40, 61 P.2d 496. That was a proceeding in prohibition to restrain the Superior Court from hearing a petition for distribution of a testamentary trust which put in issue the extent of the interests of various as-

signees of the beneficiaries and conflicting claims among these assignees. In denying prohibition the appellate court said:

"The contention of the petitioner is that the superior court has no jurisdiction in such proceeding to determine such matters, and he relies upon the case of Kingsbury v. Ross, 217 Cal. 484, 19 P.2d 784, and cases cited therein. Petitioner does not overlook section 1120 of the Probate Code * * *, but he contends that the court does not have jurisdiction in spite of said section. The section reads as follows * * *. It will be observed that under said section the court does not lose jurisdiction of the trust estate by the final distribution of the probate estate, but that the superior court 'shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust,' etc. The petition for distribution is pending before the superior court as such and that court has jurisdiction, subject to the limitations of section 1120, to do the very things which the petitioner seeks to have this court prohibit."

The Thomas case has been cited with approval in Re Estate of Rey, 31 Cal.App. 2d 648, 88 P.2d 718; Re Estate of Smead, 12 Cal.2d 20, 82 P.2d 182; and Re Estate of Evans, 62 Cal.App.2d 249, at page 257, 144 P.2d 625, at page 629, where the court took the broad view that, under Section 1120, "At any time subsequent to a final settlement of accounts, an heir, devisee or legatee or his assignee, grantee or successor in interest, may, after due notice, file an application for the distribution of the residue of an estate."

[1, 2] There is no lack of harmony in any of the cases following the enactment of the Probate Code that the court has jurisdiction under Section 1120 to determine conflicting interests between rival beneficiaries and rival assignees. The Evans case goes further and adds grantees or successors in interest of a beneficiary. Hence if the respondent herein can maintain his position that he is an assignee, or an equitable assignee, it cannot be doubted that he is one entitled to urge his petition in the probate proceedings. This postulate rests on the broad interpretation that the words of the section giving power to determine "to whom the property shall pass and be delivered" mean that the probate court has power to determine conflicting claims to the present right of possession of the estate whether such claims are based upon inheritance, descent, or contract.

This conclusion is strengthened by what was said in Re Estate of Smith, supra, that it was the purpose of the new section (1120) "to broaden the jurisdiction of the probate court." Since long prior to the enactment of the Probate Code the Supreme Court had held in McAdoo v. Sayre, 145 Cal. 344, 78 P. 874, that the probate court had jurisdiction under 1699, Code of Civil Procedure, to determine a controversy between the trustee and a legatee under the will of the beneficiary of the trust the Legislature must have intended something more than a controversy between beneficiaries when it added the words to determine "to whom the property shall pass and be delivered." It is further strengthened by the language of the McAdoo case, 145 Cal. at page 350, 78 P. at page 876, "These methods of procedure in probate and in equity were obviously not adopted arbitrarily, but from the necessities of the case, and because there could be no complete accounting without establishing the right of the parties entitled to the property accounted for when it was passed from the control of the trustee. And it is difficult to perceive how any good end could be accomplished by arresting a proceeding of this character midway, and relegating the parties to another action in the same court, or another court of concurrent jurisdiction, for a second determination of questions which the court in the proceeding had been compelled to determine—an action in which no new questions could well arise, and the only effect of which would be further delay and uncertainty, and possibly further complications arising from conflicting decisions in the different courts."

This view sustains some analogical consolation in a reference to the provisions of section 1020.1 of the Probate Code, which section was added in 1941. Therein it is provided that: "The court before making distribution of any property of a decedent to *any assignee or transferee* of any heir, devisee or legatee or before making distribution to any person *other than* an heir, devisee, or legatee *pursuant to any agreement*, request or instructions of any heir * * * may (on motion of interested party or on its own motion) inquire into the consideration * * * and into the circumstances * * * and if it finds that * * * any such assign-

ment, transfer, agreement, * * * was obtained by duress, fraud or undue influence it may refuse to make distribution pursuant thereto *except upon such terms as it deems just and equitable.*" (Emphasis ours.) The Legislature by this section bestowed upon the probate court the very power and jurisdiction (in the case of final distribution) which the appellant herein contests. It would seem to be a logical deduction as to legislative "intent", that section 1020.1 was enacted upon the understanding that section 1120 meant what we have herein held because there is no sound reason why the court sitting in probate should have that power on final distribution and not upon distribution of a testamentary trust continuing after distribution of the estate proper.

[3, 4] Accepting the view that the probate court has jurisdiction to determine the extent of the interests of the assignees of beneficial interests in the trust estate we are confronted with the contention of the appellant herein that the contract of these parties is not an assignment of any part of his beneficial interest. Reference is made to the language of the contract: "will pay Griffith Henshaw or his heirs from the proceeds of said trust estate." Ordinarily a promise to pay an obligation out of the proceeds of a specific fund is not a present assignment of any portion of the fund. 6 C.J.S., Assignments, § 59, pp. 1105, 1106; 4 Am.Jur. p. 293; 16 Cal.Jur. p. 309. But there is respectable authority to the contrary. Frequently our courts, in the effort to see that equity is done, have relaxed this rule and permitted evidence to show the intention of the parties beyond the limited words of the contract. It is uniformly held that a contract of this nature is open to construction and interpretation just like any other contract. Here the trial court found that the parties intended to make an assignment of appellant's beneficial interest, and to create an equitable lien thereon to the extent of respondent's claim. The evidence fully supported this finding and the only testimony to the contrary came from the appellant who discredited himself as a witness on so many occasions that the trial court could properly reject his testimony as a whole.

However, assuming that the direct evidence did not support this finding, the evidence of the circumstances surrounding the execution of the contract did fully support the finding that the parties by their contract created an equitable lien on appellant's share of the fund to the amount stated in the contract and that they intended an assignment of that portion of the trust. Beside the direct testimony of the witnesses the evidence of the circumstances supports the inference and the finding that the parties contemplated that such was the legal effect of their act—the fact that respondent held appellant's unsecured promissory note for $26,000 which was past due, the fact that appellant's wife, Mooney Henshaw, was not obligated on this note and held all the stock of the Tubbs Estate in her own name, the fact that appellant and his wife had marital difficulties which had caused separations, the fact that she thus contracted to transfer the remainderman interest as a part of the contract whereby appellant agreed to pay the obligation out of the trust estate, and the fact that respondent agreed to cancel the promissory note of appellant and look to payment out of the uncertain contingent interest of appellant in the trust estate. Since appellant would take nothing from the trust unless his mother predeceased him, all these circumstances lead inescapably to the inference that the parties intended something more than a mere promise to pay out of such a contingent expectancy when such promise was taken in consideration for an express promise to pay the existing note, which was enforceable out of any asset of appellant which might be found.

[5] The accepted rule is that equitable liens are favored to do justice and prevent unfair results. Mannon v. Pesula, 59 Cal. App.2d 597, 606, 139 P.2d 336; Wagner v. Sariotti, 56 Cal.App.2d 693, 698, 133 P.2d 430. When therefore after a full and impartial hearing the trial court finds upon the only reliable evidence presented that the parties intended to create an equitable assignment and an equitable lien such finding should not be disturbed.

The other grounds raised by appellant do not require extended discussion. In his answer to the petition for distribution the appellant directed his attack upon the contract of October 21, 1940, to the charge that it was procured by fraud and duress. His evidence wholly failed to prove any part of the charge. To the contrary the evidence shows that he was given every opportunity and ample time to study the contract, took all the time he desired, and

executed the contract without any pressure or influence on the part of respondent.

As a part of his claim of fraud in the execution of the contract appellant alleged that a part of the principal sum represented gambling debts from him to respondent. The trial court found that $4,000 of the principal sum represented sums paid appellant by respondent to satisfy gambling debts incurred by appellant to third parties, and that the sum of $22,000 represented advances made by respondent for the use and benefit of appellant other than for gambling purposes. The evidence supported this finding—in fact there was nothing in the way of competent evidence upon which a contrary finding could be based. This would require an affirmance of the judgment to the extent of $22,000, moneys advanced to appellant for his personal use and benefit. The effect of the finding covering the $4,000 item will be considered later.

[6] Appellant attacks the rulings of the trial court under which a witness was permitted to testify from a memorandum made from the books of the Riverside Cement Company, of which company the respondent was a director and vice-president and appellant was an employee and the witness the bookkeeper. The evidence, prior to the objection, had disclosed that for many years appellant had drawn on respondent personally for large amounts above his salary and that it had been the practice of respondent to make these advances out of the funds of the cement company and to charge them to respondent's account. The transcript which was prepared by the witness covered the advances made to appellant over the entire period from 1924 to December 1940. In 1937 the parties had met and made a full statement and settlement of their account. It was then agreed that appellant owed respondent in excess of $46,000. Respondent settled by accepting appellant's promissory note for $26,000. This was the note that was cancelled under the contract of October, 1940. Under these circumstances we do not understand why respondent tendered the evidence objected to or why appellant made his objection. The evidence did not tend to prove any issue in the case. The appellant conceded that advances had been made to him over this period of time. The testimony of the bookkeeper tended to prove this to be true. But the issue was whether these advances were in payment of gambling debts. The testimony of the witness did not prove or disprove this. The burden was on appellant and he was satisfied to say that "a part" of the indebtedness was for gambling debts. Hence, even if the testimony was objectionable, it certainly was not prejudicial. To some extent it is a case under subd. 5 of Sec. 1855, Code Civ.Proc. where the original "consists of numerous accounts" and the evidence sought is only the "general result of the whole", and a case similar to Johnstone v. Morris, 210 Cal. 580, 588, 292 P. 970, where the Supreme Court said that the purpose of the Code section was to prevent the time wasting procedure of bringing a large number of books into court.

[7] Finally the appellant argues that the trial court erred in denying him a trial by jury. The facts leading to the demand for a jury are these—the petition was filed on July 9, 1943, and set for hearing for July 29. The order to show cause was served on appellant on July 15. The answer of appellant was filed July 20. The matter was partially heard and on September 27 appellant's objections to the jurisdiction were overruled and the cause continued to October 11, for further hearing. It is stated by respondent, and not denied, that the appellant was present in court on September 27, that the matter was continued to October 11 on appellant's request, and again continued to January 10, 1944, by consent of the parties. On December 24, 1943, the demand for a jury was filed. There is no escape from the conclusion that this demand did not comply with the provisions of section 631, Code Civ.Proc. That section in part provides that a trial by jury is waived by failing to demand a jury "at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation." Here the cause was "first set" for trial upon appellant's request, and, of course, he must be deemed to have notice of that fact.

We have reserved until this time a discussion of the finding of the trial court that $4,000 of the sum recovered represented moneys advanced to the appellant to enable him to pay gambling debts. Preliminarily it should be said that the evidence would have supported a finding that this fact was not proved. The advances were made in the summer of 1925. Ap-

pellant was a guest of respondent on a vacation trip where, during a two weeks' sojourn, a group of men engaged daily in a game of what is commonly called "poker", which, by judicial decree, had been declared to be a game of chance, or gambling. 38 C.J.S., Gaming, p. 41. Both appellant and respondent participated in the game and both apparently played "on the cuff". In any event after the vacation ended the two found that they were $9,100 in the red. Respondent paid the winner or winners and, by mutual agreement, the two partitioned their losses $4,000 to appellant, and $5,100 to respondent. The $4,000 was thereupon entered on the books as an advance to appellant. Now the trial court found that of the sum of $26,000 the sum of $4,000 and no more represented sums paid by respondent at the special instance and request of appellant "to satisfy gambling debts incurred by the said Stanley Henshaw to third parties." This presents the question whether moneys so advanced come within the rule that "gambling debts" are not recoverable.

[8-10] The general rule is that moneys paid out at the request of the loser in discharge of a gambling debt may be recovered by the payor. 38 C.J.S., Gaming, § 27, p. 98; Corbin v. Wachhorst, 73 Cal. 411, 15 P. 22; Moritz v. Lumbley, 141 Miss. 453, 106 So. 642; Pohlman v. Bretz, 20 Ohio App. 273, 153 N.E. 139. The basic principle upon which gambling debts are held unenforceable is that the courts should not lend their aid to an illegal transaction. This is emphasized in Kyne v. Kyne, 16 Cal.2d 436, 438, 106 P.2d 620, 621, where the Supreme Court said: "This rule has been rigidly enforced in this state to deny any relief in the courts to parties seeking to recover either their stakes or their winnings under a wagering contract which is in violation of law, whether the party against whom the relief was sought was a party to the wager or a stakeholder for the parties to the wager." The appellant does not question this rule and does not cite any authority to show error in the judgment. He is content to argue that "a part" of the judgment represented roulette chips received from respondent to enable appellant to engage in gambling games. The trial court found that this was not so and the evidence supports that finding. The transactions upon which appellant relies were said to have occurred some ten or fifteen years before the settlement which the parties made in 1937. It was a fair inference that the sum stated in appellant's promissory note of that date represented moneys advanced to appellant for other than gambling purposes. We find no reversible error in the record.

Judgment affirmed.

GOODELL, J., and DOOLING, Justice pro tem., concur.




## ZIEGLER v. REUZE. *

Civ. 12815.

District Court of Appeal, First District, Division 2, California.

April 6, 1945.

Rehearing Denied May 5, 1945.

Hearing Granted May 31, 1945.

1. Malicious prosecution ⇐59(4)

In action for malicious prosecution, both parties may introduce evidence on question of plaintiff's character for purpose of throwing light on issue of want of probable cause.

2. Malicious prosecution ⇐59(4, 5)

In action for malicious prosecution, evidence of plaintiff's character or reputation may be shown only by testimony of general reputation of plaintiff in community, and not by proof of specific wrongful acts collateral to action on trial.

3. Malicious prosecution ⇐59(5)

In action for malicious prosecution based on charge of disturbing the peace on a specified day, admission of evidence of relations existing between plaintiff and her neighbors, including specific incidents occurring on various occasions, was error.

4. Malicious prosecution ⇐59(5), 60(3)

In action for malicious prosecution, evidence of numerous collateral wrongful acts of plaintiff is inadmissible to prove malice and negative claim of want of probable cause.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

* Subsequent opinion 164 P.2d 494.

Action for malicious prosecution by Louise Ziegler against Juliette Reuze. Judgment for the defendant, and the plaintiff appeals.

Judgment reversed.

Samuel D. Hamburg, of San Francisco, for appellant.

J. B. Zimdars, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff commenced this action to recover damages for injuries alleged to have been sustained in an action for malicious prosecution. The defendant answered and the action was tried by the court sitting without a jury. The trial court made findings of fact in favor of the defendant. Shortly after the judgment was entered there was a substitution of attorneys for the plaintiff. Samuel D. Hamburg, Esq., was substituted in place of William H. Penaat, Esq. Later Mr. Hamburg prepared and served all papers necessary to complete a case on appeal and since has conducted all proceedings on this appeal.

The exhibits have not been brought up. The action was based on a criminal complaint alleged to have been presented by the defendant. Quoting from the reporter's transcript the record shows: "The Court: The date is September 26, 1942, and it is sworn to before Judge Cronin of the Municipal Court. It is a regular printed form of complaint, charging that the defendant on the 16th day of September, 1942, committed the crime of misdemeanor, towit: disturbing the peace. That is all the complaint states. The printed portion also specifies that the defendant did wilfully, unlawfully and maliciously disturb the peace and quiet of the neighborhood of Corbett Avenue, between Twenty-third and Twenty-fourth Streets, in the City and County of San Francisco, by making loud and unusual noise, etc."

As to what was involved in the charge so stated was testified to by this plaintiff as follows: "My husband had been working in the afternoon, so he come home after 5 and had supper, and after supper, between 6 and 7, he said he left some tools laying on the lot where he had been working; so he went over after supper, and I was washing the dishes. I didn't go with him. And after a while I heard my husband, very excited, call 'Louise! Louise!' He was very excited. I had no shoes on. I slipped my shoes on quick and ran out in front of my home, and I saw coming around, there was Mrs. Reuze hanging on to my husband. I was at the front of the house, on the sidewalk. That is when I saw them come around the corner. Mrs. Reuze, the defendant, was hanging on to my husband and pulling him back; and my husband tried to get away but she held him back; and there was an Arthur Kelly that had a big pot in his hand aiming for my husband's head—Arthur Kelly—he is not here but his wife is here. I called to my husband to come in the house, and that Mrs. Reuze, the defendant, was still hanging; but my husband jerked loose and, at the same time, I saw Pete Reuze, her husband, flying around the corner and he had a gun—it looked like a machine gun—and he said, 'I will blow your—' should I say the way he said it? He said 'I will blow your God damn head off, you dirty skunks. I am going to kill you both,' and he was aiming at me, and I was standing by my house, and I said nothing. And she, the defendant, said 'You dirty skunks, you dirty skunks, you dirty skunks, and I will kill you, you dirty sons of bitches,' and Mr. Kelly said, 'Who's a dirty skunk?' And he was the man with the pot."

The defendant's husband told the story as follows: "After I got through working, the wife told me that those people were putting up stake posts to erect a fence; so I went down the lane and I saw a big railroad tie sticking up on the wall, and I didn't pay attention to it, and I was looking to see if it was on my ground, and I didn't see nothing; and I saw Mr. Ziegler come from behind and he grabbed me by the neck, he said, 'What in the hell are you looking at, you little son of a bitch.' Anyway, he grabbed me by the neck and dragged me to the sidewalk, and I started to holler to have witnesses, and then the wife came, Mrs. Ruffoni came, and the folks living up above, who was Mrs. Kelly, Mr. Kelly, and, I don't know, possibly Mrs. Williams heard the commotion, and may have heard something; but anyway, I had those people there, and when they saw—Mrs. Kelly saw what was going on—I don't know how far away, but she called the police and the police came after it was all over, because those folks came, the wife, Mrs. Ruffoni, and Mr. Kelly, Mrs. Kelly was there, and when the wife saw he had me by the neck, she

came to separate the two of us and then he got a hold of her, and pushed the two of us in the middle of the street, and here were machines coming around behind, and I was hollering, 'Here's a machine!' And he was trying to push the two of us in the middle of the street, and that's the truth. And after that we managed to get loose, or, he released his grab on us, and the machines missed us by maybe three feet is about all I can see, and after that he was hollering for Louise—Mrs. Ziegler; and she came down, and she said, 'Christopher, come on home, and leave those two sons of bitches alone,' and she didn't pay no more attention; and here comes a police wagon, a sedan, and the officer said, 'Oh, well, we know those people. We had trouble before, Nobody got hurt. Forget about it. We came over because we were sent over,' and he said 'That's why we came here,' and that was that particular case. Your Honor, may I say something else? I have been pestered by those people all along. They said I am the 'machine gunner' and they have sent the FBI up. I have no objection for anybody to investigate me on my actions, but it seems on different occasions that those people have persecuted me on having machine guns."

[1, 2] The plaintiff concedes that in an action for malicious prosecution the plaintiff may show on his examination in chief that his general character or reputation was good at the time of the prosecution, evidence of that nature being held to be admissible for the purpose of throwing light on the question of want of probable cause. The plaintiff also concedes that in such an action evidence of the general bad character of the plaintiff may be introduced by the defendant to show that the prosecution was not without probable cause. Calhoun v. Bell, 136 La. 149, 66 So. 761, Ann.Cas.1916D, 1165; 1 Wigmore on Evidence p. 78, sec. 258; Murphy v. Davids, 181 Cal. 706, 186 P. 143. However the plaintiff earnestly contends that such character may be shown only by testimony of the general reputation of such person in the community in which he resides and not by proof of specific wrongful acts collateral to the action on trial. Marks v. Reissinger, 35 Cal.App. 44, 169 P. 243. Continuing the plaintiff contends that the rule last stated was violated by the examination of nearly every witness called by the defendant. We think the contention is fully sustained by the record.

[3] While Mr. Reuze was testifying as a witness for defendants the proceedings in part were as follows:

Mr. Zimdars:

"Q. They told the Bethlehem Steel Company that you had stolen tools from them, and that you were a thief? A. And that I threatened his wife with a machine gun.

"Q. And they tried to get you discharged? A. Yes, that was the idea when they came there, to have me discharged.

"Mr. Penaat: I move to strike this latter testimony. It is all hearsay, and it is entirely incompetent, irrelevant, and immaterial.

"The Court: He hasn't stated the source of his information.

"Q. How do you know that all these annoyances resulted from the activities of these people? A. Yes.

"Q. How do you know? A. Because the chief of the guards called me in his office and told me about it himself.

"Mr. Penaat: That is hearsay.

"The Witness: A. And I asked him if he wanted to be a witness and he said, 'I will be glad to.'

"Mr. Penaat: I ask that that be stricken.

"The Court: Yes, *but it still produces a certain amount of effect in my mind.*"

What the trial court meant by that portion of its order which we have italicized, we will not pause to debate. It was a clear intimation that the court intended to consider evidence stricken out as being improper. For the trier of the facts to do so was to violate fundamental rules of evidence. The erroneous contention just mentioned is reinforced by comments made during the examination of Mrs. Saran which will be noted below.

[4] When Mrs. Saran was testifying for defendant the proceedings in part were as follows:

"Q. Do you know Mrs. and Mr. Ziegler? A. Yes.

"Q. You have known them all the time you have lived there? A. Well, I work most of the time and have very little time to spend with my neighbors; but they made so much trouble for me from the day—

"Mr. Penaat: We are only concerned with the trouble set forth in the complaint, September 16, 1942.

"The Court: Malice is involved in this case—I don't know what the lady is going to say, naturally, but I think that the attitude and relations that existed between the plaintiff here and all of her neighbors has more or less to do with this case.

"Mr. Zimdars: Furthermore, when Mr. Penaat went into matters that included this, and went all over the lot, I asked the question if I may be permitted to—

"The Court: I am not concerned with just what happened on the actual day of this encounter. We will go into the entire situation. Your counsel will probably ask you to relate specific incidents.

"Mr. Zimdars: Q. Relate what Mr. and Mrs. Ziegler have done with the neighbors, including Mrs. Reuze. A. From the day that I bought the place, it was very run down, so I had to do quite a little bit repairing on it, and most every day for weeks at a time I had people coming from the Board of Health and the City Inspectors were coming, on complaints of Mr. and Mrs. Ziegler. In fact, they had written letters complaining about it. I was under the impression that I could do a little bit of work without a permit, so therefore I did; and when I had all these complaints, I got my permit to go ahead with my work; but I had trouble with them; every time I had a piece of lumber come to be delivered, they would call the inspectors up, and they were always standing on the sidewalk. Mrs. Ziegler from the time she gets up in the morning until she goes to bed stands on the sidewalk and watches everything that is going on. You can't go across the street, and you can't even mail a letter but what they know what goes on in the whole street. This particular day of this trouble, I was coming home and Mr. Ziegler was putting up posts for a spite fence that is fully ten feet high, in front of Mrs. Reuze's house, and they also planted about 150 trees. You can't see Mrs. Reuze's house from the street at all. She had a very beautiful view and they have ruined it with this fence. Mrs. Reuze minds her own business and didn't have trouble with anyone, even with those people. I walk across the street, because for months Mr. Ziegler, for no reason at all, called me a son of a bitch, and he called me a red headed son of a bitch. I never had any trouble with them outside of that; and I found three dead rats in front of my doorway—

"The Court: Q. You didn't see them put them there? A. No, but no one else would throw any rats.

"The Court: I will accept a motion to strike that.

"Mr. Penaat: Yes. As a matter of fact, I think all of her testimony is irrelevant.

"The Court: There are parts of it that have some relevancy to the nature of this case."

That the testimony regarding the rats should have been stricken the parties do not challenge. Comparing the other testimony given by Mrs. Saran with the allegations of the criminal complaint it is patent that all of her testimony was irrelevant and the plaintiff's attack thereon was improperly denied. The trial court erred in assuming that it was permissible to introduce evidence of numerous collateral wrongful acts for the purpose of proving malice and negativing the claim of want of probable cause. But as we have shown such testimony was not admissible for such purpose. 10 Cal.Jur. p. 1047 Evidence, sec. 297.

The improper theory prompting the ruling just considered was continued in the two rulings we have quoted above: "The Court: Malice is involved in this case—I don't know what the lady is going to say, naturally, but I think that the attitude and relations that existed between the plaintiff and all her neighbors has more or less to do with this case. * * * I am not concerned with just what happened on the actual day of this encounter. We will go into the entire situation. Your counsel will probably ask you to relate specific incidents." That ruling was entirely too broad. There was nothing in the proceedings showing plaintiff sought to exclude evidence of any part of the incident of September 16, 1942. The witness was not asked any question regarding the general reputation of this plaintiff. She was asked and was proceeding to enumerate certain collateral wrongful acts of the plaintiff. The trial court erred in receiving evidence of such acts. 10 Cal.Jur. 1047, Evidence, sec. 297.

When Mrs. Sheehy was testifying for the defendants she was allowed to make

an uninterrupted statement of troubles that she had had, and what the public officials had told her. That statement was followed by these proceedings:

"The Court: The cops told you? A. The policemen, the Board of Health, and the building inspectors. That is the cause of this trouble, and there is no reason for it; but that stopped our friendship.

"The Court: Any questions?

"Mr. Penaat: No questions, except at this time I will renew my objection to this witness' testimony and all similar testimony, on the ground that it is incompetent, irrelevant, and immaterial, and has nothing to do with the disturbance of the peace charge on September 16th.

"The Court: I told you before that I wasn't going to restrict my attention to that.

"Mr. Penaat: I think your Honor should.

"The Court: I think all this is calculated to show the general nature and character of the plaintiffs and their inclination to interfere with their neighbors.

"The Witness: A. We used to have peace on the hill.

"Mr. Penaat: I think that is all improper testimony.

"The Court: Next witness. You weren't at the Bond and Warrant Clerk's office when the warrant was issued?

"The Witness: Yes, I was.

"The Court: All these witnesses could be asked about the general reputation of the plaintiffs for peace and quiet. That would be relevant, and that is why I am permitting this testimony, in order to show all the specific acts."

The next and last witness called by the defendants was Mrs. Mabel Kelly. In part the proceedings were as follows:

"Q. What is the reputation of Mr. and Mrs. Ziegler among the neighbors for peace and quiet? A. He has been causing a lot of trouble.

"The Court: Is it good or bad? A. Bad. Both tried to get my husband fired from two jobs, and they threw two-by-fours on the street to try and wreck our car; and they opened the top window and they would throw a shoe or something at his car and hit the fender; and another time—

"The Court: Why are they sore at you? A. I never speak to either one.

"Q. Why are they sore at your husband? A. No reason at all.

"Q. Was it your husband who was working on the WPA? A. Yes.

"Q. What kind of project was it? A. Just—

"Q. Was he working? A. Yes.

"Q. Or was he just standing still? A. He was working in the office.

"Mr. Zimdars: Q. And they went around and had that stopped? A. Yes.

"The Court: That was during the tough times when people used to be supported and they were making jobs for people.

"Mr. Penaat: The check wouldn't have been stopped if he was entitled to have it. His employment would not have been terminated unless there was justification for the termination."

Then later the following occurred:

"Mr. Penaat: I will renew my objection to the testimony of this witness prior to the occasion of September 16th, and ask that it be stricken from the record.

"The Court: Suppose a person lived in a residential locality like this, and it can be shown that they have had trouble with all the neighbors around them? Don't you think that has some bearing upon the general attitude and state of mind of people of that character?

"Mr. Penaat: No.

"The Court: Is there a conspiracy upon this entire hill against the plaintiff here?

"Mr. Penaat: That is not the point that is in issue.

"The Court: It is a matter in issue. How are you going to decide—

"Mr. Penaat: I might have committed six misdemeanors and—

"The Court: I will decide this case without further testimony. I have heard plenty. * * * They have this WPA worker taken off his job, and they make half a dozen or more complaints against the maintenance of conditions that are in various homes up there. * * *"

It is clear from what we have recited that the trial court improperly admitted evidence of many collateral wrongful acts; that some of it was stricken out and some was allowed to stand; that whether stricken or otherwise the trial court allowed such

improper evidence to affect and that it did affect its mind; and that the judgment under attack was the result of said alleged errors.

The judgment is reversed.

NOURSE, P. J., and GOODELL, J., concur.




68 Cal.App.2d 504

**ATLAS FINANCE CORPORATION v. KENNY, Attorney General, et al.**

**Civ. 14619.**

**District Court of Appeal, Second District, Division 1, California.**

**March 26, 1945.**

Hearing Denied May 24, 1945.

**1. Gaming ⇐74(1)**

The only possession of a gambling device which is denounced by statutes is the possession of device which is operated or played, and not one which may be operated or played.

**2. Gaming ⇐74(1)**

The sole purpose of anti-gambling laws is to prohibit use of paraphernalia or devices for gambling games in which money or property, or representative thereof, is won or lost, and not to absolutely prohibit possession of any slot machine or card game equipment.

**3. Gaming ⇐74(1)**

One may legally possess equipment usable for gambling purposes if, with it, he plays games for amusement only and without the incident of money or property being wagered or bet upon outcome of such game, or he may have such equipment in his possession for sale and transportation to a place where gambling is legal.

**4. Limitation of actions ⇐66(14)**

Where chattel mortgagee and office of Attorney General agreed that taking of mortgaged equipment usable for gambling purposes from a boat would be pursuant to agreement which required Attorney General to preserve equipment at mortgagee's expense until legality of mortgagee's possession of equipment might be determined in pending case, and that mortgagee might sue at its own convenience to recover possession of such equipment, the three-year statute of limitations began to run from time of demand and refusal to return, and hence an action commenced within three years after demand and refusal was not barred by limitations. Code Civ.Proc. § 338, subd. 3.

**5. Gaming ⇐60**

A warrant for search of gambling equipment on board a boat, which failed to particularly describe property to be taken and which was directed to chief of police of City of Long Beach and not the Attorney General, was void. Pen.Code, §§ 1525, 1530.

**6. Limitation of actions ⇐1**

Statutes of limitation are no longer regarded as a technical means of avoiding a just obligation, but are viewed favorably as affording repose from stale demands upon one who may have lost ability to procure evidence, and such statutes have become rules of property and will when pleaded be enforced.

**7. Limitation of actions ⇐1, 15**

A statute limiting time within which actions may be brought is for benefit of individuals and not to secure general objects of policy or morals, and hence its protection may be waived by those entitled thereto, and such waiver when acted upon becomes an estoppel to plead the statute.

**8. Limitation of actions ⇐15**

An agreement by office of Attorney General, who seized mortgaged gambling equipment, that chattel mortgagee claiming possession could bring a suit "at its own convenience and whenever it so desired" provided mortgagee paid storage charges, constituted a waiver of three-year statute of limitations which commenced to run only when one or both of the parties ceased to act upon the agreement. Code Civ. Proc. § 338, subd. 3; § 360.

**9. Limitation of actions ⇐15**

A provision in agreement waiving statute of limitations is valid and necessarily implies court's willingness to enforce it.

**10. Contracts ⇐153**

The general policy of the law is to give effect to every valid provision of a contract not unlawful or against public policy.

**11. Limitation of actions ⇐15**

The statute of limitations may be waived by a provision in the agreement itself.

**12. Limitation of actions ⇐15**

The waiver of statute of limitations need not be in writing, since conduct or even silence of a party under some circumstances may create equitable estoppel which would deprive him of his right to plead the statute as a bar.

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Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by the Atlas Finance Corporation against Robert W. Kenny, Attorney General of the State of California, and others, to recover the possession of equipment usable for gambling purposes, wherein defendants filed a demurrer. From a judgment of dismissal following the sustaining without leave to amend of the demurrer, plaintiff appeals.

Reversed and remanded with directions.

Wendell P. Hubbard, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondents.

WHITE, Justice.

This appeal comes before us on the judgment roll and is taken from a judgment of dismissal of an action brought by plaintiff to recover possession of equipment, usable for gambling purposes (hereinafter referred to as "equipment"), following the sustaining without leave to amend of the demurrer of defendant to plaintiff's second amended complaint.

By such second amended complaint filed herein, plaintiff seeks to recover possession of said equipment, which, it is alleged, is usable for gambling purposes but was not being so used when, on or about December 29, 1939, it was seized on board the S. S. Mount Baker, a vessel or barge allegedly located at the time of said seizure upon the high seas outside of and beyond the boundary lines of the State of California, or to recover the value of such equipment so seized in the amount of $35,000 in the event possession cannot be had, together with damages in the sum of $2,500 for alleged illegal detention thereof.

The property seized is described in said complaint as follows:

2 Poker tables and chairs
110 Caille Bros. slot machines
6 Dice tables complete with layouts, racks, etc.
4 21 Tables and racks
1 Big Six Wheel
1 Table and layout for Big Six
2 Cages, dice layouts and tables
70 Stools
8 Roulette outfits, chips, etc., complete
Miscellaneous equipment and parts.

Defendant Robert W. Kenny, in his official capacity as Attorney General of the State of California, demurred to the second amended complaint (wherein all available facts as to waiver and estoppel were pleaded) on the grounds that the action was barred by the statute of limitations, that the statute was not waived, that defendant was not estopped from pleading the same, and that said second amended complaint failed to state facts sufficient to constitute a cause of action.

From the facts alleged in the second amended complaint it appears that, during the term of office of defendant's predecessor as Attorney General of the State of California, certain officers, deputies, investigators and employees of said Office attempted to board the above mentioned vessel for the purpose of removing the aforesaid equipment; that the crew, acting under instructions from plaintiff, refused to permit the representatives of the Attorney General's Office to board the vessel; that Warren Olney, as Chief Criminal Deputy in the Office of the Attorney General, and Attorney Alford P. Olmstead, counsel for plaintiff, held a conference at which they discussed the legality and rightfulness of plaintiff's possession of said equipment; that Olney stated he was going to obtain a search warrant to board said vessel; that Attorney Olmstead stated he did not think a search warrant could legally be obtained because a bona fide affidavit could not be made that an offense was being committed on board the vessel, and that a sufficient affidavit could not therefore be made to sustain the issuance of a search warrant, but that if such warrant were obtained plaintiff would not question its validity and would permit the representatives of the Attorney General's Office to board said vessel and would surrender to them said equipment on condition that the same be stored in a public warehouse and kept in storage at plaintiff's expense until such time as the latter might have the le-

gality and rightfulness of its possession of said equipment determined by a court action, and said equipment would not be destroyed or disposed of by the Attorney General's Office pending a final court decision; that said Olney agreed thereto and on the following day did obtain a search warrant from a judge of the Municipal Court of the City of Los Angeles, authorizing the Chief of Police of the City of Long Beach to search said vessel, but which warrant did not specifically describe nor direct that such search be made for any of the aforesaid equipment; that thereafter, on the 29th or 30th of December, 1939, said employees of the Attorney General's Office presented said search warrant and, in accordance with the aforesaid agreement and instructions given by plaintiff to its crew and in reliance upon said agreement, the representatives of the Attorney General's Office were permitted to board said vessel where, in further compliance with said agreement, the equipment was given and surrendered to the Attorney General's Office. That the same was removed by employees of the Attorney General's Office and stored with the Crescent Warehouse Company, Ltd. on Terminal Island, about January 2, 1940. In the second amended complaint it is then alleged that after the property was taken to the warehouse, it was agreed between Attorney Olmstead, representing plaintiff, and Chief Criminal Deputy Attorney General Olney that the Office of the Attorney General should bill the plaintiff from time to time for the storage charges. It appears from certain exhibits attached to and made a part of the second amended complaint consisting of letters exchanged between Attorney Olmstead, representing plaintiff, and the then Attorney General that the storage charges were paid by plaintiff up to January 1, 1943. In a letter from the Office of the Attorney General to Attorney Olmstead, under date of June 25, 1940, appears the following:

"* * * The bills which we have paid total $86.02 and we would be obliged if you would remit this amount to us, in accordance with our understanding that these storage charges would be paid by your clients."

In the second amended complaint it is further alleged that said Chief Criminal Deputy Attorney General Olney assured plaintiff that so long as the latter paid the storage charges *"the said personal property should remain in storage intact and would not be destroyed and that plaintiff could bring suit at its own convenience and whenever it so desired"* (emphasis added); that the Attorney General's Office was uncertain of the correctness of its contention that the possession of said property by plaintiff was illegal and the aforesaid agreements were partly actuated by such uncertainty; that Olmstead and Olney discussed between them that "prior to the time that the legality or rightfulness of plaintiff's possession of the aforesaid personal property, another case might be decided by the courts of this state determinative of the question involved in connection with plaintiff's possession of the aforesaid personal property; that in fact, the case of A. Chapman v. Judge Leo T. Aggeler was then pending in the Superior Court of Los Angeles County involving the legality and rightfulness of the possession of similar equipment, particularly slot machines similar to those described as aforesaid."

It is then alleged that in the latter part of January, 1942, the case of Chapman v. Aggeler, 47 Cal.App.2d 848, 119 P.2d 204, was decided by the District Court of Appeal and a hearing was denied by the Supreme Court; that in said case the court held that mere possession of slot machines and other equipment similar to that involved in the case at bar was not illegal and directed the police department of the City of Los Angeles to return said equipment to the plaintiff; that during the early part of February, 1942, Olmstead and Olney had a conversation wherein Olmstead claimed that the case of Chapman v. Aggeler was determinative of the legality and rightfulness of plaintiff's possession of the said gambling devices and equipment seized on board the Mount Baker and demanded the return thereof, and that Olney stated that he did not think the decision was determinative of the rightfulness and legality of plaintiff's possession of said personal property and refused to permit plaintiff to retake possession thereof; that in later conversations between Olmstead and Olney, had during the Spring and Summer of 1942, Olney in each of said conversations refused to permit plaintiff to retake possession of said personal property; that in Summer and early Fall of 1942 a discussion was had between Olmstead and Olney as to the filing of a suit by plaintiff and the county in which suit should be brought. It is then alleged that Olmstead and Olney discussed the political campaign for the governorship of California, which was then in prog-

ress and that Attorney Olmstead, representing plaintiff, stated he did not wish to institute a law suit in connection with the existent controversy until after the first of the year 1943 because of "possible political repercussions," and that Chief Criminal Deputy Attorney General Olney did not protest against this delay, make any objection thereto, or request that plaintiff bring suit, but that said Olney remained silent, and by such silence "appeared to acquiesce therein," and led Attorney Olmstead to believe that the Attorney General's Office was in accord with such further delay in the commencement of said legal action because of the aforesaid political campaign. It is further alleged that during said conversations the possibility was discussed that, if the defendant in the instant action who was then a candidate for Attorney General should be elected, he might take the legal position that the case of Chapman v. Aggeler, supra, was determinative of the question involved in plaintiff's possession of said personal property and direct that said personal property be returned to plaintiff. By its second amended complaint plaintiff alleges that said agreements and conversations "lulled plaintiff into a sense of security" in so far as the statute of limitations was concerned; that the Attorney General's Office was apprized of all the facts and knew that plaintiff had not used any of said equipment illegally but had merely obtained possession thereof pursuant to its mortgage thereon, and that the Attorney General's Office knew that plaintiff believed that as long as it paid the storage charges it would not be compelled to bring suit against the Office of the Attorney General.

It is further alleged: "That the Attorney General's Office intended that its conduct be acted upon and its conduct was so acted upon as to lead the plaintiff to rely thereon and to refrain from bringing the above entitled suit at an earlier date; that in reliance upon said conduct and upon said agreement, plaintiff has paid out substantial sums of money for storage charges and neglected to bring this, the above entitled suit, verily and truly believing that it might bring a suit to determine the rightfulness and legality of the possession of the aforesaid equipment at any time; that the Attorney General's Office has never disputed said agreement and has never notified plaintiff that it was not bound further by the said agreement, and plaintiff by reason of such silence and conduct as hereinabove set forth on the part of the officers and agents of the Office of the Attorney General permitted more than three years to elapse from the time that the property was surrendered and delivered to the Office of the Attorney General before bringing the above entitled suit. That by reason of the foregoing facts, the statute of limitations has been waived by the Office of the Attorney General and said Attorney General's Office and said Robert W. Kenny, the Attorney General, is estopped thereby to plead and set up the defense of the statute of limitations; that if defendant is permitted to avail himself of the statute of limitations the same will be a fraud upon the plaintiff and will redound to plaintiff's injury and prejudice."

It is then alleged in the second amended complaint that plaintiff obtained title to the S. S. Mount Baker for the sum of $10,000 through a sale conducted by the United States Marshal and subsequently confirmed by a United States Commissioner. With reference to the aforesaid equipment, plaintiff alleges that title thereto was obtained pursuant to the provisions of the mortgage held by plaintiff upon said equipment, which authorized a sale of the same at public auction after default; that such public auction was held in the City of Long Beach; and that, as the highest bidder, plaintiff purchased all the right, title and interest of the mortgagor, Mount Baker Amusement Corporation, in and to the aforesaid equipment and personal property.

The second amended complaint then goes on to allege that the defendant herein Robert W. Kenny was elected to the Office of Attorney General of the State of California and assumed such office on or about the first day of January, 1943, since which time he has been the duly elected, qualified and acting Attorney General of the State. That subsequent to the induction of said defendant into the Office of Attorney General, plaintiff has demanded from him that the aforesaid equipment be restored to it, but that said defendant has neglected, failed and refused to restore possession of the same to the plaintiff, and that said defendant, in his official capacity, continues to retain and detain said personal property from plaintiff against the latter's will and consent; and that plaintiff is now the owner and entitled to the possession of said personal property.

Finally by its second amended complaint, plaintiff alleges that it "has never used

said personal property or any portion thereof for the purpose of gambling or gaming, nor for the purpose of staking or hazarding or causing to be staked or hazarded any money or any other valuable thing upon the result of action of said personal property; that at the time plaintiff took possession of said personal property on the 4th day of October, 1939, neither the said personal property nor any portion thereof was being used nor has it since been used by the plaintiff or by anyone else for the purpose of gambling or gaming nor was at said time nor since said time has any money or other valuable thing been staked or hazarded or won or lost upon the action of any of said personal property but the same remained upon the said vessel Mount Baker and was stored and unused during possession of the plaintiff from the 4th day of October, 1939, until the same was surrendered and turned over to the agents and employees of the Office of the Attorney General, and removed from the vessel on the 2nd day of January, 1940."

"That no stockholder of the plaintiff, Atlas Finance Corporation, ever owned, nor does he now own, any stock or any interest in the Mount Baker Amusement Corporation, and no stockholder of the Mount Baker Amusement Corporation ever owned, nor does any stockholder of said corporation now own any stock or interest in the Atlas Finance Corporation; that no officer of either company was ever or now is an officer of the other company; that no connection or relationship whatever existed or exists between said two companies other than the relationship of debtor and creditor, or mortgagor and mortgagee as hereinabove set forth."

As its first ground for reversal of the judgment, appellant urges that the demurrer should have been overruled because the allegations of the second amended complaint, the verity of which is admitted for the purposes of demurrer, show that plaintiff's possession of the equipment was legal and that plaintiff was therefore entitled to recover possession thereof from the defendant Attorney General. The pleading specifically alleges that the promissory note, the ship's mortgage and the chattel mortgage were all executed aboard the S. S. Mount Baker on the high seas and outside the territorial limits of the United States. It must therefore be assumed when considering the demurrer herein that the chattel mortgage was valid and legal because of its execution at a place where there are no anti-gambling laws. Such chattel mortgage is just as legal as if it were executed in a state adjacent to California where there are no anti-gambling laws. Plaintiff having legally acquired possession and title to the equipment, the legality of the chattel mortgage or foreclosure proceedings under which plaintiff acquired title is not open to question. Furthermore, by its second amended complaint herein plaintiff is not seeking to enforce the provisions of the chattel mortgage nor is it asking the court to enforce what might be claimed to be an illegal contract.

[1-3] Assuming for the purpose of passing upon the demurrer the legality of the contract by which plaintiff acquired title, we are brought to a consideration of the question whether because of the allegations of the second amended complaint that plaintiff had never used the equipment for gambling or unlawful purposes and that the same was not being used for any illegal purpose at the time possession thereof was taken by the Attorney General, plaintiff is entitled to the possession of such equipment. The allegations of the second amended complaint bring this case squarely within the holding in Chapman v. Aggeler, 47 Cal. App.2d 848, 119 P.2d 204, 206, that the only possession of a gambling device which is denounced by our statutes is the possession of one which "is operated, or played" and not one "which may be operated or played." The cited case is authority for the statement that the sole purpose of the anti-gambling laws of this state is to prohibit the use of paraphernalia or devices for gambling games in which money or property, or the representative thereof, is won or lost, and not to absolutely prohibit the possession of any slot machines or card game equipment. In other words, one may legally possess equipment usable for gambling purposes if with it he plays games for amusement only and without the incident of money or property being wagered or bet upon the outcome of such games, or he may have such equipment in his possession for sale and transportation to a state or country where gambling is legal.

[4] We are now confronted with the question whether plaintiff's action was barred by the statute of limitations. Sec. 338, subd. 3, Code Civ.Proc. In this regard, it is appellant's contention that, since the property was surrendered to the Attorney General's Office pursuant to an agreement,

the statute did not commence to run until three years after a demand was made upon the Attorney General's office for the return of said property. The pleading with which we are here concerned definitely and unequivocally alleged that when certain officers and employees of the Attorney General's Office attempted to board the S. S. Mount Baker to seize the equipment in question and were thwarted by the refusal of the ship's crew to permit such boarding of the ship, that Warren Olney, then Chief Criminal Deputy in the Office of the Attorney General, conferred with the plaintiff's attorney; that the question was discussed between them as to the legality of the proposed action on the part of the Attorney General. It was further alleged that at such conference plaintiff's attorney challenged the right of the Attorney General to obtain a search warrant but agreed that should such a warrant be obtained plaintiff would not resist the same but would voluntarily surrender the equipment provided it was stored in a warehouse to await a decision by the courts in a pending case as to the validity of possession of equipment similar to that of plaintiff's and under like conditions. It is also alleged that a search warrant was obtained which did not refer to nor describe the equipment which is the subject of this action, but that, in accordance with plaintiff's agreement with the Attorney General's Office, the former surrendered to the latter the equipment here in question, which was stored in the warehouse and that plaintiff paid to the Attorney General the storage charges thereon. It is specifically alleged that "it was further agreed that the Attorney General's Office should bill the plaintiff from time to time for the storage charges incurred and said Warren Olney assured the plaintiff that so long as plaintiff paid said storage charges the said personal property should remain in storage intact and would not be destroyed and *that plaintiff could bring a suit at its own convenience and whenever it so desired*" (emphasis added). To us it seems clear that plaintiff and the Office of the Attorney General agreed that the taking of the equipment would be pursuant to an agreement that it would be preserved at plaintiff's expense until the legality of plaintiff's possession might be determined in the case of Chapman v. Aggeler, supra, then pending in the courts of this state and in which case the contentions of plaintiff were the same as the claims of plaintiff herein concerning the legality of the possession of similar equipment; and that plaintiff herein might "bring a suit at its own convenience and whenever it so desired." There was nothing tortious or illegal about the taking of the property with which we are here concerned, but such taking was with the consent of plaintiff pursuant to an agreement with defendant's predecessor in office. Therefore, the statute pleaded by defendant began to run from the time of demand and refusal to return. 5 Cal.Jur. 172 and cases therein cited; San Francisco Credit Clearing House v. Wells, 196 Cal. 701, 239 P. 319; Webster v. Mountain Monarch Gold Mining Co., 6 Cal.App. 2d 450, 44 P.2d 646. The second amended complaint alleged that a demand was made upon the defendant's predecessor in the Office of Attorney General during February, 1942, and upon defendant herein during the year 1943; both demands being made within less than three years prior to the commencement of the instant action. This action was therefore not barred by the statute of limitations.

[5] In so far as the search warrant is concerned, it is at once apparent from the allegations of the second amended complaint with reference thereto that the same was irregular on its face and void in so far as seizure thereunder of this equipment was concerned because, according to the allegations of the second amended complaint, the search warrant failed to particularly describe the property to be taken. Sec. 1525, Penal Code. And the search warrant was directed to the Chief of Police of the City of Long Beach and not to the Attorney General. The latter therefore was not authorized to serve it except in aid of the officer to whom it was directed. Sec. 1530, Penal Code. In any event, it is clear from the second amended complaint that the equipment was not surrendered pursuant to the search warrant but in accordance with the aforesaid agreement between plaintiff and the Office of the Attorney General. Furthermore, it was surrendered to the latter and not to any one mentioned in the directions contained in the search warrant.

[6-8] We are also persuaded that appellant must be sustained in its claim that the bar of the statute of limitations was waived by the Office of the Attorney General. We are in accord with respondent's contention that statutes of limitation are no longer regarded as a technical means of avoiding a just obligation but are viewed favorably as affording repose and security

from stale demands upon one who may have lost the ability to procure evidence; that such statutes are vital to the welfare of society and have become rules of property. The statute will, when pleaded, be enforced in all cases which come within its operation and strained constructions will not be resorted to in an effort to relieve a party from its operation. But a statute limiting the time within which actions shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form, by those who are entitled to it; and such waiver, when acted upon, becomes an estoppel to plead the statute. To us, this seems a fair statement of the law. According to the averments contained in the second amended complaint, the Attorney General agreed that, as long as plaintiff paid the storage charges on the equipment, plaintiff could bring a suit "at its own convenience and whenever it so desired." When this agreement was made the Attorney General knew of its terms and was also aware that contained therein were provisions which might postpone beyond the statutory period the time when plaintiff would commence an action to determine the legality of its possession of the equipment. From the allegations of the second amended complaint, it is apparent that there was in the minds of both parties a question as to the possession of the equipment by plaintiff under the circumstances pleaded being lawful. Plaintiff wanted additional time to await a decision by the courts in pending litigation of a character similar to that contemplated by it. The Attorney General was privileged at any time to advise the plaintiff that he would no longer abide by the agreement, rescind the same, and demand that plaintiff institute legal proceedings to determine the legality of its possession of the equipment, but instead of taking such course the Attorney General chose to abide by the agreement and to demand of and to receive from plaintiff storage charges upon the equipment up to January 1, 1943. As we read the allegations of the second amended complaint, a fair construction of the provisions of the agreement that plaintiff "could bring a suit at its own convenience and whenever it so desired" would be that the same is tantamount to a waiver of the statute of limitations. In other words, the practical effect of the agreement between the parties herein was that the Attorney General said to the plaintiff: "In view of pending litigation, upon the outcome of which the legality of your possession of the equipment in question may be determined, if you will deliver the equipment to me, I will store the same in a warehouse if you pay the storage charges thereon, and so long as you do so, and pending the outcome of the aforesaid litigation, you may bring legal action to determine your rights to possession of the equipment 'at your own convenience and whenever you so desire.'" Therefore, under the provisions of the agreement pleaded herein, it must be held that the statute of limitations commenced to run only when the parties to the aforesaid agreement, or one of them, ceased to act upon it, which was well within three years prior to the commencement of the instant proceeding.

[9-12] The respondent herein urges the bar of section 360 of the Code of Civil Procedure relative to the time of commencing civil actions. We do not think that the cited section is controlling here because the courts hold, for instance, that a provision for renewal contained within an instrument is a valid provision. Morehouse v. Allen, 213 Cal. 1, 300 P. 961. By the same token, a provision in an agreement waiving the statute of limitations is a valid provision and necessarily implies the courts' willingness to enforce the same. To give effect to every valid provision of a contract or agreement not unlawful or against public policy is the general policy of the law. It is well settled law in this jurisdiction that the statute of limitations may be waived, and little, if any, doubt is left that it may be waived by a provision in the agreement itself. Furthermore, it is not necessary in all cases that the waiver of the statute of limitations be in writing, because the conduct or even the silence of a party under some circumstances may create an equitable estoppel which would deprive him of his right to plead the statute as a bar. Calistoga National Bank v. Calistoga Vineyard Co., 7 Cal.App.2d 65, 73, 46 P.2d 246.

For the foregoing reasons, the judgment is reversed and the cause remanded with directions to the court below to overrule the demurrer to the second amended complaint, and to allow the defendant a reasonable time within which to file an answer thereto.

YORK, P. J., and DORAN, J., concur.

Hearing denied; SHENK, J., dissenting.

**HAGGE et al. v. DREW et al.***

**Civ. 14707.**

District Court of Appeal, Second District, Division 1, California.

March 23, 1945.

Rehearing Denied April 16, 1945.

Hearing Granted May 21, 1945.

**1. Vendor and purchaser ⇐35**

That vendor represented in writing that he was then owner in fee simple of premises, whereas he had only made a part payment, and there was outstanding trust deed for balance of price for which vendor had purchased property, did not entitle purchaser to cancellation of contract to purchase.

**2. Vendor and purchaser ⇐134(1)**

An outstanding mortgage on property does not necessarily mean that vendor does not have a fee-simple title.

**3. Contracts ⇐94(8)**

Generally, a party entering into a bargain is not bound to tell everything he knows to other party even if he is aware that the other is ignorant of the facts, but if a fact known by one party and not the other is so vital that, if mistake were mutual, contract would be voidable and party knowing fact also knows that the other does not know it, nondisclosure is fraudulent.

**4. Contracts ⇐123(1)**

Where contract for sale of land and subdivision thereof for home purposes was part of administration of Federal Housing Act in time of war and improvements were to be made with federal priorities for building of homes for war workers, if profit of vendor was inordinate and unfair, contract would be unenforceable for reasons of public policy. National Housing Act, 12 U.S.C.A. § 1701 et seq.

**5. Contracts ⇐142**

Where contract for sale of land and subdivision thereof for home purposes was part of administration of Federal Housing Act in time of war and improvements were to be made with federal priorities for building of homes for war workers, in purchaser's action to cancel the contract, whether profit of vendor resulted in overvaluing property, when all parties were aware that property was to be passed upon for security for loans under Federal Housing Administration, was question of fact. National Housing Act § 512, 12 U.S.C.A. § 1731.

**6. Contracts ⇐107**

Generally, where statute primarily designed for protection of public provides penalty for violation thereof, penalty is equivalent of an express prohibition and a contract made contrary to the statutory requirements is void.

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Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by H. H. Hagge and another against John Drew and another for cancellation of a contract and to enforce a trust. From a judgment for defendants, from an order denying a motion to vacate and enter a different judgment, and from an order denying a motion for new trial, the plaintiffs appeal.

Judgment reversed and attempted appeals from orders denying motions dismissed.

Buel R. Wood and Robert T. Linney, both of Los Angeles, for appellants.

Samuel DeGroot and Aaron Sapiro, both of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

The property involved in this litigation is situated in the San Fernando Valley, and consists of a considerable acreage suitable for subdivision for residential purposes. Title to the property was in a trustee in bankruptcy; the trustee sold it to the defendant, John Drew. The purchase price was $87,135, $20,000 in cash, the balance represented by defendants' promissory note, secured by a trust deed.

The trustee in bankruptcy and defendant agreed that the sale was for the purpose of subdivision and building of homes. In addition to the usual terms, the trust deed contained additional covenants requiring the defendant to subdivide and to build residences within a specified time. There was also a release clause applicable to lots and improvements to be sold to home purchasers. Such purchasers were to have a clear title, subject to a purchase-money mortgage or trust deed, for the greater part of the cost of lot and improvements. And the financing was to be done under the National Housing Act, which provides a method for such mortgages to be insured with the Federal Housing Administrator.

* Subsequent opinion 165 P.2d 461.

February 27, 1942, plaintiff H. H. Hagge and defendant John Drew entered into an agreement; plaintiff to buy the property and defendant to sell it. This agreement was in writing, executed by plaintiff and defendant and their wives. In discussing the agreement we will refer to it as the agreement of purchase and sale. And in this agreement the plaintiff was bound by the terms and conditions of the trust deed, except that times of payments upon deferred principal were somewhat later than like payments required to be made by the defendant under the trust deed.

There was, however, a considerable difference in the purchase price which defendant agreed to pay the trustee in bankruptcy and which plaintiff agreed to pay defendant. Defendant was to pay $87,135 to the trustee in bankruptcy; plaintiff agreed to pay defendant $174,270; $10,000 down and the balance as improved lots were sold. In other words, plaintiff's price was just twice defendant's, 29 days after defendant bought the property.

Following the execution of the agreement of purchase and sale plaintiff went upon the property, subdivided it, improved it with necessary streets, curbs and facilities to connect with public utilities, and built a number of homes—all financed in accordance with the National Housing Act, 12 U.S.C.A. § 1701 et seq.

During the progress of the work the plaintiff encountered difficulties. It was necessary for him to furnish public authorities a builder's bond conditioned upon the completion of streets, curbs, sidewalks, and facilities to connect with public utilities. The purchase and sale agreement provided that plaintiff and defendant were jointly to furnish such bonds, but under present day minuscule regulations enmeshing anyone attempting to do anything, plaintiff was advised that only the owner of the property could execute such bonds. Thus delay was occasioned.

And then, to crown it all, the plaintiff was advised by the lending authority of the discrepancy between the purchase price to him and that paid by the defendant to the trustee in bankruptcy.

Notwithstanding these things, the plaintiff went ahead, secured release of 206 lots, and built residences upon them. Thereafter he failed to comply with the terms of the agreement applicable to the balance of the property, and default was declared by defendant. Whereupon the plaintiff brought this action against the defendant alleging fraud in the inception of the agreement of purchase and sale.

The trial court found there was no fraud. Judgment followed for defendant. Plaintiff moved for a new trial, which motion was denied. Plaintiff also moved to vacate the judgment and to enter a different judgment, which motion was also denied. Plaintiff appeals from the judgment from the order denying his motion to enter a different judgment, and from the order denying his motion for a new trial.

A careful review of the record discloses that prior to the execution of the agreement of purchase and sale, all negotiations were conducted between agents of the defendant and plaintiff. There is no testimony of any fraudulent representation as to any fact entering into the transaction. The plaintiff was not advised of the purchase price paid the trustee in bankruptcy. No representation as to it was made to him or to his agent; neither he nor his agent made any inquiry about it.

[1, 2] Plaintiff has built his case primarily around the theory that there was fraud because in the agreement of purchase and sale the defendant represented in writing that he was then owner in fee simple of the premises, whereas he had only paid $10,000 down and there was an outstanding trust deed for the balance of $164,000. This theory falls, however, because an outstanding mortgage upon property does not necessarily mean that one does not have a fee simple title. In re Waltz, 197 Cal. 263, 240 P. 19.

But there are two reasons under either of which a new trial must be had in this action.

These concern the profit of $87,135 made by the defendant. That amount must be passed on to individual purchasers of homes in the tract. In the event such purchasers default in payment of purchase-money mortgages, and the properties cannot be sold for sufficient to pay the mortgages, the loss then falls upon the Federal Housing Administrator under the National Housing Act. If the profit is fair under the circumstances, then the defendant should prevail; if, on the contrary, the profit is inordinate, or unfair, then it may not be passed on, first to home purchasers, secondly to finance

companies, and thirdly to a governmental agency. There is no finding as to this essential fact.

[3] The first reason referred to is this: There is a well settled exception to the general rule in the law of frauds that a party entering into a bargain is not bound to tell everything he knows to the other party even if he is aware that the other is ignorant of the facts. The general rule is stated in Bacon v. Soule, 19 Cal.App. 428, 126 P. 384; Heydenfeldt v. Osmont, 178 Cal. 768, 175 P. 1.

The exception is that "if a fact known by one party and not the other is so vital that if the mistake were mutual, the contract would be voidable, and the party knowing the fact also knows that the other does not know it, non-disclosure is not privileged and is fraudulent." Rest. Contracts, Sec. 472, Clause b.

The exception has been applied in California in Clauser v. Taylor, 44 Cal.App.2d 453, 112 P.2d 661, and Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 113 P. 2d 465, where it was held to be the duty of a seller to disclose a filled-in condition of land.

[4] The second reason requiring a new trial is that if the profit involved is inordinate or unfair, it is against public policy to enforce the contract. The entire transaction is part and parcel of the administration of the Federal Housing Act in a time of war. And also the improvements were made with federal priorities for the building of homes for war workers. The building project is manifestly dependent upon priorities, because its only purpose was to build homes for war workers—priorities which no private enterprise may secure for any private purpose. It thus becomes evident that if the profit of defendant was inordinate or unfair, any contract respecting it would be unenforceable for reasons of public policy.

This principle is being applied by the courts more and more in the development of the modern law of contracts, when contracts contravene or tend to defeat the purpose of a public statute. 17 C.J.S., Contracts, § 271, p. 655. In California its application has been aptly set forth by our Supreme Court in McAllister v. Drapeau, 14 Cal.2d 102, where, at page 108, 92 P.2d 911, at page 915, 125 A.L.R. 800, referring to administration of the Home Owners' Loan Corporation statute, it is said: "It is obvious, from a reading of the statute and the rules and regulations above quoted, that the main and controlling purpose of the act was to assist small home owners who, because of the then existing financial conditions, faced loss of their homes through inability to meet the charges due on mortgages on their home property. It is to be noted that the act places no compulsion, direct or indirect, on the creditor. The creditor had complete liberty of action. If he refused to accept the offer of the H.O.L.C. as to the amount of bonds and cash it would advance to refund the debt, there was nothing the H.O.L.C. or the debtor could do about it. It was contemplated, however, that many creditors would, and experience under the act proved that many did, accept a reduction in the amount of the existing loan in order to secure liquid assets such as bonds of the H.O.L.C. rather than foreclose on the property and have to hold it until conditions in the real estate market improved. The act provides that such reduction should be passed on to the home owner, the debtor. The rules and regulations contemplated that under some circumstances it would be to the interest of the home owner to give a second mortgage to the creditor to secure a part of the refunded debt, but such rules and regulations provided that the H.O.L.C. would not refund the first mortgage if the creditor demanded a second unless the financial ability of the debtor and the financial arrangements were such that the debtor would have a reasonable opportunity to pay off both mortgages. Obviously, before these facts could be ascertained, a full disclosure of the amount and the terms of the proposed second lien would have to be made to the H.O.L.C. The securing of a second lien by the creditor without such disclosure is clearly in violation of the letter and spirit of the statute and regulations. This is demonstrated not only by the terms of the statute and the regulations, but also by the language of the agreement above quoted which all creditors were required to sign wherein the creditor represented and agreed that he was accepting the bonds 'in full settlement of the claim of the undersigned'." See also: Woods v. Kern County Mutual Building & Loan Ass'n, 34 Cal.App.2d 468, 93 P.2d 837; Richard R. Adams Co. v. Pacific States Savings & Loan Co., 34 Cal. App.2d 723, 94 P.2d 370.

[5, 6] Moreover, it becomes a question of fact whether the profit of the defendant resulted in over-valuing the property here

in question, when all parties were aware it was to be passed upon for security for loans under the Federal Housing Administration. Sec. 1731, 12 U.S.C.A., Banks and Banking, makes it a felony to wilfully over-value any security for the purpose of influencing in any way the action of the administration of the Federal Authority.

"As a general rule it may be said that when it appears there has been a violation of a statute primarily designed for the protection of the public with a penalty prescribed for the violation thereof, such penalty is the equivalent of an express prohibition—that a contract made contrary to such statutory requirements is void and no action may be brought to enforce it. Berka v. Woodward, 1899, 125 Cal. 119, 57 P. 777, 73 Am.St.Rep. 31, 45 L.R.A. 420; Citizens State Bank v. Gentry, 1937, 20 Cal.App.2d 415, 67 P.2d 364; Wise v. Radis, 1925, 74 Cal.App. 765, 242 P. 90." Gatti v. Highland Park Builders, Inc., Cal.App., 155 P.2d 656, 658.

The judgment is reversed; the attempted appeals from the order denying motion to enter a different judgment and from the order denying motion for a new trial are, and each of them is, dismissed.

YORK, P. J., and WHITE, J., concur.




68 Cal.App.2d 621

**In re TIERNEY'S ESTATE.**

**SCRIBNER v. YOUNG.**

**Civ. 14571.**

District Court of Appeal, Second District, Division 1, California.

April 2, 1945.

Hearing Denied May 28, 1945.

**1. Executors and administrators ⇐76**

The probate court is deemed to be guardian of estates of decedents, and to have control of persons appointed by it to administer them.

**2. Executors and administrators ⇐469(1)**

Independent of objections urged by any person, probate court has duty of its own motion to scrutinize carefully the accounts of person appointed to administer estate of decedent, to correct all errors appearing therein and to disallow any item which is not a proper charge against the estate.

**3. Executors and administrators ⇐469(1)**

Probate court has exclusive jurisdiction upon settlement of account, after notice to parties interested, to determine what items of expenditure incurred by administration are proper charges against estate of decedent.

**4. Executors and administrators ⇐510(10)**

Probate court, in passing upon expenditures incurred during administration of estate of a decedent, is vested with a broad discretion which will not be disturbed on appeal except when abused.

**5. Executors and administrators ⇐76**

The probate court is vested with power to supervise conduct of administrators, and is the tribunal to approve or disapprove if they neglect to procure authorization to perform acts.

**6. Executors and administrators ⇐506(3)**

Evidence established that probate court did not abuse its discretion in approving and settling fourth account current and report of one as surviving trustee under will of a decedent and as executor under will of deceased cotrustee and overruling objections thereto relating principally to investment of trust funds.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Proceeding in the matter of the estate of Helen Iten Tierney, deceased. From an order approving and settling the fourth account current and report of Lyndol L. Young, as surviving trustee under the will of Helen Iten Tierney, deceased, and as executor under the will of Katherine C. Iten, deceased cotrustee, and overruling objections and exceptions made thereto by Frederick Scribner, as trustee, Frederick Scribner appeals.

Affirmed.

See, also, 63 Cal.App.2d 295, 146 P.2d 700.

Lillick, Geary, McHose & Adams, A. F. Mack, Jr., and Donn B. Tatum, all of Los Angeles, and W. C. Black, of San Francisco, for appellant.

Lyndol L. Young, of Los Angeles, in proper.

YORK, Presiding Justice.

This is an appeal by Frederick Scribner, as trustee, from an order approving and settling the fourth account current and report of Lyndol L. Young, as surviving trustee under the will of Helen Iten Tierney, deceased, and as executor under the will of Katherine C. Iten, deceased co-trustee, and overruling objections and exceptions made thereto by said Frederick Scribner.

The record herein discloses that Helen Iten Tierney died testate on February 12, 1938. Her will was probated and pursuant to paragraph 14th thereof, nominating and appointing Katherine C. Iten and Lyndol L. Young "as guardians of the estate of my three children, and as executors and trustees of this my last will and testament", her estate was distributed on December 14, 1938, to said Katherine C. Iten and Lyndol L. Young, as trustees, who administered the same until the death of Katherine C. Iten on February 6, 1943, at which time appellant Scribner was appointed as trustee in the place of said Katherine C. Iten, deceased.

Katherine C. Iten appointed respondent Young as executor of her will, as well as trustee of a trust estate created thereunder. On May 10, 1943, respondent Young, as surviving trustee under the will of Helen Iten Tierney, deceased, and as executor of the will of Katherine C. Iten, deceased co-trustee, filed his fourth account current and report of cotrustees and petition for approval thereof, to which appellant filed his objections and exceptions.

At the hearing on said petition and objections at which respondent Young testified and no evidence was adduced on behalf of appellant Scribner, the trial court made its order overruling the objections and approving the account. The instant appeal followed.

Appellant here contends that the trial court was in error in approving the trust accounts in regard to each of the following objections:

"1. Objection to the loan of $100,000 out of the assets of the estate to Katherine C. Iten, one of the trustees, for her personal use and gain and without any order of court.

"2. Objection to the investment of $70,000 in the Iten-Barmettler Biscuit Company, for stock known by the trustees to be of less value and in a company in which Katherine C. Iten was an officer and promoter, and who was represented by Lyndol L. Young, as her attorney.

"3. A further objection to the $100,000 loan, the $70,000 investment and to said accounts upon the ground that a conflict of interest exists between Lyndol L. Young, Katherine C. Iten and the beneficiaries of the above estate, by virtue of their being in conflicting positions.

"4. Objection on the ground that the investments were made in violation of the provisions of the will of Helen Iten Tierney, deceased, in that no investment counselor was consulted, and that the investments were not authorized.

"5. Objection to the account upon the ground that: (a) No segregation as to each beneficiary as provided in the will; (b) Not supported by proper vouchers; (c) Does not show the true condition of the estate; (d) Not in sufficient detail; (e) That it cannot be determined what is income, exchange or sale of capital assets, or loss or gain of capital assets.

"6. Objection to the payment of $1,000 a month to Lyndol L. Young in that it was excessive, and that it included trustee's and Guardian's fees performed by Lyndol L. Young as an attorney for himself as trustee and guardian.

"7. Objections to specific items."

The order from which this appeal is taken decrees as follows with reference to the various items to which the foregoing objections are directed:

"That all of the accounts and all of the transactions of said trustees as set forth in said report and said fourth account current, both where mandatory and where done pursuant to their powers and discretion as said trustee, were in accordance with law and in accordance with the terms of the trust herein as set forth and declared in the last will and testament of the above named decedent and the decree of distribution in the matter of the estate of the above named decedent; that the disbursements of said trustees from the estates of the beneficiaries and in connection with the administration of said trust, as shown by said exhibits and schedule of said account, where not mandatory under the terms of said decree of distribution, have all been duly made pursuant to the exercise of discretionary powers conferred upon said trus-

tees by law, or in said decree of distribution and in accordance with the conditions and limitations therein prescribed;

"That all investments made for said trust are in securities authorized by law or by the terms of said trust and were carefully selected and made by said trustees for the purpose of serving the best interests of said trusts and all parties interested therein, and that the best interests of said trust, and all parties interested therein, have been served by the making and selection thereof by said trustees; and that on none of them have the trustees or either of them, made any profits, directly or indirectly;

"That the orders of this court placing the compensation of said petitioner, Lyndol L. Young, for his services as cotrustee, on an annual basis of $12,000.00 payable $1,000.00 per month, are hereby supplemented to include therein the services now being rendered by said petitioner as guardian of the persons of said minors, said petitioner having been appointed their personal guardian by this Court on the 4th day of March, 1944;

"That the advancement by said trust estate during the year 1942 to Mrs. Katherine C. Iten, grandmother of said minors and mother of said Helen Iten Tierney, deceased, of the sum of $100,000.00, as set forth in Schedule C–1 of said accounting, was for the benefit and to the best interests of said trust, and the beneficiaries thereof, and is hereby approved; that said loan was not in default on * * * the date of said accounting; that the allegations set forth on pages 3, 4, 5, and 6 of said fourth account current and report of trustees with reference to said advancement are true;

"That it is to the benefit and best interests of said trust and of the beneficiaries thereof, and it is hereby ordered, that the loan of $100,000.00 which was made to said Katherine C. Iten on March 3, 1942, be extended for another year, to-wit: to and including March 3, 1944;

"That each and all of the objections and exceptions of Frederick Scribner, trustee, to said fourth account current and report of trustees and petition for approval thereof, are untrue and are hereby overruled and denied;

"That the objection of said Frederick Scribner to the alleged investment by said Katherine C. Iten of $70,000.00 from funds of the trust estate in shares of the Iten-Barmettler Biscuit Company, is unfounded and untrue, it appearing to the court, and the court finds, that no funds of this trust estate were at any time invested by said trustees in shares of the capital stock of the Iten-Barmettler Biscuit Company;

"That said account shows a sufficient segregation as to the individual minors, beneficiaries of the trust estate, and as to their respective interests and as to the assets and expenses in the trust estate of each individual minor; that proper and sufficient vouchers have been filed with this court in support of said accountings;

"That the investments and re-investments set forth in said fourth account current were authorized, and were proper, and were in accordance with the terms of the last will and testament of Helen Iten Tierney, deceased, and were for the benefit and for the best interest of the trust estate and all the beneficiaries thereof, and are hereby approved; that said trust estate, and the beneficiaries thereof, greatly benefited by said investments and re-investments;

"That the financial advisors named in the last will and testament of Helen Iten Tierney were not consulted in regard to the investment of trust funds; that the provision in said last will and testament of Helen Iten Tierney, deceased, with reference thereto, is advisory and not mandatory upon said trustees; that, however, it appears to the court and the court further finds, that the trustees did consult with E. F. Hutton & Company of Los Angeles, California, and the officers of the Security First National Bank of Los Angeles, California, with reference to the financial affairs of said trust estate;

"That said account is a full, complete, true and accurate acounting of said trustees and contains a full, complete, true and accurate account of all their dealings; that said account is in sufficient detail and form; that the evidence submitted at this hearing shows that the assets of the said trust are kept in a proper and legal place, and in the name and under the responsibility of said trustees; that it can be ascertained from said account what is income, exchange and sale of capital assets and loss or gain of capital assets; * * *"

The court further found that the amounts paid out for trustees' fees were fair and reasonable, not excessive, unwarranted or improper; that the sale of bonds

and securities was necessary, authorized, proper, and for the benefit and best interests of the trust estate and the beneficiaries thereof; and that all of the administrative expenses were proper and necessary disbursements and for the best interests of said trust estate and the beneficiaries thereof, and approved each of said items.

[1-4] With respect to accounting, the probate court is deemed "to be the guardian of estates and to have control of the person appointed by it to administer them"; that "independent of objections urged by any person, it is the duty of the court, of its own motion, to scrutinize the account carefully"; to correct all errors appearing therein and to disallow any item which is not a proper and legal charge against the estate. 11B Cal.Jur. 589; Estate of Bennett, 13 Cal.2d 354, 368, 90 P.2d 84, 126 A.L.R. 771; Estate of Gainfort, 11 Cal.2d 298, 300, 79 P.2d 97; Estate of Roberts, 49 Cal.App.2d 71, 81, 120 P.2d 933; Estate of De Barry, 43 Cal.App.2d 715, 725, 111 P.2d 728. Moreover, the "Probate Court has exclusive jurisdiction upon the settlement of the account, after notice to the parties interested, to determine what items of expenditure incurred during the administration are proper charges against the estate. Gurnee v. Maloney, 38 Cal. 85, 99 Am.Dec. 352. The court in passing upon such expenditures is vested with a broad discretion which will not be disturbed on appeal except when abused. Estate of Parker, 186 Cal. 668, 200 P. 619." Estate of Lindauer, 53 Cal.App.2d 160, 165, 127 P.2d 589, 592.

[5] In Estate of Maddalena, 42 Cal.App.2d 12, 19, 108 P.2d 17, 21, it was held: "The probate court is vested with power to supervise the conduct of administrators. If they neglect to procure authorization to perform acts, that court is the tribunal to approve or disapprove. The fact that economic losses may result to beneficiaries is not the sole criterion by which to measure the quality of the administrator's act. In the absence of a showing of bad faith upon his part or of an abuse of discretion by the trial court in approving the account, it would be inappropriate for the appellate court to interfere with the action of the trial judge."

[6] At the hearing herein respondent Young was interrogated by the trial judge regarding each particular objection made to the account by appellant. To the questions so propounded, respondent made full and complete explanations and submitted himself to cross-examination by counsel for appellant. Without reciting such testimony in detail, suffice to say that this court after reading the reporter's transcript has concluded that the evidence presented amply supports the findings and order, and demonstrates to a degree that there was no abuse of discretion on the part of the trial court in approving the account and overruling the objections made thereto.

For the reasons stated, the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.




68 Cal.App.2d 894

**In the Matter of the ESTATE and Guardianship of Mary Jane TIERNEY, Joan Katherine Tierney, and John Allen Tierney, minors.**

**Frederick SCRIBNER, Contestant and Appellant, v. Lyndol L. YOUNG, Petitioner and Respondent.**

**Civ. 14572.**

District Court of Appeal, Second District, Division 1, California.

April 2, 1945.

Hearing Denied May 28, 1945.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Lillick, Geary, McHose & Adams, A. F. Mack, Jr., and Donn B. Tatum, all of Los Angeles, and W. C. Black, of San Francisco, for appellant.

Lyndol L. Young, of Los Angeles, in pro. per.

YORK, Presiding Justice.

This is a companion case to the case of Estate of Tierney, Cal.App., 157 P.2d 411, and involves practically the same issues, except that the instant cause has reference to an appeal from an order approving the fifth account current of the guardians of the minor children of decedent Tierney, and overruling objections thereto made by appellant Scribner; while the companion case

involves an appeal from an order approving the fourth account current of the surviving trustee of the testamentary trust created by the will of Helen Iten Tierney, deceased, for the benefit of the said minors, and overruling objections directed against said account by appellant Scribner.

For the reasons stated in the companion case of Estate of Tierney, supra, the order appealed from is affirmed.

DORAN and WHITE, JJ., concur.




68 Cal.App.2d 650

## WHITE v. WHITE.

Civ. 14710.

District Court of Appeal, Second District, Division 2, California.

April 4, 1945.

**Divorce ⇐303(3)**

Modifying custodial provisions of divorce decree so as to permit divorced wife to take her child with her to her new home in another state under certain conditions was not an abuse of discretion. Civ.Code, § 138.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Angela M. White against McDonald White for divorce, wherein a decree was entered granting plaintiff a divorce and custody of a minor child. From an order granting plaintiff permission to remove the child from the state under certain conditions, the defendant appeals.

Affirmed.

James C. Bone, of Arcadia, and Gerald E. Kerrin, of Los Angeles, for appellant.

George I. Devor, of Los Angeles, for respondent.

W. J. WOOD, Justice.

This is an appeal by defendant from an order of the superior court permitting plaintiff to remove the minor child of the parties from the State of California.

Plaintiff was granted an interlocutory decree of divorce from defendant on November 27, 1939, and the final decree was entered on December 6, 1940. On those dates both parties were residents of California. On April 9, 1944, plaintiff was married to Ben L. Olcott, a captain in the United States armed forces whose permanent residence was and is in Cheney, Pennsylvania. Under an order of the court which was entered on July 31, 1940, both parties were prohibited from taking the minor child from Southern California. But after her marriage to Captain Olcott plaintiff applied for and obtained from the court on May 23, 1944, the following order: "In the matter of the order to show cause in re removal of minor child from the State, which was heard May 10, 1944 and taken under submission by the court, it is ordered that the motion of the plaintiff for permission to remove the child of the parties, Nancy White, from the State of California be and it is hereby granted upon the following conditions: (1) That said child shall not be removed until the completion of the present school term; (2) That defendant shall at all times be advised of the address where said child is domiciled; and (3) That plaintiff upon request shall cooperate in making reasonable arrangements for defendant to visit said child." An appeal taken by defendant from this order is now before us. Pending the appeal plaintiff took the child to her new home in Pennsylvania, resulting in contempt proceedings in which we filed our decision on March 29, 1945. The facts concerning the legal difficulties of this couple are more fully set forth in the opinion in that proceeding.

By section 138 of the Civil Code the superior court is given authority in divorce actions to make such orders for the care and custody of minor children as may seem necessary and proper and it is to be governed by what appears to be the best interest of the child. It is especially provided in the code section that if the child is of tender years it should be given to the mother. Captain Olcott has the legal right to establish the family domicile for his wife and there is no evidence before the court to justify any conclusion other than that he had a permanent and proper home at Cheney, Pennsylvania, where plaintiff is now living with her husband's mother while her husband is in the armed forces. Unquestionably a girl of ten years of age, in

the absence of evidence of unfitness, should be with her mother and it is clear that her mother should be in the home established for her by her husband even though he be temporarily absent because of the war. Defendant undoubtedly has the right to live in any state of his choice but he cannot successfully support the contention that the court has abused its discretion by refusing to compel the mother of the child to choose between leaving her child in California and failing to abide in the home provided by her husband. We see no abuse of discretion in the trial court in permitting the mother to take the child with her to her new home. In enacting section 138 of the Civil Code the legislature did not limit the discretion of the court by state boundaries. Counsel has not cited any California case in which it is especially held that the superior court may grant permission of a parent to take a minor child from this state but in a number of the other states such orders have been made with the approval of the reviewing courts. Butler v. Butler, 1928, 83 N.H. 413, 143 A. 471; Roosma v. Moots, 1941, 62 Idaho 450, 112 P.2d 1000; Epstein v. Epstein, 1926, 234 Mich. 200, 207 N.W. 894; Bennett v. Bennett, 228 Wis. 401, 403, 280 N.W. 363; Kane v. Kane, 241 Mich. 96, 216 N.W. 437; Arnold v. Arnold, 67 Ohio App. 282, 36 N.E.2d 430.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.




## CALIFORNIA EMPLOYMENT COMMISSION v. KOVACEVICH. *

Civ. 3124.

District Court of Appeal, Fourth District, California.

April 4, 1945.

Rehearing Denied April 25, 1945.

Hearing Granted May 31, 1945.

**1. Master and servant ⇐78**

Liberal construction of unemployment insurance legislation should not go beyond the limits of the statutory intent. Gen. Laws 1937, and Supp. 1939, Act 8780d.

**2. Taxation ⇐219**

The exemption of "agricultural labor" from the Unemployment Compensation Act is based upon the kind of work done and not on the status of the employer. Gen. Laws Supp. 1939, Act 8780d, § 7(a).

**3. Constitutional law ⇐70(1), 77**

Any labor which is in fact agricultural in character and which cannot be otherwise regardless of any change in the custom of doing it should not be included within the operation of the Unemployment Insurance Act by administrative or judicial legislation under the guise of liberal interpretation. Gen.Laws Supp. 1939, Act 8780 d, § 7(a).

**4. Taxation ⇐219**

The picking or harvesting of fruit crops, being an indispensable and inseparable part of the production of crops and necessarily performed on a farm, constituted "agricultural labor", exempt from operation of Unemployment Insurance Act. Gen.Laws Supp. 1939, Act 8780d, § 7(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

**5. Taxation ⇐219**

No change in the custom or method of doing work in the actual production of an agricultural crop can make such labor anything other than agricultural, even though the work be done by or for a person or corporation whose business is industrial or commercial in nature. Gen. Laws Supp. 1939, Act 8780d, § 7(a).

**6. Taxation ⇐219**

Services performed by packing house labor and office help in employer's fruit packing house after the fruit was harvested was an integral part of employer's general commercial business and was not exempt from Unemployment Insurance Act as "agricultural labor." Gen.Laws Supp. 1939, Act 8780d, § 7(a).

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Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by California Employment Commission, formerly Unemployment Reserves Commission, against John Kovacevich, Jr., as administrator of the estate of John Kovacevich, Sr., deceased, to recover contributions alleged to be due under the Un-

* Subsequent opinion 165 P.2d 917.

employment Insurance Act. Judgment for defendant, and plaintiff appeals.

Reversed, with directions.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and Forrest M. Hill, Ralph R. Planteen, and Miriam E. Wolff, all of Sacramento, for appellant.

Iener W. Nielsen, of Fresno, and Calvin H. Conron, Jr., of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to recover contributions claimed to be due under the Unemployment Insurance Act, Deering's Gen.Laws, and Supp. 1939, Act 8780d, based upon wages paid employees by John Kovacevich, Sr., during the years 1939 and 1940.

John Kovacevich, Sr., who has since died, was engaged in the business of packing and shipping grapes and plums, operating under the name of "The Arvin Fruit Distributors." He handled no fruit except his own. He owned no land during 1939 but bought some land late in 1940. Most of the fruit he handled was obtained by purchasing the crops of various growers under contracts by which he agreed to buy, and the owner of the land agreed to sell, the crops on certain land for that year at a fixed price payable in installments, the last one being due about harvest time. In most of the contracts he agreed to do the "girdling, thinning and harvesting" at his own expense and the seller agreed to do the cultivating, irrigating and other farm work, but in a few of them Kovacevich also agreed to do the pruning and irrigating or other parts of the work of raising the crops. The contracts were entered into at various dates between January and May of the particular year.

He operated a packing house in Arvin containing the usual machinery and equipment at which he packed and loaded this fruit on cars for shipment. On his records, his employees were divided into three classifications: "packing house labor" covering employees engaged in packing and shipping the fruit, "field labor" covering those employed in picking and harvesting and such other services as were performed on the various farms, and "office help". The assessment or contribution here involved was based upon the wages paid to employees in all of these classifications, and the record fails to show the exact amounts paid to the respective classes.

The court adopted the defendant's theory that in operating this business Kovacevich was not acting as a commercial packer or shipper but was packing and shipping his own fruit which he had grown and harvested, that his business was related solely to growing and marketing his own produce, and that the entire business was exempt from contributions under the act in question. Judgment was entered in favor of the defendant and the plaintiff commission has appealed.

Appellant's position is that none of the services here involved, either in connection with growing or picking the fruit or in connection with packing and shipping the same, constituted agricultural labor within the meaning of section 7(a) of this act nor within the meaning of Rule 7.1 adopted by the commission; that most of these services were performed at the packing house and away from the farms; that the remainder were closely connected therewith and essential thereto; that Kovacevich was engaged in commercial rather than agricultural activities; that he purchased crops from various farms but was not a tenant of those farms; that such work as he did on these farms was done solely for the purpose of furthering his commercial business by getting fruit of a better quality and of earlier maturity; that such work was not done for the owners or tenants of the farms; and that such work was carried on not as an incident to ordinary farming operations but as an incident to manufacturing or commercial operations. It is further argued that the purpose of this act is remedial in nature and that its provisions should be liberally construed to the end that its coverage and benefits be extended to as many workers as possible.

[1-3] While it may be true that such legislation should be liberally construed, this should not go beyond the limits of the statutory intent. By section 7(a), the Legislature has definitely excluded agricultural labor from the operation of this act, without limiting or defining that term. In Stuart v. Kleck, 9 Cir., 129 F.2d 400, 402, in speaking of the Federal Social Security Act, the court said: "When the Congress * * * made use of the broad term 'agricultural labor', this expression, used by itself, must be given a meaning wide enough to include agricultural labor of any kind, as generally understood throughout the United States." And, further, "Accordingly, the exemption attaches to the 'serv-

ices performed', which refers to the type of work that is being done, and is not dependent on the form of the contract or whether the employee is employed by the owner or tenant of the farm or an independent contractor." By statute, the exclusion is based upon the kind of work done and not on the status of the employer. Our statute recognizes that the same employee may be engaged in both industrial and agricultural activities and provides, in section 7, that his classification shall be determined by the kind of service in which he spends the greater part of his time. In view of the express statutory intent to exclude agricultural labor any labor which is, in fact, agricultural in character, and which cannot be otherwise regardless of any change in the custom of doing it, should not be included within the operation of the act by administrative or judicial legislation under the guise of liberal interpretation. Any extension of the act to cover services which can only be performed on a farm and which are an essential part of the production of crops should, and easily may be, made by legislative action.

[4] It may be conceded that some things formerly done by a farmer and which would have been considered purely agricultural in character have become, in all reason, much more industrial or commercial in character than agricultural because of the changed way of doing them, brought about by modern economic development. However, those changes have occurred in connection with the handling of products of the soil after they have come into being, that is, after the crops have been harvested. Products of the soil do not become the raw materials which may be handled and dealt with in industrial and commercial activities until they are grown and harvested. There is a natural and distinct difference between activities in handling such raw materials, and activities in producing those materials which are not "produced" until they are severed from the soil or harvested. The work of growing and producing crops is, by its very nature, agricultural in character, as universally understood, and cannot be anything else regardless of any change in the custom of doing that work. Until the crops are harvested, any change in the way of doing such work is but a change in agricultural methods, and the labor is still performed in producing crops. Since picking or harvesting is an indispensable and inseparable part of the production of crops and is necessarily performed on a farm it follows that such labor is agricultural.

Moreover, we think this distinction is recognized by the language and arrangement of the rule defining agricultural labor adopted by the commission (Rule 7.1) and that this rule, properly interpreted, leads to the same result. The former rule in this regard was divided into two clear and definite subdivisions. Subdivision (a) provided that all labor performed by an employee on a farm in connection with the cultivation of the soil and the harvesting of crops was agricultural labor. Subdivision (b) provided that services in connection with processing, packing, transporting or marketing materials produced on a farm did not constitute agricultural labor unless they were performed by an employee of the owner or tenant of the farm on which the materials were produced, nor unless they were carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

In February, 1937, the commission adopted a new rule. So far as material here, this rule provides that the term "agricultural labor" includes all services performed:

"(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops; * * *

"(2) By an employee in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations."

In 1940, this rule was amended by adding another paragraph excluding from the exemption services performed by persons pursuing special trades not closely connected with agriculture.

It will be observed that in changing the rule subdivision (a) of the old rule, which had clearly covered all services on the farm

in raising and harvesting crops, was placed in subdivision 1 of the new rule without material change. The provisions of subdivision (b) of the old rule, in somewhat changed language, were all placed in subdivision (2) of the new rule but were divided into two paragraphs. The first provides that the described services in connection with "materials * * * produced on the farm" are exempt only if they are incidental to ordinary farming operations. The second contains the additional requirement that the services "hereinabove set forth" must be performed "by an employee of the owner or tenant of the farm on which the materials * * * were produced." The two paragraphs, in form and substance, seem to be merely a restatement of the provisions of subdivision (b) of the old rule. They are placed together in a separate subdivision marked (2); each refers to materials as completed things, and to the farms on which they were produced; and both relate to the same matter—the handling of materials which have already been produced. The most reasonable interpretation of the language and arrangement of Rule 7.1 is that the second paragraph of subdivision (2) relates only to the same kind of services described in the first paragraph thereof, the handling of agricultural commodities which have already been produced, or harvested. This is especially true since subdivision (1) had already clearly and definitely covered all services on a farm up to and including the harvesting of crops.

Under any other interpretation this rule would, as stated in Cal. Employment Com. v. Bowden, 52 Cal.App.2d Supp. 841, 126 P.2d 972, 976: "amount to unauthorized legislation by the Commission, in that it would purport to restrict the meaning of the expression 'agricultural labor' as used by the legislature in the act itself, * * *."

This act was adopted as a part of a national plan of social welfare and was designed to work closely with similar federal legislation. It is even provided, in section 2 of the act, that a change in the national legislation or in the interpretation placed thereon shall, under some circumstances, affect the requirement for contributions under our act. In 1939, the Federal Social Security Act was amended by Congress, 26 U.S.C.A. Int.Rev.Code, § 1426(h), so as to define as agricultural labor all services performed on a farm, in the employ of any person, in connection with cultivating the soil or raising and harvesting any agricultural commodity. Before that amendment, in a number of federal cases it was pointed out that there was a line of demarcation after the crops had been harvested, and that services in producing and harvesting all crops were agricultural. In Latimer v. United States, D.C., 52 F.Supp. 228, 235, the court said: "It is all done in the grower's orchard, in other words, on the farm, and it all precedes delivery of the fruit for processing or marketing purposes. Thus the stage of operations at which such services cease to be an incident to ordinary farming and become incidental to the commercial operations of the packing house is reached after the fruit has been picked and upon actual delivery of the fruit to the employees of the association for transmission to the packing house." In Ellis v. Continental Cas. Co., 5 Cir., 115 F.2d 1006, 1007, in holding that the picking of oranges was agricultural labor within the meaning of the Workmen's Compensation Act, Rev. St.Tex. 1925, art. 8306 et seq., the court said: "Gathering fruit by hand is manual labor. The operation of an orchard is an agricultural pursuit. The performance of manual labor in an orchard upon the produce of the soil is farm work." In North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 9 Cir., 109 F.2d 76, 80, a case involving the processing, packing and shipping of citrus fruits, the court said: "Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry'." In that case the court quoted from Pinnacle Packing Co. v. State Unemployment Commission, an unreported Oregon case, as follows: "'The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading, packing, and marketing, then the exemption ceases.'" The last two quotations were cited with apparent approval in the recent case of Cal. Emp. Com. v. Butte County etc. Ass'n, Cal., 154 P.2d 892.

It is true, in Fosgate Co. v. United States, 5 Cir., 125 F.2d 775, 778, in speaking of businesses which have arisen in re-

cent years which are more nearly mercantile and manufacturing than agricultural, the court said: "Such businesses have increasingly tended to buy crops in the field or on the trees, thus cutting short the agricultural operations and transferring the harvest to the new business field." Agricultural operations, the act of producing agricultural commodities, cannot be cut short prior to the harvest, and this statement confuses the kind of service with the identity and nature of the employer, a thing which is immaterial under our act. Also, in Employment Security Commission v. Arizona Citrus Growers, Ariz., 144 P.2d 682, 687, the court upheld the right of certain claimants to receive unemployment benefits. There were twelve claimants, eleven of whom worked in a packing house and one was engaged in picking fruit from trees belonging to members of the association. However, the language in the opinion is limited to a discussion with respect to services performed in packing and processing fruit and the court's conclusion is thus expressed: "We conclude that the claimants who worked in the Association's packing house are not agricultural laborers, * * *."

[5] It has been said that the true test in determining whether a worker is or is not an agricultural laborer is "the nature of the work modified by the custom of doing it." Services in connection with the handling of agricultural commodities after they have been harvested may or may not be agricultural labor, depending on circumstances, as the nature of such work may well be modified by the custom of doing it. But no change in the custom or method of doing work in the actual production of agricultural crops can make such labor anything other than agricultural, even though the work be done by or for a person or corporation whose business is industrial or commercial in nature. While men are engaged in the actual work of cultivating the soil and harvesting crops therefrom, that part of their activities is necessarily agricultural.

We, therefore, hold that the second paragraph of subdivision (2) of Rule 7.1 does not relate or apply to subdivision 1 of that rule, and that all services here in question in connection with raising and producing these crops, up to and including the harvesting thereof, constituted agricultural labor within the meaning of this act.

[6] A different situation is presented with respect to that part of the services in question which was embraced within the classifications "office help" and "packing house labor", as made by the respondent. Those services were performed either in the packing house or as an integral part of the respondent's general business. Under the principles laid down in North Whittier Heights Citrus Ass'n v. National Labor Relations Board and Cal. Emp. Com. v. Butte County etc. Ass'n, supra, it clearly appears that those services were not agricultural labor within the meaning of this act. These services were of the kind described in both paragraphs of subdivision (2) of Rule 7.1 and it is, therefore, immaterial whether or not the contracts under which Kovacevich purchased this fruit made him, in law, a tenant with respect to the various properties, as contended by the respondent.

The judgment is reversed with directions to the trial court to take such evidence as may be necessary in order to determine the amount of contributions assessed with respect to that part of the services in question which were classified as "office help" and "packing house labor", and to enter a judgment for the appellant accordingly.

MARKS and GRIFFIN, JJ., concur.




68 Cal.App.2d 895

## PORTERVILLE CITRUS ASS'N v. CALIFORNIA UNEMPLOYMENT RESERVES COMMISSION.

## CALIFORNIA EMPLOYMENT COMMISSION v. GRAND VIEW HEIGHTS CITRUS ASS'N et al.

Civ. 3154.

District Court of Appeal, Fourth District, California.

April 4, 1945.

**Courts ⇐90(4)**

The District Court of Appeal having rendered opinion that services of co-operative association's employees in picking citrus

fruits constitute "agricultural labor" exempt from provisions of Unemployment Insurance Act for contributions, Employment Commission's appeal from superior court's judgment to same effect in subsequent actions will be dismissed on appellant's motion, instead of deciding such cases and repeating principles applied in prior opinion. St.1939, p. 2058, § 45.10; p. 2850, § 7(a).

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Actions, consolidated for trial, under the Unemployment Insurance Act, by the Porterville Citrus Association, a corporation, against California Unemployment Reserves Commission, also known as the California Employment Commission, to recover contributions paid under protest, and by the California Employment Commission, formerly the Unemployment Reserves Commission, against the Grand View Heights Citrus Association, a corporation, and others to collect contributions with interest and penalties. From a judgment for plaintiff in the first case and for defendants in the second case, the Commission appeals. On appellant's motion to dismiss the appeal.

Appeal dismissed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Ivan G. McDaniel and George C. Lyon, both of Los Angeles, for respondents.

PER CURIAM.

The first of these actions was brought under Section 45.10 of the California Unemployment Insurance Act, St.1939, p. 2058, for the recovery of contributions paid under protest. The second was brought under other sections of this act for the collection of contributions, with interest and penalties. The actions were consolidated for trial as both involved the same issue, namely: whether or not persons engaged in the harvesting of citrus fruit for the respective associations were subject to the contributory provisions of the act or exempted under Section 7(a), St.1939, p. 2850, thereof and Rule 7.1 of the Commission, as being engaged in "agricultural labor". The court held that these services were exempt from such contributions and the Commission took this appeal from the judgment.

When the matter was called for oral argument the attorneys for the appellant moved to dismiss the appeal. Counsel for the respondents objected to such dismissal on the ground that an important public question is involved which affects many pending and prospective cases, and that an early decision thereon should be had, in the public interest.

The question here involved, whether services in the picking of citrus fruits, rendered by employees of cooperative associations, constitute "agricultural labor" within the meaning of this act, has in principle been decided, so far as this court is concerned, in the case of California Employment Commission v. Kovacevich, Cal. App., 157 P.2d 416, the opinion in which was this day filed. No good reason appears for deciding this case and repeating the principles there applied.

The appeal is dismissed.




68 Cal.App.2d 582

**PLANTE v. GRAY et al.**

**Civ. 14726.**

**District Court of Appeal, Second District, Division 2, California.**

**March 29, 1945.**

**1. Appeal and error ⇐1010(1)**

The lower court's fact finding will prevail on appeal as against attack that finding is not supported by evidence unless there is an entire lack of substantial evidence to support it.

**2. Husband and wife ⇐279(2)**

Where property settlement agreement was made in contemplation of dismissal of wife's pending divorce action, mere fact that wife did not totally exclude husband from participation in management of properties involved was not conclusive proof that parties had abandoned contract, especially where wife retained her office as manager of estate, and in view of fact that parties sought to carry out agreement. Civ.Code, § 158.

**3. Husband and wife ⇐279(1)**

Where property settlement agreement was made in contemplation of dismissal of wife's pending divorce action, fact that husband criticized wife's manner of execution of contract, and fact that wife in some particulars may have violated covenants in contract, did not render erroneous finding that contract was binding on both parties and that husband intended that wife should succeed to ownership of husband's interest in property on his death. Civ. Code, § 158.

**4. Husband and wife ⇐279(2)**

Evidence as to parties' conduct after execution of property settlement agreement in contemplation of dismissal of wife's pending divorce action sustained finding that contract was not abrogated by the reconciliation and subsequent conduct, and that both parties considered contract to be a statement of their respective rights. Civ.Code, § 158.

**5. Husband and wife ⇐279(1)**

Where property settlement agreement was made in contemplation of dismissal of pending divorce action, fact that parties may have planned to avoid arguments concerning division of revenue or of property under all circumstances did not make contract one for a "marriage settlement" within section 178, in contemplation of separation, instead of one under section 158, permitting married couples to enter into any agreement or transaction with respect to property. Civ.Code, §§ 158, 178.

See Words and Phrases, Permanent Edition, for all other definitions of "Marriage Settlement".

**6. Husband and wife ⇐279(2)**

A marriage settlement made in contemplation of separation may be terminated by reconciliation which avoids executory portions of contract. Civ.Code, § 178.

**7. Husband and wife ⇐279(2)**

A property settlement agreement made in contemplation of dismissal of wife's pending divorce action, and not in contemplation of separation or divorce, was not abrogated by subsequent reconciliation and cohabitation. Civ.Code, §§ 158, 178.

**8. Husband and wife ⇐279(2)**

A settlement agreement made in contemplation of dismissal of pending divorce action, even if viewed as a "marriage settlement" in contemplation of separation, would not be avoided by a mere reconciliation, but could be abrogated only by some action indicating parties' purpose to restore their respectve properties to status quo. Civ.Code, §§ 158, 178.

**9. Joint tenancy ⇐1**

Two persons who hold an estate jointly, sharing equally in its profits, increments, and losses while they live, but passing the entirety thereof to survivor on death of either, are "joint tenants".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenant".

**10. Joint tenancy ⇐6**

On death of one of two joint tenants, all rights of survivorship provided for by instrument which created joint tenancy become effective and title vests instantly in survivor. Civ.Code, § 683.

**11. Joint tenancy ⇐1**

A joint tenancy is complete when there is a unity of interest, of title, of time, and possession.

**12. Husband and wife ⇐279(4)**

A settlement agreement declaring all property of both parties to be community property and vesting in parties an undivided one-half interest in property of either or both and providing that, on death of either, deceased's right to property should vest in survivor, and obligating each to keep in force a will to carry out such agreement, if not technically creating a joint tenancy, clearly safeguarded equality in enjoyment of estate while both parties should live and guaranteed totality thereof to survivor. Civ.Code, §§ 158, 683.

**13. Contracts ⇐318**

If no forfeiture is to occur by virtue of a provision of an agreement, none can be created on demand and for accommodation of one of parties thereto.

**14. Contracts ⇐318**

Equity abhors forfeitures, and they will not be allowed so long as party who deems himself aggrieved has a remedy by which he may be compensated for his loss. Civ.Code, §§ 3275, 3369.

**15. Husband and wife ⇐279(2)**

A property settlement agreement made in contemplation of dismissal of pending

divorce action could not be adjudged to be abrogated after subsequent divorce and death of husband on theory of forfeiture because of wife's alleged violation of agreement by her alleged misappropriation of funds of cotenancy or failure to properly apply such funds, or as to employment of persons objectionable to husband and her failure personally to manage properties, since any losses to deceased husband because of any such derelictions were compensable in money. Civ.Code, §§ 158, 3275, 3369.

**16. Husband and wife ⇐279(4)**

Where property settlement agreement created title in parties in nature of a joint tenancy, and such title was circumscribed by inhibitions against destruction of that tenancy, such investiture could not be defeated, after cotenancy had been terminated by death of one of parties, by mere demand of decedent's personal representative. Civ. Code, §§ 158, 683.

**17. Specific performance ⇐82**

Where wife's alleged violations of property settlement agreement made in contemplation of dismissal of pending divorce action were not such as to forfeit her rights under agreement because any loss to husband was compensable in money, wife was entitled to specific performance of agreement after subsequent divorce and husband's death. Civ.Code, §§ 158, 3275, 3369.

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Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Mary Elizabeth Plante against Pearl A. Gray, formerly Pearl A. Plante, also known as Pearl Abbott, as executrix of the last will and estate of Joseph H. Plante, also known as Joseph De La Plante, deceased, and Pearl A. Gray, formerly Pearl A. Plante, individually, for declaratory relief and for specific performance of a contract made by plaintiff with her husband for management of their properties and conversion of their titles. Judgment for plaintiff, and defendant appeals.

Affirmed.

L. H. Phillips and Rollin L. McNitt, both of Los Angeles, for appellant.

H. M. Lineman, Mab Copeland Lineman, Ernest P. Morgan, and John E. Sisson, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff instituted this action for declaratory relief and for specific performance of a contract made with her husband for the management of their properties and the conversion of their titles. The case was appealed once before from a judgment adverse to plaintiff. Plante v. Bank of America Nat. Trust & Savings Ass'n, 54 Cal.App.2d 326, 128 P.2d 791, 795. While the court there declared the meaning of controverted clauses of the contract, it denied judgment of specific performance because the record contained "substantial evidence" of plaintiff's having violated terms of the contract "on various occasions and in grave respects"; also, because there was some question whether the parties had abrogated their contract following their reconciliation. With the exception of some deleted passages the contract and other facts of the case will be found in that decision.

Suffice it to say here that after the parties had lived together for thirty years plaintiff brought suit against her husband for divorce. While that action was pending the parties executed the contract. Thereupon the divorce action was dismissed and the parties dwelled together in amity for about three years after which, because of differences growing out of disagreements concerning the management of their properties, Mr. Plante left his wife, obtained a divorce and married the defendant Pearl. Sometime after this marriage Mr. Plante deceased and his widow qualified as the executrix of his estate. She subsequently became Pearl A. Gray. As executrix and individually, Mrs. Gray appeals from the judgment rendered on the second trial, adjudicating that the properties described in the contract of plaintiff and decedent belong to Mary Elizabeth Plante and that appellant has no right or interest therein. For reversal she relies upon three propositions: (1) The findings of fact are not supported by the evidence; (2) the contract was abrogated by virtue of the reconciliation of Joseph and Mary Plante and their subsequent cohabitation and disregard of the contract; (3) respondent is not entitled to a specific performance by reason of her breaches thereof.

[1] By finding 13 it was determined that "* * * It is untrue that by reason of said reconciliation and subsequent cohabitation said agreement was voided or

that it became of no further force or effect, and it was not the intention of the contracting parties at any time subsequent to * * * said agreement to abrogate or do away with the same and that said parties at all times relied upon said agreement and acted thereunder and in compliance therewith and at all times considered the same to be the measure and statement of their respective property rights and interests." It is now contended that this finding is not supported by the evidence. This attack will be considered in the light of the doctrine that a finding attacked will prevail unless there is an entire lack of substantial evidence in support thereof. Bellman v. San Francisco H. S. District, 11 Cal.2d 576, 581, 81 P.2d 894.

[2-4] The proof in this case is that after the property settlement was agreed upon each of the parties kept his own copy. Neither discussed a reconveyance of the property; neither suggested a cancelation of the contract. Not only did the parties live together for three years after their reconciliation, but thereafter when disagreements arose they submitted their dispute to the board of arbitration for which the contract had provided.*

The mere fact that respondent did not totally exclude decedent from participation in the management of the properties is not conclusive proof that they had abandoned the contract. Having her husband collaborate with her and sharing her responsibilities with him was normal and customary behavior toward a friendly spouse. But with both parties endeavoring to succeed with the more important phase of life, respondent retained her office as manager of the estate although decedent performed many essential tasks. In other respects both disclosed a fidelity to the provisions of the contract: they converted their titles from community ownership to cotenancies; after sale of a 4-flat building they divided the proceeds; following disagreements they submitted their disputes to the board of arbitration. The conduct which gave rise to differences was itself an attempted performance of their agreement. Because decedent criticised respondent's methods and manner of execution or because she may in some particulars have violated the covenants to which she had pledged her faith, it cannot be said that the court erroneously found that the contract was binding upon both parties and that decedent intended that respondent should succeed to ownership of his interest in the properties described in the instrument of their joint creation. The language of the agreement, the relationship of the parties and their conduct following the reconciliation warranted the finding that the contract was not voided or abrogated and that both parties relied upon it and acted in compliance with it and considered it as a statement of their respective rights.

[5-7] The contract of respondent and decedent was not arranged in order to effect a separation. It was made in contemplation of a resumption of the marriage relation and of a dismissal of the pending divorce action. They may have planned to avoid arguments concerning a division of revenues or of property under all circumstances, but that purpose did not alter the nature of their agreement. The law permits husband and wife to contract for

* "3. In the event either party becomes dissatisfied with the management of the property by the one in control, then the dissatisfied party shall make application to the persons whose names are set out below, who shall constitute a Board of Arbitration, and the decision of said Board in any complaint laid before it shall be final and binding upon both parties hereto, and if upon a determination by said Board that the management by the party in control has, through any cause, failed to adequately manage and safeguard the property set out in paragraph 2, then such party shall relinquish the control and management of said property in the manner directed by the Board of Arbitration. The following persons shall constitute the above-described Board:

Maude Ewing, 2717 Gilroy Street, Los Angeles;

W. O. McCarthy, 1471 Bellevue Street, Los Angeles;

W. S. Cross, 1154 West 29th Street, Los Angeles; in the event of such removal, or in the event of the voluntary relinquishment of said management by Second Party, either temporarily or permanently, Second Party shall receive the sum of not less than Seventy five Dollars ($75.00) per month to be paid out of the income of said property by the party in control. Said party in control shall at all times be subject to the same conditions and restrictions in the handling of said property and the receipts and disbursements of moneys received therefrom as is more particularly set forth hereafter."

a "marriage settlement." Civil Code, sec. 178. Such a contract is made so that the parties may live separate, and may be terminated by a reconciliation which avoids such portions of the contract as may remain executory. Jones v. Lamont, 118 Cal. 499, 501, 50 P. 766, 62 Am.St.Rep. 251. However, the contract under consideration was not for a marriage settlement. Insofar as it related to the matrimonial relationship its aim was to rededicate the parties to the marriage status and to a life partnership in their properties. It is authorized by section 158, Civil Code, which permits a married couple to enter into "any engagement or transaction" respecting property. As such a contract it was not to be deemed abrogated by reconciliation and cohabitation. Estate of Brimhall, 62 Cal. App.2d 30, 35, 143 P.2d 981.

[8] But viewing the contract as a "marriage settlement" it would not have been avoided by a mere reconciliation. Such result can flow only from a resort to some effective means clearly indicating the purpose of the parties to restore their respective properties to the status quo, such as destruction of the document containing their agreement, executing reconveyances, or restoring control to the one who formerly had exercise thereof. Brown v. Brown, 170 Cal. 1, 7, 147 P. 1168; Estate of Martin, 166 Cal. 399, 402, 137 P. 2; Jones v. Lamont, 118 Cal. 499, 501, 50 P. 766, 62 Am. St.Rep. 251. No conduct of these parties discloses an intention to terminate their agreement. For the greater portion of three years they collaborated agreeably and in their subsequent strife they submitted their disputes to arbitration by a board of their joint choosing. Neither suggested a revestment of the properties with community title or a cancellation of the contract.

[9-11] Further proof that decedent and respondent had no intention of ever abrogating the contract is found in the nature of the tenancy created thereby. But for the statute requiring a joint tenancy to be created by a "single will or transfer," Civil Code, sec. 683, the contract and the contemporaneous deeds would have created a joint tenancy. That in effect they achieved nothing short of a joint tenancy is emphasized by the authorities. When two persons hold an estate jointly, sharing equally in its profits, increment, and losses while they live but passing the entirety thereof to the survivor upon the death of either, they are joint tenants. 14 Am.Jur. p. 79. Upon the decease of one of the tenants all rights of survivorship provided for by the instrument which created the point tenancy become effective and title vests instantly in the survivor. Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann.Cas.1916D, 515. A joint tenancy is complete when there is a unity of interest, of title, of time and of possession. Wilkins v. Young, 144 Ind. 1, 41 N.E. 68, 590, 55 Am.St.Rep. 162.

[12] Having declared that all of their property was community in the nature of its title and ownership, decedent and respondent agreed to vest the title thereof in the two "as their sole and separate property, respectively, each to receive and have an undivided one-half interest therein except as herein otherwise specifically provided." After providing for the management of the property and the disposition of its income the contract continues: "(8) * * * That in the event of the death of either party hereto all of his or her right, title, or interest in or to all of the community property of the parties shall vest in the survivor." In addition to vesting the properties in the survivor, paragraph 8 likewise obligated each of the parties to keep in force a Last Will with "necessary provisions to carry out the purpose thereof" and paragraph 12 inhibited each from incurring liabilities against the other. Their mutual aims were moulded into form by the prompt execution of reciprocal wills and by the steadfastness of each in not incurring debts against the other. If, therefore, a joint tenancy was not technically created, yet the provisions clearly safeguarded equality in enjoyment of the estate while both should live and guaranteed the totality thereof to the survivor. 54 Cal. App.2d at page 333, 128 P.2d 791. This similitude of the tenancy of decedent and respondent to that of joint tenancy was an effective factor in inducing the finding (1) that the provisions of the contract are binding; (2) that decedent violated them by making a will on March 29, 1940, bequeathing a half interest in the properties described in the contract to appellant; (3) that respondent is entitled to all of such properties without administration.

[13-16] There is still another feature of the contract which fortifies the finding of the trial court and the holding of this court on the former appeal. The contract makes no provision for its termination or

for a forfeiture of the interest of either party. If no forfeiture is to occur by virtue of a provision of an agreement, surely none can be created upon the demand, and for the accomodation, of one of the parties. Equity abhors forfeitures and they will not be allowed so long as the party who deems himself to be aggrieved has a remedy by which he may be compensated for his loss. Civil Code, sec. 3369; Ebbert v. Mercantile Trust Co., 213 Cal. 496, 2 P.2d 776; Ross v. McDougal, 31 Cal.App.2d 114, 87 P.2d 709; Grimes v. Steele, 56 Cal.App.2d 786, 133 P.2d 874. The only "violations" of the contract whereby appellant seeks to avoid its effect are compensable in coin. In her brief appellant specifies 15 derelictions of respondent under the contract. Decedent presented these to the board of arbitration. All but two relate to her alleged misappropriation of funds of the cotenancy or to her failure properly to apply certain of its funds to its properties. The other two were (1) her employment of two persons objectionable to decedent and (2) her failure personally to manage the properties. Any loss which decedent might have suffered by reason of any or all of such derelictions could have been ascertained and adjudged by a court of law. Forfeiture was therefore unavailable. See Civil Code, sec. 3275. The parties having invested the properties with a title in a cotenancy circumscribed by inhibitions against a destruction of that tenancy, such investiture cannot be defeated after the cotenancy has been terminated by the death of one of the parties by the mere demand of the personal representative of such decedent.

[17] In view of the holding that the contract in suit was effective until respondent succeeded to the interest of decedent in the properties described in the contract by virtue of her survivorship, the third contention is disposed of by the observation that she did not forfeit her contract by appropriating moneys of decedent because they could have been recovered by a judgment at law without forfeiting respondent's rights in the contract. If the contract be deemed an arrangement for operating a joint adventure, none of the acts of respondent complained of would have warranted a forfeiture of respondent's rights under the agreement. If they were not forfeitable she is entitled to a specific performance. That decedent himself entertained no such purpose as that of obtaining a nullification of the contract is evidenced by his presenting all of his grievances against respondent to the board of arbiters immediately prior to his demise.

Judgment affirmed.

W. J. WOOD, and McCOMB, JJ., concur.




68 Cal.App.2d 607

**PEOPLE v. RADLEY.**

**Cr. 3873.**

District Court of Appeal, Second District, Division 2, California.

March 29, 1945.

**1. Criminal law ⇐1159(6)**
**Gaming ⇐98(3)**

The prosecution is not required to prove by direct evidence that defendants occupied a room for purpose of recording bets on horse races, but the purpose for which the room was used may be shown by surrounding circumstances, and a finding of guilty may not be disturbed on appeal when so supported. Pen.Code, § 337a, subd. 2.

**2. Criminal law ⇐386**

In prosecution for occupying a room for the purpose of recording bets on horse races, evidence of conversations on telephone between arresting officer and those who called defendant's premises with reference to bets was admissible. Pen.Code, § 337a, subd. 2.

**3. Gaming ⇐97(1)**

Evidence as to conversations on telephone with reference to the placing of bets on horse races may be received for purpose of establishing that the room was being occupied for placing bets on horse races, but not for purpose of establishing the truth of what was said over the telephone. Pen.Code, § 337a, subd. 2.

**4. Criminal law ⇐419(1)**

The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Herbert O. Radley was convicted of occupying a room with paraphernalia for the purpose of recording bets upon horse racing, and he appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

Max M. Solomon, of Los Angeles, for appellant.

W. J. WOOD, Justice.

Defendant was charged by information with the violation of section 337a, subdivision 2, of the Penal Code, in that he occupied a room with paraphernalia for the purpose of recording bets upon the result of horse races. He was found guilty by the court sitting without a jury and has appealed from the judgment of conviction.

Defendant now contends that the evidence is insufficient to justify the conviction. Police officer Anderson testified that on June 2, 1933, at about 4:50 o'clock in the afteroon he went to 806 East 24th Street in the city of Los Angeles, entered a one-story frame residence and found the defendant seated on a couch in the living room. Defendant's sister-in-law also was present. The officer found on the coffee table in front of defendant A.B.C.sheets and the "Daily Reporter". The officer qualified as an expert in bookmaking matters and testified that the papers found on the coffee table were of the kind generally used by persons who engage in bookmaking with the use of a telephone. He explained the manner in which the notations on the papers were commonly used. While the officer was in the room two parties called on the telephone in reference to placing bets on horse races, one of them stating that he wished to place "four dollars to win on Flame Away". In a conversation with the officer defendant at first stated that he was booking for himself but later stated that he was booking for a woman and that he received 25 percent of the profits made on the taking of the bets. Defendant also stated that the pencil notations on the scratch sheets were in his own handwriting. Defendant did not testify as a witness and did not offer any testimony in his behalf.

[1] It is not necessary for the prosecution to prove by direct evidence that defendant occupied the room for the purpose of recording bets on horse races. The purposes for which the room was used may be shown by the surrounding circumstances and if the trial court could reasonably conclude from the circumstances established that defendant was guilty the finding is sufficiently supported and may not be disturbed on appeal. These rules are so well established that citation of authority would be superfluous. The circumstances outlined above are sufficient to give support to the finding of the trial court.

[2-4] Defendant also contends that the court erred in receiving evidence of the conversations on the telephone between the arresting officer and those who called the house in question with reference to their bets. It is the established rule that the court may properly receive evidence of such conversations, not for the purpose of establishing the truth of what was said over the telephone, but for the purpose of establishing that the room was being occupied for placing bets on horse races. People v. Joffe, 45 Cal.App.2d 233, 235, 113 P.2d 901; People v. Reifenstuhl, 37 Cal.App.2d 402, 405, 99 P.2d 564. In 6 Wigmore on Evidence, 3d Ed., sec. 1766, p. 178, the author explains why the admission of such evidence does not do violence to the hearsay evidence rule: "The prohibition of the Hearsay rule, then, does not apply to all words or utterances merely as such. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted".

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

68 Cal.App.2d 600

## RUDDELL v. WARNE et al.

Civ. 14784.

District Court of Appeal, Second District, Division 2, California.

March 29, 1945.

Rehearing Denied April 13, 1945.

As Modified April 20, 1945.

Hearing Denied May 24, 1945.

**1. Homestead ⇐68**

The protection afforded by declaration of homestead is limited to $5,000 in value, and when homesteaded property is enhanced in value in any excess over statutory limit it is subject to claims of creditors of owner. Civ.Code, §§ 1245–1259, 1265.

**2. Evidence ⇐18**

The court cannot take judicial notice of exact time during present war conditions that property in any given locality has increased in value or of exact amount of increase in value.

**3. Execution ⇐73**

Superior court was justified in granting plaintiff's motion for issuance of execution more than five years after entry of judgment upon statement in plaintiff's affidavit that defendants' homestead property had enhanced in value "within three months last past". Code Civ.Proc. § 685; Civ.Code, §§ 1245–1259, 1265.

**4. Execution ⇐73**

Superior court had authority upon showing of diligence to order issuance of execution after lapse of more than five years after entry of judgment even if shown that defendants' homestead property had enhanced in value during period before lapse of 5 years. Code Civ.Proc. § 685; Civ.Code, §§ 1245–1259, 1265.

**5. Execution ⇐73**

A motion for issuance of execution after a lapse of five years from entry of judgment rests in trial court's discretion. Code Civ.Proc. § 685.

**6. Homestead ⇐68**

Superior court did not abuse its discretion in granting plaintiff's motion for issuance of execution more than five years after entry of judgment against father and son upon proof that defendants' homestead property had enhanced in value notwithstanding that son was in the navy. Code Civ.Proc. § 685; Civ.Code, §§ 1245–1259, 1265.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by O. C. Ruddell against Walter E. Warne and another for injuries sustained in automobile accident, wherein a judgment was entered for the plaintiff. From an order granting plaintiff's motion for issuance of execution more than five years after the entry of judgment, defendants appeal.

Affirmed.

Lloyd S. Nix, of Los Angeles (Henry F. Walker, of Los Angeles, of counsel), for appellants.

Romaine Hogan, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Defendants have appealed from an order of the superior court granting plaintiff's motion for the issuance of execution more than five years after the entry of judgment.

Plaintiff obtained a judgment on June 13, 1938, against defendant Walter E. Warne in the sum of $8,176.60 for injuries suffered in an automobile accident in which plaintiff was injured. At the same time plaintiff obtained judgment against defendant Kenneth Warne, who was the owner of the automobile being driven by his father, in the sum of $5,000. A writ of execution was issued on October 7, 1938, which was returned unsatisfied. Defendants were examined on supplementary proceedings on November 1, 1938. An order was made for the appearance of defendants on September 21, 1941, but they were excused without examination because it appeared from a conference then held that Kenneth Warne was about to enter the Navy and that both defendants were without property other than the homestead dwelling hereinafter referred to. Nothing further was done towards realizing on the judgment until August 16, 1944, when plaintiff filed an affidavit and asked that an order be made for the issuance of execution under the provisions of section 685 of the Code of Civil Procedure. The motion was heard upon plaintiff's affidavit and that of defendant Walter E. Warne and the court made the order from which the appeal is now prosecuted.

From the affidavits it appears that defendant Walter E. Warne and his wife purchased a lot and constructed a dwelling

thereon in 1928 at a total cost of $4,800. They have lived on the property since that time. On June 14, 1938, a declaration of homestead was filed upon the property. From plaintiff's affidavit, executed on September 16, 1944, the statement appears "that within three months last past, the aforesaid homesteaded real property has greatly enhanced in value and is now of the value of $8500.00 to $9500.00, all in excess of $5000.00 allowed the defendants, or either of them as a homestead."

[1] The protection afforded by a declaration of homestead is limited to $5000 in value and when the homesteaded property is enhanced in value any excess over the statutory limit of $5000 is subject to the claims of the creditors of the owner. In re Estate of Delaney, 37 Cal. 176, 180; Lubbock v. McMann, 82 Cal. 226, 22 P. 1145, 16 Am.St.Rep. 108. The excess may be reached by following the procedure provided in sections 1245–1259 of the Civil Code. Plaintiff refers to the amendment in 1911 to section 1265 of the Civil Code, providing that neither the homestead "or the products, rents, issues or profits thereof" shall be held liable for the debts of the owner. We see nothing in this amendment which prevents the subjection of the increased value of the property to the claims of the creditors of the owner. The statute refers to such items as rents and products and makes no reference whatever to the increased value of the property itself.

[2-4] It is contended that the court should have refused the order because, as claimed, the court should take judicial notice of the fact that property values greatly increased within the period of five years from the entry of the judgment and therefore plaintiff could have sought the issuance of execution within five years. The court cannot take judicial notice of the exact time during the present war conditions that property in any given locality has increased in value or of the exact amount of the increase in value. The court was justified in acting upon the statement in plaintiff's affidavit that the property has enhanced in value "within three months last past." Moreover, the court was not without authority, upon a showing of due diligence on the part of plaintiff, to order the issuance of execution after the lapse of five years even if defendants had shown that the property had enhanced in value during the period before the lapse of five years. Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205.

[5, 6] It is within the sound discretion of the trial court to grant or refuse a motion for the issuance of execution after a lapse of five years from the entry of the judgment. Butcher v. Brouwer, 21 Cal.2d 354, 132 P.2d 205; McClelland v. Shaw, supra. In contending that the trial court abused its discretion in granting the motion defendants refer to the fact that the younger Warne is in the Navy and claims that "to force a sale of the property under present conditions would result in great hardship". In response plaintiff urges that defendants are not in position to speak of hardship and draws a picture of an injured man "halt and crippled, sans spirit sans hope, uncertainly groping through life forever deprived of the blessings and privileges of the hearty and strong". We may not reverse the order of the trial court except for a clear abuse of discretion. We see no such situation here.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.




68 Cal.App.2d 670

**PEOPLE v. ENGLISH.**

**Cr. 1894.**

**District Court of Appeal, Third District, California.**

**April 7, 1945.**

**1. Criminal law ⇐1171(1)**

In prosecution for second-degree robbery, where defendant testified that he had been honorably discharged from army, cross-examination of defendant disclosed that it was a section 8 discharge, and district attorney suggested making of a stipulation that a section 8 discharge is a mental discharge, there was no prejudicial error.

**2. Criminal law ⇐1169(1)**

Where defendant relies upon an honorable discharge from army merely to

create a favorable impression on jury, it is not prejudicial error for prosecution to show true nature of his discharge, particularly where no misconduct but only mental condition of defendant is shown as ground for his discharge.

3. Criminal law ⇐938(1)

The granting or denial of a motion for new trial on ground of newly discovered evidence rests in discretion of trial court.

4. Criminal law ⇐938(1), 1156(3)

A motion for new trial on ground of newly discovered evidence is looked upon with disfavor, and an appellate court will not interfere except upon a clear showing of an abuse of discretion by trial court.

5. Criminal law ⇐938(3)

Facts within knowledge of accused at time of trial are not newly discovered and will not authorize a new trial even though he did not make the same known to his counsel until after trial.

6. Criminal law ⇐938(3)

The evidence, and not merely the materiality of it, must be newly discovered in order to support a motion for new trial on ground of newly discovered evidence.

7. Criminal law ⇐938(2)

Affidavit of defendant's counsel, on information and belief, that when defendant drinks his mind becomes affected and he is no longer able to distinguish between right and wrong, did not authorize new trial on ground of newly discovered evidence.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Roy Lee English was convicted of second-degree robbery, and he appeals.

Affirmed.

Manwell & Manwell, of Marysville, for appellant.

Robert W. Kenny, Atty. Gen., and D. K. Lener, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Appellant was convicted of robbery of the second degree, and his motion for a new trial was denied. He has appealed contending that the trial court erred in allowing certain questions to be asked of him on cross-examination, and in denying his motion for a new trial.

[1] On direct examination English testified that he had been in the army and honorably discharged. On his cross-examination the following questions were asked and answers given:

"The District Attorney: You say you were discharged from the army? A. Yes sir.

"Q. What kind of a discharge did you have? A. Just honorably discharged.

"Q. What is the letter marking on it?

"Mr. Manwell: Object on the ground it is incompetent, irrelevant and immaterial.

* * * * *

"The Court: I will permit it.

"The District Attorney: Do you know the classification?

"The Witness: One C.

"Q. The classification of your discharge? A. Section 8.

"Q. That's all. Mr. Manwell, will you stipulate section eight discharge is a mental discharge.

"Mr. Manwell: I won't stipulate to anything of the kind. I don't know."

Subsequently the prosecution called a witness who was asked to explain the meaning of a section 8 discharge, but upon objection by appellant the witness was not permitted to answer. While no testimony was presented on this subject the report of the probation officer presented to the court on motion for probation shows that defendant's discharge under section 8 was for "Inaptness or undesirable traits," the discharge further providing that reinlistment or re-induction could only be accomplished by permission of the Adjutant General.

[2] Appellant here contends that by the foregoing examination the district attorney was permitted to "assassinate" and "cast a slur" upon appellant's military record; that he insinuated that the discharge was a dishonorable one, and that prejudicial error has resulted. We do not agree that the information elicited by the questions asked appellant by the district attorney had the effect of assassinating or casting a slur upon appellant's military record or of showing that his discharge was a dishonorable one. The most that can be said was that it indicated that he had been discharged for a mental condition which rendered him unsuited for military duty; that he did not have an unqualified "honorable discharge" as claimed. Where, as here, defendant relies upon an honorable

discharge merely to create a favorable impression upon a jury, we cannot say that it is prejudicial error for the prosecution to show the true nature of his discharge, particularly where no misconduct but only the mental condition of defendant is shown as ground for his discharge.

Appellant's motion for a new trial, the denial of which he now asserts was error, was based upon an affidavit of appellant's counsel which alleged that affiant was informed and believed that defendant suffers from a mental condition of such a nature that when he drinks intoxicating liquors "his mind becomes affected and he no longer is able to distinguish the difference between right and wrong." Affiant further avers that until the district attorney intimated that the defendant had been discharged from the military service on the ground of a mental condition affiant did not know that defendant suffered from any mental affliction; and that as the evidence showed that defendant had been drinking at the time of the alleged commission of the crime charged, he should be granted a new trial and allowed to enter a plea of not guilty by reason of insanity and to show that at the time of the robbery he was irresponsible. It is contended that this alleged discovery by counsel of defendant's mental condition was made after the trial, and constitutes newly discovered evidence justifying a new trial.

[3, 4] It is conceded by appellant that the granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the discretion of a trial court. This is undoubtedly the law. It is also well settled that such motions are looked upon with disfavor, and that an appellate court will not interfere except upon a clear showing of an abuse of discretion by the trial court. People v. Mandell, 48 Cal.App.2d 806, 818, 120 P.2d 921; People v. Yeager, 194 Cal. 452, 491, 229 P. 40; People v. Paysen, 123 Cal.App. 396, 401, 11 P.2d 431; People v. Taminago, 35 Cal.App. 238, 239, 169 P. 696; People v. Del Prado, 49 Cal.App.2d 597, 599, 122 P.2d 76.

[5, 6] Facts that are within the knowledge of an accused at the time of trial are not newly discovered even though he did not make same known to his counsel until after the trial (People v. Kelly, 32 Cal.App. 2d 624, 627, 90 P.2d 605; 23 C.J.S., Criminal Law, § 1454, pp. 1228, 1230); and it must appear that evidence and not the materiality of it be newly discovered in order to support a motion for a new trial on that ground. People v. Kelly, supra; People v. Urquidas, 96 Cal. 239, 242, 31 P. 52; People v. Sutton, 73 Cal. 243, 247, 248, 15 P. 86, 88. In the latter case the court said:

"To entitle a party to a new trial, on the ground of newly discovered evidence, it must appear— 'First, that the evidence, and not merely its materiality, be newly discovered; second, that the evidence is not cumulative merely; third, that it is such as to render a different result probable on a retrial of the cause; fourth, that the party could not with reasonable diligence have discovered and produced it at the trial; and, fifth, that these facts be shown by the best evidence of which the case admits.' 1 Hayne, New Trial & App., § 83."

[7] Appellant produced no affidavits of persons who would testify to the evidence which, in the affidavit of his counsel is urged as newly discovered; and that affidavit merely asserts that affiant "has been informed and believes, and upon such information alleges" that when defendant drinks his mind becomes affected and he is no longer able to distinguish the difference between right and wrong. Such averments do not meet the test laid down in the above cited cases, nor show that the effect of intoxicants upon appellant differs from their effect upon the others who indulge in their use.

We find no merit in appellant's appeal, and the judgment and order denying a new trial are therefore affirmed.

PEEK and THOMPSON, JJ., concur.

68 Cal.App.2d 617

**PEOPLE v. OWEN.**

**Cr. 2331.**

District Court of Appeal, First District, Division 1, California.

March 30, 1945.

Hearing Denied April 26, 1945.

**1. Infants ⇐20**

Evidence sustained conviction of lewd and lascivious conduct. Pen.Code, § 288.

**2. Courts ⇐90(1)**

Unless facts in all essential details are identical in previous case involving sex perversions or lascivious conduct with children it is not a precedent for a subsequent case of same nature, since each case must be decided upon evidence introduced. Pen. Code, §§ 288, 288a.

**3. Infants ⇐20**

In prosecution for lewd and lascivious conduct with a child, intent to arouse the passions of defendant and child may be based upon the conduct, manner of performance, etc., of acts performed by defendant. Pen.Code, §§ 21, 288.

**4. Criminal law ⇐260(11)**

To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

**5. Criminal law ⇐260(11), 1159(3)**

Conflicts and even testimony which is subject to justifiable suspicion do not justify reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine credibility of a witness and the truth or falsity of facts upon which a determination depends.

**6. Infants ⇐20**

In prosecution for sex crimes, evidence is admissible to show lewd and lascivious disposition of defendant.

**7. Infants ⇐20**

In prosecution for lewd and lascivious conduct with children, admission of evidence that defendant at a previous occasion treated a flea bite on buttock of one of the children and placed his hands upon her legs was not error. Pen.Code, § 288.

**8. Criminal law ⇐1168(2)**

In prosecution for lewd and lascivious conduct with children, where it was established that defendant served one of the children wine in glass, exhibition to the jury of the wine jug from which wine was poured, although not introduced in evidence, was not prejudicial to defendant, since jug would be admissible in evidence. Pen.Code, § 288.

**9. Criminal law ⇐787(2)**

Instruction that jury in determining defendant's guilt was "entitled" to consider defendant's failure to testify was not error. Pen.Code, §§ 1093, 1127; Const. art. 1, § 13.

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Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Ralph Owen was convicted of lewd and lascivious conduct as set forth in Penal Code, section 288, and he appeals.

Affirmed.

Edward E. Craig, of Berkeley, for appellant.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

WARD, Justice.

This is an appeal from a judgment and order denying a motion for a new trial following defendant's conviction by a jury of lewd and lascivious conduct as set forth in Penal Code, section 288.

The complainant, a female child of the age of eleven years, and her sister, aged ten, visited defendant's "shack" in the City of Richmond on an afternoon in the early part of July, 1944, upon the invitation of two girl friends to "play house." The defendant worked nights and slept in the daytime. On the occasion of their first visit, the defendant asked the sisters to sit on the bed with him, gave the older child a drink of wine, and put his arms around the younger and felt her legs. Upon the discovery of a flea bite, which had begun "to be a big sore," on her buttock, he treated it with mercurochrome and applied a tape. As the children were leaving defendant told them to take some money that was on his dresser and to come again. When the children returned the next day, they again sat on the bed with defendant. At this time he put his arms around the younger child and kissed her. Again he gave them money. Upon their third visit, the children sat on the bed with him, and after fondling the older child, de-

fendant succeeded in getting her under the covers with him, used cold cream on parts of her body and committed acts with intent as outlined in section 288. The child became frightened and said she had to go home. Again, upon his suggestion, the children took money from the top of the dresser and were invited to return. The mother of the children learned of the source of the money.

[1, 2] On appeal defendant argues that the evidence was insufficient to support the verdict. He states that the contact, if any, between himself and the child "was but for a fleeting moment," and that had he intended to gratify his lust or passions or those of the child, he would not have desisted when she expressed a desire to go home. To support his theory that this evidence is insufficient defendant cites People v. Angier, 44 Cal.App.2d 417, 112 P.2d 659. Unless the facts in all essential details are identical the Angier case is not a precedent that need be followed in every case involving sex perversion or lascivious conduct with children. Penal Code, secs. 288, 288a. The facts in the present case differ materially, both in the nature of the offense committed and in the series of acts preliminary thereto.

[3-5] Intent is manifested by the circumstances connected with the offense. Penal Code, sec. 21. It should be conceded that the acts performed in this case are of a lustful nature. The intent to arouse the passions of defendant and, as alleged in the information, the child, may be based upon the conduct, manner of performance, etc., of the act. People v. O'Donnell, 11 Cal.2d 666, 81 P.2d 939. Each case must be decided upon the evidence introduced and is not necessarily controlled by a previous decision; it is the evidence introduced in a particular case that determines the guilt or innocence of an accused. "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citing cases] Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 781, 117 P.2d 850." People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759; see, also, People v. Meyers, 62 Cal.App.2d 24, 144 P.2d 60.

[6, 7] Defendant complains of the admission of evidence that he treated a flea bite on the buttock of the younger child, and placed his hands upon her legs. In cases of this character evidence is admissible to show or tending to show the lewd and lascivious disposition of the accused. It is not the accomplishment but the intent of the party that is the basis of the commission of the acts condemned in Penal Code, section 288. People v. Hunt, 17 Cal. App.2d 284, 61 P.2d 1208; People v. Huston, supra. Evidence tending to show intent may be introduced, as in this case, by reference to the conduct of the defendant on other recent visits of the same children. It was not error to admit the evidence.

[8] The exhibition of a wine jug to the jury, though not introduced in evidence, is not prejudicial error in view of the fact that the complainant testified that wine poured from the jug was served her in a glass. In our opinion the jug might well have been admitted in evidence.

The contention of appellant that as an ex-convict he "would certainly know enough not to commit a crime in the presence of witnesses" is a matter that might properly have been presented to the jury had defendant laid the foundation for the admission of such evidence. The defendant did not take the stand.

[9] Defendant objects to the court's instruction on his failure to take the stand in his own behalf. The court told the jury: "The defendant, Ralph Owens did not take the witness stand in his own behalf. In determining his guilt or innocence you are entitled to consider this failure on the part of the defendant Owens to explain or deny by his testimony any evidence or fact in the case against him." Defendant concedes that the court could comment on his failure to take the stand, Penal Code, secs. 1127, 1093, but contends that "The court may not, however, instruct the jury as a matter of law on those points where the court is merely permitted to comment." Defendant confesses that he is unable to find any authority to support his position. Article I, section 13 of the California Constitution, provides in part: "* * *

in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." The trial judge did no more than inform the jury of the right given them by the Constitution, that is, he told them that they were entitled to consider defendant's failure to testify, not that they must do so. Defendant's contention is therefore without merit.

The judgment and order from which the appeal is taken are affirmed.

PETERS, P. J., and DOOLING, Justice pro tem., concur.




68 Cal.App.2d 517

**WHITE et al. v. WATERS et al.**

**Civ. 14530.**

District Court of Appeal, Second District, Division 2, California.

March 27, 1945.

**1. Depositions ⇐81**

A change in widow's deposition, at time of signing it, by adding, to her testimony that her husband told her to take and put away three deeds executed by him, a statement that he told deponent to record deeds after his death, was authorized by statute and properly considered by trial court in action to quiet title to land conveyed to widow by one of such deeds. Code Civ. Proc. § 2006.

**2. Deeds ⇐194(2)**

Possession of deed by grantee named therein raises presumption that it was delivered to him.

**3. Deeds ⇐208(3)**

The presumption, arising from grantee's possession of deed and production of certified copy thereof by her successors in interest to land conveyed on trial of their action to quiet title thereto, and grantee's testimony, in deposition taken before her death, that her husband signed deed, handed it to her, and told her to put it away and record it after his death, constituted substantial evidence sustaining trial court's finding that deed was delivered to grantee.

**4. Appeal and error ⇐989**

On appeal, District Court of Appeal must disregard inferences contradicting, and testimony conflicting with, evidence favorable to respondents.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Margaret J. Waters, after whose death William A. White and others were substituted as plaintiffs, against Roy Waters and another to quiet title to land. Judgment for plaintiffs, and defendants appeal.

Affirmed.

James S. Jarrott, of Los Angeles, for appellants.

Birger Tinglof, of Los Angeles, for respondents.

McCOMB, Justice.

This is an action to quiet title to a parcel of land. The action was originally instituted by Margaret J. Waters, widow of Elias Waters, deceased, against Lily Edwards and Roy Waters, children of Elias Waters by a former marriage and his sole heirs at law. Margaret J. Waters died prior to trial, and her sons by a former marriage, William A. White, Albert H. White and George L. White, presented a deed from their mother and were substituted as plaintiffs. From a judgment in favor of plaintiffs, defendants appeal.

The evidence being viewed in the light most favorable to plaintiffs (respondents), and pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App.2d 214, 216 et seq., 146 P.2d 424, the essential facts are:

On March 28, 1937, Elias Waters had a family conference with his wife, Margaret J. Waters, age 62, and two adult children by a prior marriage, Lily Edwards and Roy Waters, for the purpose of making division of Elias Waters' property. An amicable division was agreed upon. Elias Waters then requested his attorney to prepare deeds, which was done, and on March 29, 1937, in the presence of his wife, two children, his attorney and a notary public,

Elias Waters signed and acknowledged three joint tenancy deeds. In one deed Mr. Waters, as grantor, conveyed to himself and his wife, Margaret J. Waters, as joint tenants with right of survivorship, the property which is the subject of the present litigation. This deed, with two other deeds, was then handed by Mr. Waters to his wife with instructions to record the three deeds after his death. Mr. Waters died April 4, 1937. After his death Mrs. Waters caused the joint tenancy deed to be recorded in the County Recorder's office at Los Angeles. Approximately three years later, Mrs. Waters was advised by a Title Company that Roy Waters and Lily Edwards claimed that her title was defective because the deed to her had never been delivered. The present quiet title suit was then instituted which resulted in a judgment from which the present appeal is prosecuted.

[1] There are two questions presented for our determination which will be stated and answered hereunder seriatim:

First: *Did the trial court properly consider a change which Mrs. Margaret J. Waters made in her deposition at the time she signed it?*

This question must be answered in the affirmative. The testimony of Mrs. Waters, who was dead at the time of the trial, was introduced through a deposition which she had given. Mrs. Waters testified at the time her deposition was taken, that on March 29, 1937, she was present when her husband executed three deeds, one of which is here in question; that after executing the deeds her husband said to her, "Take them and put them away." She also testified in response to certain questions thus:

"Q. After the deeds were signed by Mrs. Waters, did he hand them to you? A. Yes, he handed them to me and told me to put them away.

"Q. To put them where you and he put your property papers. A. Yes."

At the time Mrs. Waters executed her deposition she changed her testimony to read that her husband told her to "Take them [referring to the deeds] and put them away, record them after my death." Clearly such change in Mrs. Waters' deposition was authorized by section 2006 of the Code of Civil Procedure which reads, in part, that after a deposition has been taken and transcribed "it must be carefully read to or by the witness and *corrected by him* in any particular if desired." *

[2-4] Second: *Was there substantial evidence to sustain the trial court's finding that the deed here in question was delivered to the grantee, Mrs. Margaret J. Waters?*

This question must likewise be answered in the affirmative. The possession of a deed by the grantee named therein raises a presumption that the deed was delivered. Butler v. Woodburn, 19 Cal.2d 420, 425, 122 P.2d 17; Stewart v. Silva, 192 Cal. 405, 409, 221 P. 191; Rivera v. Ron, 51 Cal. App.2d 702, 704, 125 P.2d 517.

In the instant case the foregoing presumption applies because the deed was in the possession of the grantee named therein and a certified copy of the deed was produced at the trial by the grantee's successors in interest. This presumption and the testimony of Mrs. Waters that her husband had signed the deed and handed it to her, saying, "Take them and put them away, record them after my death", constituted substantial evidence to sustain the trial court's finding that the deed was in fact delivered to Mrs. Waters. We need not cite authority to support the proposition that contradictory inferences and conflicting testimony must be disregarded by this court.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

* Italics added.

68 Cal.App.2d 610

## PEOPLE v. VOICE.

Cr. 2310.

District Court of Appeal, First District, Division 1, California.

March 30, 1945.

Hearing Denied April 26, 1945.

1. Criminal law ⇐1178

Defendant's failure to specify or cite cases from which it could be inferred wherein he claimed there was a failure to comply with constitutional provision regarding waiver of trial by jury would justify court in disregarding the claim. Const. art. 1, § 7.

2. Jury ⇐28(4)

Under Constitution provision regarding waiver of trial by jury, no stereotyped language expressing such waiver need be used by parties, but it is necessary only that words used in their ordinary meaning show an intention to submit case to court without jury. Const. art. 1, § 7.

3. Jury ⇐28(5)

Record disclosing that at time of arraignment defendant and his counsel asked for jury trial, but that at opening of trial defendant definitely stated that he waived a trial by jury, established waiver of jury trial. Const. art. 1, § 7.

4. Infants ⇐20

Evidence sustained conviction for contributing to the delinquency of a girl 14 years of age. St.1937, p. 1033, § 702.

5. Criminal law ⇐260(11)

Where defendant waived jury trial, decision of trial court on issue of defendant's guilt, based on conflicting evidence, was binding on appeal.

6. Criminal law ⇐1159(2, 4)

Questions of credibility of witnesses and weight to be given their testimony are for determination of trier of issues of fact, and it is only where challenged testimony is obviously so inherently improbable as to be unworthy of belief that a reviewing court will interfere.

7. Witnesses ⇐268(1)

In prosecution for contributing to the delinquency of a minor, much liberality should be allowed a defendant in cross-examining the minor involved. St.1937, p. 1033, § 702.

8. Witnesses ⇐280

In prosecution for contributing to delinquency of a minor, objection to cross-examination question put to minor was properly sustained where question was argumentative. St.1937, p. 1033, § 702.

9. Criminal law ⇐1170½(5)

In prosecution for contributing to the delinquency of a minor, sustaining objections to cross-examination questions put to the minor did not operate to defendant's prejudice, where the minor was extensively interrogated on the subject matter of those questions in other portions of the cross-examination. St.1937, p. 1033, § 702.

10. Infants ⇐18

Where defendant was convicted in department 8 of superior court before judge who was also judge of juvenile court and copies of judgment were prepared with word "juvenile" following figure "8", copy filed with papers in case was corrected by substitution of words "superior court" for word "juvenile", but copy furnished sheriff was not so corrected, record established that presiding judge in pronouncing judgment acted as judge of superior court and not as judge of juvenile court. Pen.Code, §§ 1207, 1213.

11. Criminal law ⇐996(2)

Trial court could correct copy of judgment filed with papers in case at any time after it was filed and prior to filing of notice of appeal, in order to make it speak the truth and record did not show that correction was not made within that period of time.

12. Criminal law ⇐994(1)

Where defendant was convicted before superior court of contributing to delinquency of minor, action of clerk in entering copy of judgment in records of juvenile court could have no effect on legality of proceedings had in superior court.

13. Criminal law ⇐913(4), 996(1)

Where defendant was tried and convicted in department 8 of superior court and judgment was pronounced by judge thereof who was also judge of juvenile court and copy of judgment, filed with papers in case, as originally prepared, contained word "juvenile" which was corrected by substitution of words "superior court", irregularity, if any, in making correction would not constitute ground for setting aside conviction and granting a new

trial but would merely necessitate resentencing of defendant in the same department of superior court in which he had been convicted and by same judge.

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Wesley Voice was convicted of contributing to the delinquency of a girl 14 years of age, and defendant appeals.

Affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The defendant, Wesley Voice, was found guilty by the court sitting without a jury of the crime of contributing to the delinquency of a girl 14 years of age. Sec. 702, Welfare and Institutions Code, St.1937, p. 1033. Motion for probation was denied and defendant was sentenced to five months imprisonment in the county jail. This appeal was taken from the judgment of conviction.

[1-3] The first point urged is that a trial by jury was not waived in accordance with section 7 or Article I of the state Constitution. Defendant does not specify, nor cite any cases from which it may be inferred, wherein he claims there was a failure to comply with the constitutional provision. For that reason the point might well be disregarded. However, we have examined the record and it discloses that defendant's contention is wholly without merit. The pertinent portion of section 7 provides: "A trial by jury may be waived * * * by the consent of both parties, expressed in open court by the defendant and his counsel * * *"; and in dealing with the requirements thereof it is held that "no stereotyped language expressing such waiver need be used by the parties, it being necessary only that the words used in their ordinary meaning show an intention to submit the case to a court without a jury." People v. Bastio, 55 Cal.App.2d 615, 131 P.2d 614, 616. Here the record shows that at the time of the arraignment defendant and his counsel asked for a jury trial, but that afterwards they changed their minds; and that at the opening of the trial, some twenty days later, each definitely stated that he waived a trial by jury; whereupon the prosecution consented that the cause be tried without a jury. In so stating that a jury trial was waived defendant's attorney used the plural "we"; whereupon the court asked the defendant twice the direct question whether he waived a jury trial, and both times he answered "yes." The court then said to him, "You understand that I act as judge and jury," to which he replied, "yes." At that time defendant was 39 years of age; he is a college graduate, and was formerly for about 10 years a clergyman. It cannot be said, therefore, that he did not understand the meaning of a waiver of a jury trial.

[4] Defendant's second contention is that the evidence is insufficient to sustain the conviction. This contention likewise is without merit. The testimony on material points is conflicting; and resolving all such conflicts in favor of the trial court's decision the essential facts may be stated as follows: The girl's home was in San Francisco. Her mother was dead, and she lived alone with her father, who was away from home at work during the daytime. At the time of the commission of the offense defendant was employed as a timekeeper in the Army Transport Service; and he picked up an acquaintance with the girl on a Saturday afternoon while she was attending a moving picture theatre, unaccompanied by any other person. The defendant occupied the seat next to her, and he offered her some candy and cigarettes, which she refused; but before leaving the theatre he obtained her home address and said he would call on her the following Saturday afternoon. She told him that if he did she would not let him in; so he made an appointment to have her meet him at another theatre. She kept the appointment, and at the end of the show he accompanied her part way home on the street car. On the following Tuesday afternoon, about 1:30 o'clock, he called at her home while she was alone. He insisted on entering, and they went into the front room and sat on the sofa. He asked her how old she was, and she told him she was 14. Soon after they were seated he began making improper advances. Among other things he opened the zipper on her jeans, placed his hand on her leg, and tried to induce her to have an act of sexual intercourse with him. She resisted

by attempting to arise from the sofa and get away from him, but he forcibly restrained her from doing so. While making these improper advances he engaged in lewd and lascivious conversation and conduct, all of which is shown by the girl's testimony and need not be repeated here. They had been seated on the sofa for about half an hour when a policeman officiating as school truant officer called at the house to inquire why the girl had been absent from school for approximately a month. He rang the front door bell and receiving no response tried the door; but it was fastened with a "night-chain." He then called the girl by name, and she came to the door and let him enter. After inquiring why she was not in school he asked her who was in the house with her, and she replied, "There is a man." The officer asked where the man was, and she pointed toward the bedroom. The officer searched the bedroom but found no one. He then called out that he was a police officer and that if anyone was hiding for them "to come out." Receiving no response he started to communicate with the police station, and while doing so he observed a door in the hall open and close; whereupon he went down the hall, pounded on the door, and called out that "if anybody was in there for them to come out." The door was opened and out stepped the defendant; whereupon he was taken to the police station. The room in which he had secreted himself was small and contained a wash basin and a bath tub.

[5, 6] It is evident that the facts above narrated and those concerning the defendant's lascivious and lewd conversation and conduct about which the girl testified are amply sufficient to support the trial court's decision that the defendant was guilty of the offense of contributing to the delinquency of a minor. Defendant points out that when he was interrogated at the police station immediately following his arrest he denied the accusation made against him by the girl; also that he denied the incriminating testimony given against him by her at the trial. But such denials and the testimony given by him in support thereof merely raised a conflict in the evidence; and since the trial court accepted and acted upon the girl's testimony, its decision on the issue of defendant's guilt is binding on appeal. People v. Stangler, 18 Cal.2d 688, 117 P.2d 321; People v. Paris, 59 Cal. App.2d 699, 139 P.2d 671. Defendant's opening brief is devoted largely to an attempt to show certain falsehoods in the girl's testimony; but under fundamental rules the questions of credibility of witnesses and the weight to be given their testimony are for the determination of triers of the issues of fact. It is only where the challenged testimony is obviously so inherently improbable as to be unworthy of belief, that a reviewing court will interfere (People v. Houston, 24 Cal.App.2d 167, 74 P.2d 515); and no such case is here presented.

[7-9] Defendant assigns as error certain adverse rulings made during the cross-examination of the girl; but we find nothing therein which would warrant a reversal. Nor do we believe the assignments are of sufficient importance to call for any extended discussion, or for the quotation of those portions of the record to which they relate. It is doubtless the rule that in cases of this kind much liberality should be allowed a defendant in cross-examining the minor involved; but here the record shows that there was no undue restriction placed on the defendant. The first ruling complained of was proper for the reason that the question ruled out was manifestly argumentative; and it was upon that ground that the objection thereto was made and sustained. After the objection thereto was sustained defendant made no attempt to reframe the question. The questions involved in the remaining rulings carried the implication that the girl had made up part of the story she was then telling on the witness stand from some of the language used by the assistant district attorney in asking questions on direct examination, and from a conversation had with another assistant district attorney prior to the commencement of the trial. Although both questions were objectionable as to form, the court might well have permitted the witness to answer. However, it is apparent that the adverse rulings did not operate to defendant's prejudice for the reason that the girl was extensively interrogated on the subject matter of those questions in other portions of the cross-examination.

[10] The defendant was tried and convicted in department 8 of the superior court, and judgment of sentence was pronounced by the judge thereof, who also was the judge of the juvenile court. Defendant concedes that he was properly tried and convicted in department 8 of the su-

perior court, but he contends that the presiding judge thereof, in pronouncing judgment of sentence, acted as judge of the juvenile court. The records of department 8 of the superior court affirmatively show to the contrary. The minutes thereof are embodied in the clerk's transcript, and it appears therefrom that defendant was arraigned for judgment therein on February 14, 1944; that the motion for probation was denied; that thereupon judgment of sentence was pronounced and the defendant then remanded to the custody of the sheriff with directions to execute the judgment of sentence. The copy of the judgment, signed by the judge and filed by the clerk of that court with the papers in the case in accordance with the requirements of section 1207 of the Penal Code, shows also that all proceedings had in connection with the pronouncement of judgment of sentence took place in that court. And the written notice of appeal filed by counsel for appellant on February 18, 1944, four days after the pronouncement of the judgment, was entitled "In the Superior Court, in and for the City and Co. of San Francisco, Dept. 8."

Defendant's contention that sentence was imposed by the judge of department 8 of the superior court, sitting as judge of the juvenile court, arises out of the following situation: The copy of the judgment of conviction which section 1207 requires shall be filed "with the papers in the case," and the certified copy which section 1213 of the same code requires shall be furnished to the officer whose duty it is to execute the judgment, were made out on printed forms with blank spaces left for typewriting, the latter being a carbon copy of the former. As originally prepared both copies bore the title "In the Superior Court of the State of California in and for the City and County of San Francisco Department No. ——," and then followed in typewriting the figure "8" and the word "Juvenile." But after being so prepared the copy filed with the papers in the case was corrected in this manner: a line in ink was drawn through the word "Juvenile," immediately following which the words "Superior Court" were written in ink; and the correction was initialed "T. M."; so that the title as thus corrected was made to read: "In the Superior Court of the State of California in and for the City and County of San Francisco Department No. 8." The copy furnished the sheriff was not so corrected.

We find nothing in the foregoing state of the record which would warrant this court in holding, contrary to the minutes of the superior court, that the judgment of sentence was not pronounced by the judge thereof, sitting as such.

[11] It is asserted in defendant's brief that the correction was made by the trial judge, and that it was made subsequent to the filing of the notice of appeal; but there is nothing whatever in the record to substantiate such assertion. For aught that appears it may have been corrected by the party who prepared the document either prior to or at the time it was presented to the judge for signature, and then initialed by the judge before the document was signed and filed. In any event, it was well within the province of the trial court to correct the copy at any time after it was filed with the papers in the case and prior to the filing of the notice of appeal, in order to make it speak the truth; and there is nothing in the record to show that the correction was not so made within that four day period of time.

[12] There is an unsigned typewritten note at the bottom of the corrected copy below the signature of the judge, which was evidently added by the clerk, showing that subsequent to the termination of the proceedings in the superior court relating to the pronouncement therein of the judgment of sentence the corrected copy of the judgment was entered in the records of the juvenile court. Obviously, however, whatever may have been done by the clerk in this respect can have no effect upon the legality of the proceedings theretofore had in the superior court.

[13] After all, if it were found that there was an irregularity in making the correction it would not constitute ground for setting aside the conviction and granting a new trial. It would merely necessitate the re-sentencing of the defendant, in the same department of the superior court in which he was convicted, and by the same judge. People v. Erbel, 72 Cal. App. 543, 237 P. 769.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

68 Cal.App.2d 665

## PEOPLE v. ROCHE.

Cr. 2330.

District Court of Appeal, First District, Division 2, California.

April 6, 1945.

Hearing Denied May 3, 1945.

1. Criminal law ⇐785(4)

Where the only two witnesses who testified were police officers and neither gave any testimony that was improbable, impossible, or in conflict with any physical facts, and court in general charge instructed on presumption of innocence, criminal intent, reasonable doubt, and power of jurors to properly weigh evidence, refusal to give requested instruction that testimony of police officers is to be judged by same standards as that of any other witness and that jury was not compelled to decide in favor of prosecution because case was presented through police officers was not prejudicial.

2. Criminal law ⇐785(4)

Requested instruction that testimony of police officers is to be judged by same standards as that of any other witness, and that jury is not compelled to decide in favor of prosecution because case is presented through police officers, pertained to mere commonplace matters that jurors are presumed to know about and to act upon in absence of being instructed thereon, and was properly refused in absence of any showing of prejudice.

3. Criminal law ⇐1172(1), 1173(1)

The giving or refusing of instructions upon mere commonplace matters which jurors are presumed to know about and act upon in absence of being instructed thereon is not ground for a reversal if the giving or refusal is not prejudicial.

4. Criminal law ⇐806(1)

Where court in instructing jury stated rules affirmatively it was not bound to also state them negatively.

5. Criminal law ⇐829(1)

Defendant cannot complain of refusal to give requested instructions on matters which were adequately covered by other instructions.

6. Gaming ⇐94(1)

In prosecution for occupying an automobile with books, papers and apparatus, device and paraphernalia for the purpose of recording bets and wagers and selling pools upon the result of horse races, the length of time occupancy of automobile existed was irrelevant as not an element of offense and as not alleged in information. Penal Code, § 337a, subd. 2.

7. Gaming ⇐75(1)

The Code section prohibiting occupancy of "any room, shed, tenement, tent, booth, building, float, vessel, place, and/or enclosure of any kind, or any part thereof" with books, apparatus, device, or paraphernalia for recording bets enumerates places in their most general sense and contemplates within scope of prohibition the occupancy of an automobile. Penal Code, § 337a, subd. 2.

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Appeal from Superior Court, City and County of San Francisco; Edward P. Murphy, Judge.

Joseph Roche was convicted of occupying an automobile with books, papers, apparatus, device, and paraphernalia for the purpose of recording bets and wagers and of selling pools upon the result of horse races, and he appeals.

Affirmed.

Joseph A. Brown, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The defendant was charged with having violated the provisions of section 337a of the Penal Code, subdivisions 2, 4 and 6 thereof, on the 6th day of June, 1944, in the city and county of San Francisco. The charges relating to subdivisions 4 and 6 were dismissed and after a plea of not guilty the case proceeded to trial before a jury on the first count alone. The defendant was found guilty and sentenced. From the judgment he prosecutes this appeal.

[1-4] The defendant complains because the trial court refused to give an instruction which was as follows: "You are instructed that the evidence of police officers is to be judged by the same standards and the same rules of evidence as any other witnesses, and that police officers are not entitled to any greater credence than any

other witness, and you are not compelled to decide in favor of the prosecution because the case is presented by the people through police officers." We think there is no merit in that claim. True it is that on the trial no witnesses were called by the defendant and that the prosecution called two witnesses only. One was Clement J. Dougherty, a police officer assigned to the bureau of special services which performed the function of making arrests in connection with vice conditions and bookmaking establishments. The other witness was Walter J. Francis, a police officer for over twenty-two years who was assigned to the same department. Both witnesses were examined and cross-examined. They detailed facts to the effect that on the 6th day of June, 1944, in the city and county of San Francisco, the defendant did keep and occupy an automobile in a parking lot at 145 Taylor Street, with books, papers, apparatus, device and paraphernalia for the purpose of recording and registering bets and wagers and of selling pools upon the result of speed between horses. Each witness delineated what he saw and heard. Neither witness gave any testimony that was improbable, impossible or in conflict with any physical fact. The state contends that the requested instruction was covered by other instructions which were given. We think that contention is well founded. Among others the trial court gave the following instruction:

"You are instructed that the plea of not guilty raises all of the material issues in this case, and that the presumption of innocence applies and continues throughout the case, and until your verdict overcomes it by an adjudication of guilt.

"The presumption of innocence is evidence in and of itself, and the defendant is entitled to rely thereon, and the presumption of innocence places the burden upon the prosecution to establish the guilt of the defendant as to every material issue to a moral certainty and beyond a reasonable doubt.

"Now, in every crime or public offense there must exist a union or joint operation of act and intent, or what is known in the eyes of the law as criminal negligence. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind or discretion of the person accused of the offense. And in the eyes of the law all persons are considered to be of sound mind who are neither idiots nor lunatics, or otherwise affected with insanity.

"A defendant in a criminal case is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal; but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt.

"Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after an entire comparison and consideration of all of the evidence, leaves the jurors in that state of mind, or in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

Moreover the requested instruction belongs to that class of instructions which are said to pertain to mere commonplace matters that jurors are presumed to know about and act upon in the absence of being instructed thereon. It is settled law that the giving or refusing of such instructions is not ground for a reversal if the giving or refusal is not prejudicial to appellant's case. 2 Cal.Jur. 1027, Appeal and Error, sec. 611; Medlin v. Spazier, 23 Cal.App. 242, 246, 137 P. 1078; Poor v. W. P. Fuller & Co., 30 Cal.App. 650, 655, 159 P. 233. In the instructions which the court had given the trial court had directly informed the jury regarding the power of jurors to properly weigh the evidence that had been introduced. In other words it had stated the rules affirmatively. It was not bound to also state them negatively.

[5] The defendant complains also because the trial court did not give two instructions which he requested and which were worded as follows: "(a) You are instructed that there is no duty nor obligation on the part of the defendant to produce any witnesses or present any evidence on his behalf. (b) You are instructed that there is no duty nor obligation on the part of the defendant to prove his innocence and that he has the legal right to rest upon the presumption of innocence and to require the prosecution to establish his asserted guilt beyond a reasonable doubt, as elsewhere defined in these instructions." The trial court marked on each of said requests, "Refused—covered by court." A

comparison of the requested instructions with those given by the court clearly shows that they were covered by the instructions which were given.

[6] The defendant sets forth some of the evidence and then he contends that it does not show how long occupancy of the automobile existed, that the defendant owned the automobile, or that the defendant was in the automobile at the time the alleged bet was placed. Those contentions are true but they are irrelevant. Such facts were neither alleged in the information, nor are they elements of the offense defined in the statute. Penal Code, sec. 337a, subd. 2.

[7] In his reply brief the defendant makes the contention for the first time that the statute has no application to the occupancy of an automobile. A similar question was involved in People v. Chase, 117 Cal.App.Supp. 775, 1 P.2d 60. At page 778 of 117 Cal.App.Supp., at page 61 of 1 P.2d, the court said: "Appellants contend that a ship does not come within the provisions of this section of the Code, relying on the rule of ejusdem generis to cut down the meaning of the word 'places' so as to exclude ships from its purview. Many cases are cited in which general terms have been limited by reference to preceding particular terms, but we do not deem it necessary to review them, because we can discern no genus of places broad enough to include all rooms and buildings that might not also include ships. The word 'building' in its primary sense means merely 'that which is built' (Webster's Dictionary), but usually indicates some sort of edifice or structure located on or affixed to land. It has been held to include a railroad car, which, while located on land, is certainly not affixed to it. Hardin v. State, 92 Neb. 298, 138 N.W. 146; State v. Lintner, 19 S.D. 447, 104 N. W. 205. The word 'room' is defined to mean 'space inclosed or set apart by a partition; an apartment or chamber.' Webster's Dictionary. A room may as well be on a ship as on shore; in fact, the spaces assigned to passengers on a ship are known as staterooms. In view of the manifest purpose of section 318 to further the suppression of gambling and prostitution, we cannot think the Legislature intended to draw any fine distinctions as to the nature of the places put under its ban, and we hold that the words enumerating those places are used in their most general sense, and as so used include ships. See Coleman v. State, 13 Ala. 602, and Dickey v. State, 68 Ala. 508, holding that a steamboat or ferryboat is a place, within the meaning of a statute prohibiting gambling in public places." We think the reasoning of the court in that case is directly determinative of the point which the defendant presents in this case.

We find no error in the record. The judgment is affirmed.

NOURSE, P. J., and GOODELL, J., concur.




68 Cal.App.2d 594

**SHELBY v. SOUTHERN PAC. CO. et al.**
**DEVERE v. SAME.**
**Civ. 14761, 14762.**

District Court of Appeal, Second District, Division 2, California.

March 29, 1945.

Hearing Denied May 24, 1945.

**1. Trial ⇐139(1)**

Direction of verdict for defendant is error, unless verdict for plaintiff would be so lacking in evidentiary support as to impel appellate court to reverse it.

**2. Railroads ⇐327(5)**

The statute providing that driver of motortruck carrying inflammable liquids shall stop it not less than ten feet from railway track, listen, and look in both directions along track for approaching train, before crossing track at grade, except as thereinafter provided, and imposing penalty for violation thereof, is positive, direct, and penal in nature, imposes continuous obligation on operator of such a truck, creates absolute standard of behavior, and establishes undebatable rule of road, with specified exceptions. Vehicle Code, § 576 (a), St.1941, p. 2655.

**3. Railroads ⇐327(5)**

The fact that penal statute, requiring driver of motortruck carrying inflammable liquids to stop not less than ten feet from railway track, listen, and look in both directions along track for approaching train, before crossing track at grade, causes hardships on drivers of such trucks in travers-

ing boulevard crossed at frequent intervals by spurs off main line railway, is no excuse for violating statute, nor is such violation excused because of driver's failure to see track. Vehicle Code, § 576(a), St.1941, p. 2655.

**4. Railroads ⇐327(13)**

A driver of motortruck, carrying inflammable liquids, is required by statute to stop before crossing railroad tracks, including spur tracks, though distinctive signs, indicating that no stop need be made thereat unless train is approaching, are displayed at spur track crossings with Railroad Commission's approval, as authorized by statute. Vehicle Code, § 576(a), St.1941, p. 2655; § 576(d), St.1931, p. 2127, § 135.

**5. Statutes ⇐206**

A statute must be so construed as to give meaning and effect to every clause thereof.

**6. Statutes ⇐195**

A statute enumerating things on which it is to operate must be construed as excluding from its effect all things not expressly mentioned.

**7. Railroads ⇐327(13)**

A driver of motortruck and trailer, carrying kerosene, was bound by statute to stop before crossing railroad spur track at grade and was negligent in failing to do so, so as to bar recovery from railroad company for injuries to driver and damages to vehicles and cargo as result of collision with switch engine tender at such crossing, though signs, indicating that no stop need be made unless train was approaching, were displayed thereat with Railroad Commission's approval. Vehicle Code, § 576(a), St.1941, p. 2655; § 576(d), St.1931, p. 2127, § 135.

**8. Negligence ⇐76**

Violation of statute, contributing to cause accident in which violator was injured, constitutes a defense in his action for negligence or a prima facie case of contributory negligence precluding recovery by him, if violation contributed proximately to injury.

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Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Consolidated actions by John H. Shelby and by Joseph M. Devere, doing business as Petroleum Transportation Company, respectively, against the Southern Pacific Company, a corporation, and others, for personal injuries to plaintiff Shelby and damages to plaintiff Devere's truck, trailer, and cargo as results of a collision with defendant corporation's switch engine and tender operated by codefendants. Judgments for defendants, and plaintiffs appeal.

Affirmed.

Samuel A. Rosenthal, of Los Angeles, for plaintiffs and appellants.

Frank Karr, C. W. Cornell, and O. O. Collins, of Los Angeles, for defendants and respondents.

MOORE, Presiding Justice.

Two actions having arisen out of the same event are consolidated for the purpose of decision. Appellant Shelby suffered serious injuries while operating Devere's truck and trailer which with their cargo were almost wholly destroyed as the result of their collision with the switch engine and tender of respondent company operated by the natural defendants. Judgments having been entered against plaintiffs pursuant to direction by the court, the matter comes here on their appeal.

On the evening of April 26, 1943, pursuant to instructions of his employer, Shelby loaded the truck and trailer with 6400 gallons of kerosene at San Pedro for delivery at Vernon. He traveled northerly on Alameda street and on its westerly roadway which has two lanes separated by a double white stripe down its center. About 3:30 o'clock of the following morning he collided with the tender on a spur track which crossed the westerly roadway in a northwest-southeast direction, the engine having pushed the tender into the westerly roadway immediately prior to or contemporaneously with the arrival of the truck. The tracks were imbedded in the concrete pavement flush with its surface. Shelby's visibility as well as his vision was good. His own headlights illuminated the pavement for 200 feet. The light thus shed was supplemented by the arc light over the westerly portion of the roadway near the point of impact. While deposing that he could not see the spur at its junction with the main line, Shelby admitted that he could see the railway tracks on the private right of way for 300 feet and that he could safely drive at a reasonable speed down Alameda without burning his own lights.

Moreover, while he was 150 feet south of the point of collision the headlights of an approaching southbound truck 250 feet north of that point added to the street's electrification. While he testified that the headlight on the tender was not illuminated until after the impact, he admitted that he could see an object the size of a man at a distance of 200 feet. He knew the road. Having driven along Alameda street daily for 16 years, he knew that the spur track lay upon the westerly roadway of Alameda and that it entered the east lane just north of a bottling works building. He had observed for some blocks south of the scene of the collision other spur tracks intersecting the westerly roadway.

His immediate view was a warning of danger. The spur track lies along and upon the westerly roadway for a distance of 128 feet. Its south rail leaves the west curbing of Alameda 96 feet north of the bottling works' building and intersects the east curb of the west roadway 32 feet south of the north wall of that building. The south rail intersects the double stripe 88 feet north of the point at which it enters the east curb of the west roadway. In approaching the locus at which he would cross the track, Shelby proceeded alongside the slightly curving spur track for a distance of 88 feet. He testified that he heard neither whistle nor bell; that there was neither automatic signal nor cross-arms; that he saw no person standing in the street with flag or lantern; that he did not see the spur track, the rails of which were at grade; that the trailer of the oncoming truck passed him as he was forty feet south of the point of impact; that he applied his brakes at once but crashed into the tender.

[1] The consideration of an appeal from a judgment entered pursuant to an instructed verdict is restricted by the rules announced in Gish v. Los Angeles Ry. Corp., 13 Cal.2d 570, 572, 90 P.2d 792. Accordingly, unless a verdict for plaintiff be so lacking in evidentiary support that the appellate court would be impelled to reverse it, then it is error to direct a verdict in favor of defendant.

Respondents base their argument upon the hypotheses that Shelby knew the exact location of the spur track; that he could see it 200 feet ahead; that he could stop within 60 feet; and that section 576, subd. (a), Vehicle Code, St.1941, p. 2655, is a mandatory statute by which the driver of a truck laden with inflammable liquids is inhibited from driving over the track without first stopping to look and listen. In support of the judgment respondents marshal the facts above outlined and argue therefrom that by reason of the visibility at the scene of the accident; of the moderate speed of the truck; of the distance within which it could be stopped; and of Shelby's intimate knowledge of the exact location of the spur track, his failure to stop was negligence which wholly caused or contributed to cause his own injuries and the destruction of the conveyances and their cargo, citing Baldwin v. Pacific Electric Ry. Co., 208 Cal. 364, 281 P. 380; Koster v. Southern Pacific Co., 207 Cal. 753, 756, 279 P. 788; Young v. Pacific Electric Ry. Co., 208 Cal. 568, 283 P. 61. In response thereto appellants distinguish those cases in that there was in fact in each instance a sign or other warning of the danger.

[2] These arguments would be of interest had Shelby been driving his own family automobile under the same conditions as those which confronted him on the night of his accident. But the statute in question is positive and direct and is penal in nature. Subdivision (a) thereof reads as follows: "The driver of any motor vehicle carrying passengers for hire, or of any school bus carrying any school child, or of any motor truck carrying explosive substances or inflammable liquids as a cargo or part of a cargo, before crossing at grade any track or tracks of a steam railway, interurban or suburban electric railway, shall stop such vehicle not less than 10 nor more than 50 feet from the nearest rail of such track and while so stopped shall listen, and look in both directions along such track, for any approaching railway train, interurban car or other vehicle using such rails before traversing such crossing, except as hereinafter provided."

This subdivision defines only two situations in which a motor truck conveying inflammable liquids may proceed without stopping before crossing the track of a steam railway. With those exceptions, the obligation upon the operator of a motor truck with such a cargo to bring the vehicle to a complete stop and to look and listen in both directions along the track for approaching trains is continuous. His failure to do so is a misdemeanor.

[3] The statutory inhibition of an act by the imposition of a penalty for its violation creates an absolute standard of behavior. In forbidding a kerosene-laden motor truck to cross a railroad track without first stopping, section 576 establishes a rule of the road which is not debatable. It names but two conditions under which such a truck may proceed without stopping, namely, either where an officer is on duty and directing traffic to proceed or where an automatic signal is in operation indicating that it may continue. That such a stricture upon the transportation of specified commercial cargoes imposes hardships upon drivers of such motor trucks in traversing a boulevard which is crossed at frequent intervals by spurs off a main line railway is no excuse for violating the statute. The driver of such a truck is not excusable because he does not see the track.

[4-6] That it was not intended under any circumstances to exempt trucks carrying inflammable liquids from the operation of the statute is indicated by the amendment to the statute in 1931, St.1931, p. 2127, § 135. At that time the legislature added to subdivision (a) a proviso that motor vehicles carrying passengers for hire shall not be required to stop at spur track crossings "where, with the approval of the railroad commission, distinctive signs are displayed indicating that no stop need be made unless a train is approaching." That exception has constituted subdivision (d) of the Act since its codification in 1935. Yet no such privilege has by any amendment ever been accorded to the motor truck with a cargo of inflammables. It must stop before crossing every railroad track even though signs were there displayed with the approval of the railroad commission. That such is the intent of the statute is clear from its plain and unambiguous language. In re Alpine, 203 Cal. 731, 265 P. 947, 58 A.L.R. 1500; McNamara v. Steckman, 202 Cal. 569, 262 P. 297. It must be so construed as to give meaning and effect to every clause thereof. Ahern v. Livermore Union High School Dist., 208 Cal. 770, 284 P. 1105. Another familiar rule of construction is that where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned. 59 C.J. 984.

[7] Since section 576 does not provide that vehicles freighted with inflammables may proceed across a railroad track under the conditions specified in subdivision (d) or under any other condition without stopping, appellant driver was in duty bound to stop before attempting to cross the track and was negligent in failing to do so.

[8] In this view of the statute, therefore, the arguments of appellants are immaterial to a consideration of the liability of defendants if the violation of the statute by the operator contributed to cause his injuries and the destruction of the truck and trailer and the cargo. Where the violation of a statute by the plaintiff has contributed to cause the accident such violation constitutes a defense in an action for negligence or it is a prima facie case of contributory negligence which will preclude recovery by the plaintiff if the violation contributed proximately to the injury sustained by him. 38 Am.Jur. p. 878, sec. 196; 38 Am.Jur. p. 898, sec. 214; 42 C.J. p. 1201, sec. 979. That the failure of Shelby to stop before crossing the track caused or contributed to cause the accident is not open to argument. There would have been no collision if the truck had stopped ten feet south of the point of its attempted crossing.

The cases cited by appellants in support of their argument that the question of Shelby's negligence should have been submitted to the jury are Downing v. Southern Pacific Co., 15 Cal.App.2d 246, 59 P.2d 578; Harper v. Northwestern Pacific Ry. Co., 34 Cal.App.2d 451, 93 P.2d 821; Lawrence v. Southern Pacific Ry. Co., 189 Cal. 434, 208 P. 966. They are not apropos. In each of them the driver had no knowledge of the crossing. In none of them was there a mandatory stop required of the driver. In no instance was the vehicle a "motor truck carrying * * * inflammable liquids * * * as a cargo."

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.

Hearing denied; CARTER, J., dissenting.

68 Cal.App.2d 674

**PEOPLE v. QUIEL et al.**

Cr. 1896.

District Court of Appeal, Third District, California.

April 7, 1945.

1. Larceny ⇐55

Evidence authorized conviction of petty theft with a prior conviction of felony. Pen.Code, §§ 492, 667.

2. Larceny ⇐12

The taking of a purse and its contents from seat of an automobile with intention of depriving owner thereof consummated theft of purse and its contents, and fact that purse was subsequently thrown into street and certain bank checks therein were not taken from it was immaterial. Pen. Code, § 492.

3. Criminal law ⇐1159(2)

In prosecution for petty theft, jury's finding on substantial evidence that defendant intended to and did steal a purse and its contents could not be disturbed on appeal.

4. Larceny ⇐6

In prosecution for petty theft, it is only necessary to show that things which were taken possessed some intrinsic value.

5. Larceny ⇐59

Evidence that purse which was taken from automobile seat contained two bank checks payable to owner in the sums of $32 and $34, respectively, which checks were afterward cashed by owner for their face value, and also contained some "cash" or "change" and cosmetics, established that purse and its contents were of sufficient intrinsic value to authorize charge of petty theft. Pen.Code, § 492.

6. Larceny ⇐59

In prosecution for petty theft, the value of money and coin of the United States, being fixed by law, renders their production at trial or parol evidence of their identity sufficient proof of their value.

7. Larceny ⇐59

In prosecution for petty theft for the taking of unpaid bank checks, on issue of value, proof of existence of such unpaid checks of specified amounts was sufficient evidence of their value in the sums which might be collected thereon. Pen.Code, § 492.

8. Larceny ⇐62(1)

Purse and contents left by owner on seat of automobile in which she was riding were under her control and therefore in her possession so as to render them subject to theft, so that evidence that defendant removed purse and contents from seat of automobile was sufficient proof of asportation to sustain charge of petty theft.

9. Larceny ⇐17

"Asportation" within meaning of statute penalizing theft may be fulfilled by wrongfully and unlawfully removing property from possession or control of owner against his will with intent to steal it, even though property may be retained by thief but a moment.

See Words and Phrases, Permanent Edition, for all other definitions of "Asportation".

10. Larceny ⇐12

That thief is frustrated in attempt to carry away stolen property, or that he may change his mind immediately after theft because he concludes that property is of insufficient value to warrant him in retaining it, does not relieve him of consequences of theft.

11. Criminal law ⇐957(6)

Affidavit averring that during a period of recess in progress of trial chief investigator of district attorney's office engaged in earnest and secret conversation with a juror without naming juror or disclosing subject of conversation was insufficient to authorize a new trial on ground of prejudicial misconduct. Pen.Code, § 1122.

12. Criminal law ⇐855(7)

Mere showing that chief investigator for district attorney engaged juror in conversation during recess did not authorize a presumption that investigator and juror were not properly discussing some subject which had no relation to case on trial. Pen.Code, § 1122.

13. Criminal law ⇐855(8)

A juror, during a recess of court in the progress of a trial, may discuss with third persons any proper subject not related to trial in progress. Pen.Code, § 1122.

14. Criminal law ⇐868

Where defendant's counsel knew that investigator for district attorney had talked

to a juror during a recess and failed to call court's attention to that fact until after verdict had been rendered, charge of alleged misconduct was waived. Pen.Code, § 1122.

**15. Criminal law ⇐931**

A defendant or his attorney, who possesses knowledge, during progress of a trial, of conduct of jurors which he deems to be prejudicial, may not fail to call court's attention thereto, speculate upon receiving a favorable verdict, and then assign conduct as prejudicial misconduct for first time after an adverse verdict has been returned.

**16. Criminal law ⇐1147**

District Court of Appeal would not interfere with trial court's exercise of discretion, granted it by Penal Code, to sentence a defendant, convicted of petty theft with a prior conviction of a felony, to imprisonment either in county jail or in state prison. Pen.Code, § 667.

**17. Criminal law ⇐1209, 1213**

Code section authorizing trial court to sentence a defendant, convicted of petty theft with a prior conviction of a felony, to imprisonment either in county jail or in state prison is not unconstitutional as providing for cruel, unusual or excessive punishment, or as punishing defendant twice for same offense, as additional penalty is considered punishment for last offense. Pen.Code, § 667.

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Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Joe V. Quiel and Lowell Bell were convicted of petty theft and prior convictions of felonies, and defendant Quiel appeals.

Affirmed.

Lawrence Edwards and Chas. H. Epperson, both of Stockton, for appellant.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

Mr. Justice THOMPSON delivered the opinion of the court.

The appellant and Lowell Bell were jointly charged and convicted of petty theft and prior convictions of felonies. They were tried with a jury. The appellant admitted the prior conviction of felony. A motion for new trial was granted the defendant Bell, but denied as to the appellant, who was thereupon sentenced to state prison for the indeterminate term prescribed by law. From that judgment and order denying a new trial, Joe V. Quiel appealed.

It is contended the verdict and judgment are not supported by the evidence; that the court erred in denying appellant's motion for new trial; and that the judgment is harsh and excessive.

[1] The evidence adequately supports the verdict and judgment of conviction of the appellant. The evidence is uncontradicted. No witnesses were called for the defendants. They did not take the witness stand in their own behalf. The transcript shows that on September 9, 1944, Barbara Lou Nichols drove her Ford sedan automobile to the home of her sister, Margaret Briscoe, on Flora Street in Stockton. Miss Nichols was accompanied by her friend Barbara Noble, who sat by her side on the front seat of the car. Miss Noble then held her zipper purse containing two bank checks payable to her in the sums of $32 and $34, respectively, together with some small change and cosmetics. The machine was parked on the street directly in front of the Briscoe home. As the ladies got out of their car Miss Noble placed her purse in the middle of the front seat of the machine and left it there. They entered the house. Margaret Briscoe sat at the front window sewing. From that window there was a clear view of the Ford sedan. They immediately observed the defendants' machine stop very close to their parked car. The defendants were strangers to the ladies. The driver of defendants' machine, Lowell Bell, got out and lifted the hood of his car as though he were looking for engine trouble. Margaret Briscoe testified that at the same time she saw the appellant go to the Ford sedan and reach into that car. She said:

"I was watching him [Mr. Bell as he raised the hood of his own machine], then my attention was attracted by someone in the car. He had reached in. His whole forepart of his body was in the car. * * *

"Q. And how much of his body was in the car? A. Well, I should say * * * almost his whole body with the exception of his legs, as if he was reaching over for something."

She ran "from the dining room to the living room", and thence to the front en-

trance and yelled at the men, saying "Hey". By that time both men had reentered their own car and Mr. Bell started the motor. The ladies ran out and accused Quiel of taking something from their car. He said "I didn't take nothing." They then drove away. Miss Nichols then saw the purse and picked it up from the street. It was found midway between their own car and the position previously occupied by defendants' machine. She handed Miss Noble her purse. Upon investigation they found that the bank checks had not been removed. They were afterward cashed by Miss Noble.

[2, 3] The ladies obtained the number of defendants' automobile license plate and reported the theft to the authorities. The defendants were apprehended and tried by jury as previously stated. At the trial the defendants were positively identified. Bell, the driver of the car, was seen to raise the hood of defendants' car and pretend to be looking for engine trouble while his companion, Quiel, procured the purse from the Ford sedan. There were no other vehicles or people in that vicinity at that time. The jury was justified in assuming that the defendants stopped their machine close to the parked Ford sedan with the intention of stealing something from that car, and that the driver raised the hood of his own machine to deceive any chance observer, while Quiel proceeded to steal the purse. The undisputed evidence is that Quiel was seen reaching into the Ford sedan in the very place where the purse was left by the owner. It is immaterial that the purse was subsequently thrown to the street and that the bank checks had not been taken from it. The theft of the purse and its contents was consummated the moment Quiel unlawfully took them from the seat of the automobile with the intention of depriving the owner thereof. The evidence supports that theory. The fact that the purse was immediately thrown upon the street may merely indicate that Quiel opened the purse and concluded the contents were of insufficient value to carry away, or his knowledge of the fact that he had been discovered in the very act of stealing the purse may have led him to throw it down and hasten to escape from the scene of the theft. The jury found in effect that they intended to and did steal the purse and its contents. We may not interfere with that conclusion.

[4-7] There was adequate evidence that the bag and its contents were of sufficient intrinsic value to constitute petit larceny. It was only necessary to show that the things which were taken possessed some intrinsic value. 36 C.J. 736, sec. 7. The evidence shows that the purse contained two bank checks for specified amounts which were afterward cashed for their face value, some "cash" or "change" and cosmetics. The term "cash" means money. The term "change" means "money of small denomination". Webster's New International Dict., 2d Ed., p. 449. The value of money and coin of the United States, being fixed by law, renders their production at the trial or parol evidence of their identity sufficient proof of their value. 36 C.J. 909, sec. 491 [c]. Proof of unpaid bank checks of specified amounts is sufficient evidence of values of the sums "which in any contingency might be collected thereon." Penal Code, sec. 492. The evidence in this case shows that the checks were subsequently cashed for their face values.

[8-10] Asportation of the purse and its contents was sufficiently shown in the present case. They were taken from the possession of Miss Noble, the owner thereof, with the intent to steal them. Having been left by the owner on the seat of the car in which she was riding, they must be deemed to have been under her control and therefore in her possession so as to render them subject to theft. State v. Russo, 127 Me. 313, 143 A. 99; 33 Words & Phrases, Perm. Ed., p. 106. In the case last cited it is held that possession of goods by the owner thereof is not limited to actual custody on the person, but may include things of intrinsic value taken by a thief from any place where they were under control of the owner. Asportation within the meaning of the statute prohibiting theft may be fulfilled by wrongfully and unlawfully removing property from the possession or control of the owner, against his will with the intent to steal it, even though the property may be retained by the thief but a moment. People v. Meyer, 75 Cal. 383, 17 P. 431; People v. Dukes, 16 Cal. App.2d 105, 60 P.2d 197, 198; 15 Cal.Jur. 905, sec. 11; 144 A.L.R. 1385, note. The fact that the thief is frustrated in his attempt to carry stolen property away, or that he may change his mind immediately after the theft, because he concludes that the property is of insufficient value to war-

rant him in retaining it, does not relieve him of the consequence of the theft. In the Dukes case, supra, the defendant was discovered in the living room of a house, and hearing an unusual disturbance the owner opened the door and saw a typewriter, which had evidently fallen from its case, land "on the cement walk." It was there held that asportation of the machine was accomplished. The judgment of conviction was affirmed. The implied finding of the jury in the present case was to the same effect.

[11-15] The court did not err in denying appellant's motion for new trial on the ground of prejudicial misconduct. That motion was based on the affidavit of his attorney, which merely averred that during a period of recess in the progress of the trial, the attorney observed "the chief investigator of the District Attorney's office in earnest and secret conversation with one of the jurors." The name of that juror was not mentioned. The subject of that conversation is not disclosed. No showing of an improper or prejudicial conversation was made. We may not presume the investigator was not properly discussing some subject with the juror which had no relation to the case on trial. There is no rule of law prohibiting an investigator, or any other person, from discussing with a juror during a recess of court in the progress of a trial any proper subject not related to the trial in progress. People v. Phelan, 123 Cal. 551, 567, 56 P. 424; People v. Perez, 19 Cal.App.2d 472, 480, 65 P.2d 1319; People v. Murphy, 92 Cal.App. 729, 268 P. 927; Penal Code, sec. 1122. Moreover, the defendant waived his charge of alleged misconduct since his attorney had knowledge of the fact that the investigator talked with a juror during a recess while the case was in progress of trial, and failed to call the court's attention to that fact until after the verdict had been rendered. A defendant or his attorney, who possesses knowledge, during the progress of a trial, of the conduct of jurors which he deems to be prejudicial, may not fail to call the court's attention thereto, speculate upon receiving a favorable verdict, and then assign the conduct as prejudicial misconduct for the first time after an adverse verdict has been returned against him. People v. Browning, 132 Cal.App. 136, 142, 22 P.2d 784; Sheehan v. Hammond, 2 Cal.App. 371, 374, 84 P. 340; 8 Cal.Jur. 388, sec. 418; 23 C.J.S., Criminal Law, p. 1064, sec. 1387; 96 A.L.R. 530, note.

[16, 17] Upon conviction of petty larceny and a prior conviction of a felony, the trial judge has a discretion, under Section 667 of the Penal Code, to sentence the defendant to imprisonment in either the county jail or in the State Prison. We may not interfere with that discretion on this appeal. The statute is not unconstitutional on the theory that it provides for cruel, unusual or excessive punishment. The additional penalty is considered punishment for the last offense. It has been uniformly held that such statutes do not result in punishing one twice for the same offense. It has been determined that the penalty is not unusual, cruel or excessive. In re Rosencrantz, 205 Cal. 534, 271 P. 902; People v. Stratton, 136 Cal.App. 201, 209, 28 P.2d 695; In re Rogers, 20 Cal.App.2d 397, 402, 66 P.2d 1237; 116 A.L.R. 211, note; 82 A.L.R. 349, note.

The judgment and the order are affirmed.

ADAMS, P. J., and PEEK, J., concur.

26 Cal.2d 196

## FACKRELL v. CITY OF SAN DIEGO.
L. A. 19138.

Supreme Court of California.
March 30, 1945.

Rehearing Denied April 26, 1945.

**1. Municipal corporations ⇐819(6)**

When it is shown that a street and sidewalk improvement has been planned by city officers and constructed in accordance therewith, and that a dangerous and defective condition has thereby been created, no further proof is needed to charge city with notice of that condition. Gen.Laws 1943, Act 5619.

**2. Municipal corporations ⇐791(4)**

Where it could have been anticipated that erosion during rainy season would damage newly constructed dirt sidewalk on hillside, sidewalk was "inherently dangerous" so as to charge city with notice of condition, notwithstanding that sidewalk was not defective at time of completion thereof. Gen.Laws 1943, Act 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Dangerous".

**3. Municipal corporations ⇐791(4)**

If street and sidewalk improvement is designed to be used without inspection and maintenance, it should be made reasonably safe for ordinary use under circumstances which are normally to be anticipated, and, if under any of them it will become unsafe because of its planned design, it is "inherently dangerous" so as to charge city with notice of that condition. Gen.Laws 1943, Act 5619.

**4. Municipal corporations ⇐791(4)**

A recently improved street or sidewalk may be "inherently dangerous" so as to charge city with notice of such condition even though conditions which activate defect, and which so operate because of nature of improvement, are to be present only occasionally. Gen.Laws 1943, Act 5619.

**5. Municipal corporations ⇐791(1)**

Under statute imposing liability upon municipality for dangerous or defective condition of public streets where municipality has notice thereof, actual notice of defect or dangerous condition is not required, but constructive notice is sufficient. Gen.Laws 1943, Act 5619; Civ.Code, § 19.

**6. Municipal corporations ⇐795**

Municipal authorities planning and constructing an improvement with knowledge of circumstances which reasonably might be expected to result in a dangerous condition of improvement are required to make inspections commensurate in scope with nature and character of their knowledge and peril which should be avoided. Gen.Laws 1943, Act 5619.

**7. Municipal corporations ⇐821(4)**

Existence of dangerous or defective condition of public street for which liability may be imposed upon municipality is primarily a question of fact, and must be determined upon facts of particular case. Gen.Laws 1943, Act 5619.

**8. Appeal and error ⇐931(1), 1010(1)**

Findings of trial court must be sustained on appeal if supported by substantial evidence, and all legitimate and reasonable inferences must be indulged toward upholding the findings.

**9. Appeal and error ⇐931(1)**

An appellate court should resolve doubts as to sufficiency of evidence to sustain finding in favor of the finding and, to discover whether doubt or conflict exists, court should be realistic and practical.

**10. Municipal corporations ⇐819(6)**

Evidence that city, after constructing dirt street and sidewalk on hillside, made no maintenance inspections of sidewalk, although street foreman was aware of danger of erosion during rainy season, sustained finding that city had requisite notice of dangerous condition of sidewalk resulting from oil coating on edge of sidewalk next to street. Gen.Laws 1943, Act 5619.

**11. Municipal corporations ⇐757(1)**

A pedestrian is entitled to use every part of street and sidewalk and city's duty to repair is coextensive with that right.

**12. Municipal corporations ⇐761(1)**

A city could not escape liability for injury to pedestrian, who fell into hole in street when portion of dirt sidewalk on which she was walking gave way under her, on ground that sidewalk was considered by city to be "unimproved" and that city did not endeavor to maintain unimproved sidewalks. Gen.Laws 1943, Act 5619.

**13. Municipal corporations ⇐759(5)**

Under Public Liability Act, a city is liable for injuries proximately resulting from dangerous or defective condition of its public street whether street is improved or unimproved. Gen.Laws 1943, Act 5619.

**14. Appeal and error ⇐1012(1)**

In action against city for injuries sustained by pedestrian who fell into hole in street when portion of dirt sidewalk gave way under her, testimony that witness around January 1 had seen hole into which plaintiff fell when it was small, but that it became larger after winter rains, was not unworthy of credence because conflicting and because street improvement was not completed until January 8, but weight thereof was for trial judge. Gen.Laws 1943, Act 5619

**15. Municipal corporations ⇐818(9)**

In action for injuries sustained by pedestrian who fell into hole in city street when dirt sidewalk gave way under her, testimony that witness suffered a similar fall the week before was relevant to show dangerous condition of sidewalk, and qualification that witness couldn't swear it was in same spot but that it was in that neighborhood went to weight of evidence, and not to its competency. Gen.Laws 1943, Act 5619.

**16. Municipal corporations ⇐791(4)**

A city could not avoid liability to pedestrian for injuries sustained when she fell into hole in city street, when portion of recently constructed dirt sidewalk on hillside gave way under her, on ground that if city were required to foresee erosion on such a sidewalk it would preclude use of that type of improvement and would make city an insurer of safety of its streets and that a reasonable inspection would not have disclosed defect in sidewalk or street. Gen.Laws 1943, Act 5619.

**17. Municipal corporations ⇐761(1)**

Where Public Liability Act imposed liability upon municipality for dangerous or defective condition of public street if municipality had knowledge or notice thereof, city could not avoid liability for injury to pedestrian resulting from defect in unimproved sidewalk by seeking to require pedestrians to use sidewalk at their own risk. Gen.Laws 1943, Act 5619.

**18. Negligence ⇐1**

"Negligence" is not the act itself, but is a fact which defines character of an act in respect to its being a civil wrong, and determination of that fact rests with court and not the actor.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence".

EDMONDS and TRAYNOR, JJ., dissenting.

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In Bank.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by Ida Fackrell against the City of San Diego for injuries sustained when the sidewalk upon which she was walking in the defendant city gave way and caused her to fall into a hole in the street. Judgment for the plaintiff, and the defendant appeals.

Judgment affirmed.

Prior opinion, App., 149 P.2d 313.

J. F. Du Paul, City Atty., and J. H. McKinney and Edward H. Law, Deputy City Attys., all of San Diego, for appellant.

S. G. North and Edgar G. Langford, both of San Diego, for respondent.

SCHAUER, Justice.

Plaintiff brought this action to recover damages from the city of San Diego for injuries sustained when the sidewalk upon which she was walking in the defendant city gave way under her, causing her to fall into a hole in the street. Plaintiff's right ankle was broken as a result of her fall. The action is based upon the Public Liability Act of 1923 (Stats. 1923, p. 675; Deering's Gen.Laws 1943, Act 5619). After trial before the court without a jury judgment was rendered for the plaintiff. Defendant appeals. The basic question to be determined is whether the evidence is sufficient to sustain the finding that there existed a dangerous or defective condition in the street of which the defendant city had knowledge or notice as required by the act in order to impose liability upon it. We have concluded that on the record before us the judgment must be affirmed.

West Palm Street, upon which plaintiff's injury occurred, is a short street running in an east-west direction and connecting a San Diego residential district with direct routes to the Consolidated Aircraft Factory. Prior to the winter of 1940-1941 the area of this street was in a natural state—a rather steep and rough hillside—and it

had not been opened to traffic. In November, 1940, the city itself (not through an independent contractor) began to improve the street in order that it might be opened to facilitate the movement of workers to and from the aircraft factory. The work was done under the direction of one Milton Rader, defendant's street foreman in charge of new construction and general maintenance of streets.

The improvement work included the making of cuts and excavations varying in depth from a few inches to a maximum of about 13 feet, the grading of the surface into street form, and the creation of a dirt curbing on each side of the road and a dirt sidewalk ten feet wide extending from the northerly curb to the adjacent embankment which, opposite the place where plaintiff's injury was sustained, was several feet high. After the grading had been completed a light oil was sprayed over the roadway and against the curbs. Rader (the district street foreman) testified that the curbs were bevelled and sprayed with oil to provide a seal against erosion and to prevent dust from blowing. The oil, under pressure and at a temperature of 450 degrees Fahrenheit, was sprayed from a truck with a power pump and spread over the curbs a substantial distance onto the sidewalk, where it hardened and formed a crust having the appearance, according to one witness, of an oil and gravel surface. The extent to which the sidewalk was covered with oil depended materially upon the strength of the wind blowing at the time the oil was applied. The coating so placed on the walk was allowed to remain.

Concerning the street generally Rader testified that after the grading and oiling had been completed "an ordinary individual" viewing the street "would have a tendency to think that there was pavement underneath" and would not "mistake it for just a good, hard California dirt street"; that the street "couldn't possibly be mistaken for a dirt street." Even if we assume that in so testifying the witness had in mind the roadway and not the sidewalk it would nevertheless follow that the trial court could have concluded that the portion of the sidewalk which was sprayed with oil likewise had the appearance of a paved sidewalk.

Rader testified that the overlap of oil on the sidewalk bordering the curb was "four to six, sometimes eight inches." The evidence produced by plaintiff indicated that such oiled strip on the sidewalk was approximately 18 inches wide at the point of the accident. There was also a conflict in the testimony as to the height of the curbs. Rader testified that the curbs did not exceed eight or ten inches in height, while witnesses for the plaintiff testified that the curbs were 12 to 18 inches high and that at the point where plaintiff fell there was a perpendicular drop from the sidewalk to the street level. For the purpose of drainage the sidewalk was so graded that it was approximately three inches lower at the curb than it was at the property line. After the improvement was completed, about January 8, 1941, a sign forbidding use of the street by the public was removed. From the time the work was completed until early February, 1941, Rader occasionally inspected the new roadway. Such inspections revealed a number of pot holes which Rader said were "usual" in streets treated as West Palm Street had been treated. It does not appear that anything was done to fill such holes.

Insofar as the sidewalk itself was concerned the improvement plan called for no maintenance inspections after grading and none were made. Mr. Rader testified that the sidewalk was considered to be "unimproved" and that "We don't try to maintain or keep up unimproved sidewalks, only when there is a bad wash or something that somebody has reported to us as dangerous"; "we pay no attention unless something is turned in to us as dangerous." He admitted that he had observed that "There is bound to be more erosion on a hill than there is on a level piece of ground." The position of the defendant city in respect to the sidewalk, as reflected by its conduct and as stated by its counsel, is that "the City is not liable for pedestrians walking on an unimproved sidewalk. They walk at their own risk." As was reasonably to be expected rains came in late January and in March, 1941, and that portion of the walk nearest the embankment at the place where plaintiff fell became gullied and torn by erosion from the rainwater. A strip about 30 inches wide next to the curb was the only part of the sidewalk which remained apparently usable. This strip included the oiled surface. On March 21, 1941, at about 1:15 o'clock in the afternoon, as plaintiff was proceeding westerly toward her home, walking on the oiled portion of such remaining strip of ungullied sidewalk, the surface crust gave way under her feet. The oil coat-

ing had preserved the surface apparently intact but the waters had undermined and eroded beneath the crust so that a substantial area of sidewalk and curbing at that point crumbled away, precipitating plaintiff perpendicularly about one foot, from whence she further slid into a muck-filled pot hole about 18 inches out from where the curb had been and approximately two feet deep. In this fall plaintiff sustained the injury for which she seeks to recover.

Plaintiff testified that the hole in the street, prior to her fall, had the appearance of a "mud pie" formed in the crust of the street; that it was about five inches in diameter and that she did not "notice any depth to it." She first noticed the hole "about a couple of days before the accident." As plaintiff fell into the hole "it gradually got big"; "from the five inches it got to about two feet" deep and "wide enough to let [plaintiff's] body in."

Mrs. Margaret Crawford, a witness for plaintiff, testified that she had seen a hole in the street "just out from the sidewalk" where plaintiff fell; that it "was very small, around the first of January, but then after the rains, why it became larger." She further testified that about one week prior to plaintiff's injury she (Mrs. Crawford) suffered a similar fall, near the place where plaintiff fell, caused by the crumbling of the sidewalk.

The witness Rader (who, as previously mentioned, was district street foreman) testified as to the construction of the street and sidewalk and as to the effect of erosion on dirt sidewalks and streets. He stated that "when we put a dirt sidewalk in we more or less always expect to have to do work on it"; that "There is bound to be more erosion on a hill than there is on a level piece of ground" and "there is bound to be, on new work, erosion"; that a certain amount of erosion on unimproved property which is graded is anticipated; "on unimproved property we don't cut to the line, so that erosion will not get on private property"; that an unimproved dirt sidewalk would be peculiarly subject to erosion during the rainy season and that "It would be hard to say" whether such a sidewalk would "continue to be safe after it had gone through an average season of rain"; but that "On our policy that we have tried to follow, the only thing that we ever repair on unimproved sidewalks is something that is reported to us as dangerous. We don't try to maintain or keep up unimproved sidewalks, only when there is a bad wash or something that somebody has reported to us as dangerous"; "the sidewalk is classed as unimproved, and we pay no attention unless something is turned in to us as dangerous. The road is what we are interested in."

The trial court found, among other things, that the defendant city had control of the street and sidewalk where plaintiff fell; that it "negligently maintained" them and that they were "in a dangerous and defective condition"; that defendant, "about January 8, 1941, had improved the street and sidewalk by grading the sidewalk and street and oiling the same and that by reason of said work the sidewalk and street was [sic] left in a condition which was inherently dangerous; that said inherently dangerous condition was known to the defendant and was not known to the plaintiff"; that "the hole in the street adjacent to the sidewalk had existed for some time prior to March 21, 1941; that thereby the street and sidewalk were made dangerous and defective"; that defendant "and its officers who had authority to remedy said defective and dangerous condition" had notice and knowledge of such condition but "failed and neglected for a reasonable time after acquiring said knowledge and receiving said notice to remedy said defective and dangerous condition"; and that as a proximate result of the dangerous and defective condition of the sidewalk and of the negligence of defendant plaintiff fell upon the sidewalk and into the hole in the street and was injured.

Plaintiff contends that the evidence amply supports the findings and shows that an inherently defective and dangerous condition was created by defendant and that therefore no other notice was necessary. She also contends that the evidence is sufficient to support a finding that defendant was chargeable with constructive prior notice of the dangerous condition existing at the time of her injury. Defendant controverts both contentions and urges that from the evidence it should be concluded that plaintiff's injury came about through a latent defect of which it had no knowledge or notice. The Public Liability Act (Stats.1923, p. 675; Deering's Gen.Laws, 1943, Act 5619) imposes liability upon municipalities for "the dangerous or defective condition of public streets, * * * grounds, works and property in all cases where the governing or managing board of

such * * * municipality * * *, or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, * * * grounds, works or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[1] The rule is well established that when it is shown that a certain street and sidewalk improvement has been planned by city officers and constructed in accordance with such plan, and that by carrying out the plan a dangerous or defective condition has been created, no further proof is needed to charge the city with notice of that condition. (Rafferty v. City of Marysville (1929), 207 Cal. 657, 663, 280 P. 118; George v. City of Los Angeles (1938), 11 Cal.2d 303, 307, 79 P.2d 723; Black v. Southern Pac. Co. (1932), 124 Cal.App. 321, 328, 12 P.2d 981; Sandstoe v. Atchison, T. & S. F. R. Co. (1938), 28 Cal.App.2d 215, 218, 82 P.2d 216; Bigelow v. City of Ontario (1940), 37 Cal.App.2d 198, 204, 99 P.2d 298.) Defendant does not dispute the stated proposition but contends that it is not applicable to a situation where no danger of injury exists at the time of the completion of the improvement. Defendant contends that there was nothing in or about the street or sidewalk as originally completed that was inherently dangerous, but that on the contrary they were then safe and remained safe for some weeks; that an inherent danger is one that exists from the beginning as distinguished from one which merely should be anticipated. Hence, defendant urges that the finding of the trial court that "by reason of said work the sidewalk and street was [sic] left in a condition which was inherently dangerous" upon completion of the improvement about January 8, 1941, is unsupported in the record, and that it should be held that plaintiff's injury was due solely to a latent defect caused by the elements, of the existence of which defendant had no knowledge; that unless the improvement as planned and constructed was inherently dangerous from the beginning it cannot be charged with either knowledge or notice of any subsequently developed danger or defect.

[2-4] In other words, it is the position of defendant that a public street is not inherently dangerous unless it is immediately dangerous. Since the statute (Stats. 1923, p. 675; Deering's Gen.Laws, 1944, Act 5619) imposes liability upon the basis of either a dangerous or a defective condition, defendant must also take the position, if its contention is to have substantial materiality, that an improvement is not inherently defective unless, at the moment of completion and under the conditions then existing, it is actually defective for the purpose and use for which it was constructed. Stated still differently, the effect of defendant's argument in this regard is that a potential or latent danger or defect is not inherent. This position is untenable. A quality or attribute is said to be inherent when it is "Firmly or permanently contained or joined; infixed; indwelling" or "Involved in the constitution or essential character of anything." (Webster's New Int. Dict., 2d Ed.) The expression "inherently dangerous" has been defined to mean "that in the end there inheres danger." (Majestic Theater Co. v. Lutz (1925), 210 Ky. 92, 100, 275 S.W. 16, 20.) A public highway constructed to encompass a sharp turn without warning sign or marker might be reasonably safe in daylight with clear atmosphere and a dry roadway but it could nevertheless be inherently dangerous for use in fog and rain. (See Rippe v. City of Los Angeles (1942), 50 Cal.App.2d 189, 196, 123 P.2d 47.) If the improvement is designed to be used without inspection and maintenance and under varying conditions which are normally to be anticipated then it should be made reasonably safe for ordinary use under all of those conditions and if, under any one or more of them, it is, or naturally will become, unsafe for such use because of its planned design then it is inherently dangerous. The defect and danger are no less inherent merely because the anticipated and to be expected conditions which activate such defect and danger are to be present only occasionally. Here the rains and the erosion were actually expected yet the sidewalk was left open to the public for use after the rains as well as before and with no warning based on the defendant's superior knowledge of the danger created.

In Black v. Southern Pac. Co. (1932), supra, 124 Cal.App. 321, 328, 12 P.2d 981, 984, the court said: "While the record discloses no evidence that the engineer or any member of the board of public works had

knowledge or notice [of the dangerous condition] before the accident * * * it has been held that, where the dangerous condition is due to the negligent act or omission of the officers doing or directing the work, it is unnecessary to prove as a condition to liability that they had notice of the condition and the authority and duty with funds available to correct it. Moore v. Burton, 75 Cal.App. 395, 242 P. 902. *Nor should a different rule prevail where a proposed improvement will be reasonably certain to endanger the public, unless precautionary measures are taken as a part of the projected work, and it is completed and left without the necessary safeguards.*" (Italics added.)

In Mulder v. City of Los Angeles (1930), 110 Cal.App. 663, 668, 294 P. 485, a contractor with the permission of the board of public works made a fill and embankment above plaintiff's property. The engineer's report did not require that in connection with the work any means should be provided for drainage of storm surface waters. When "a usual and common rainstorm" came soon after the work was completed water collected behind the embankment, overflowed, and caused sand and debris to come down upon and injure plaintiff's property. In holding the defendant liable under the Public Liability Act the court said: "The board of works knew that this work was to be done, as requested and permitted in accordance with the recommendation of the city engineer, and knew that said recommendation did not contain any provision for protection of property in the ravine against damage which reasonably might have been expected to result from the work as proposed to be done. Such knowledge in view of the physical situation of the streets and adjacent property, was equivalent to notice of the dangerous condition which would be created by the proposed changes if permitted to be done without some provision for suitable drainage. To hold otherwise would be to presume that the board had the right to act without even attempting to exercise its intelligence in passing upon a subject of substantial importance." In the Mulder case there was no actual and present danger of immediate damage until the arrival of the rainstorm and the collection of water behind the embankment, yet it was held, and properly so, that the city had created a dangerous condition. Since the rains and flooding of the embankment were normally to be anticipated the danger was inherent from the time the fill was made.

[5, 6] Even if we could interpret the essential elements of the plan of improvement shown here as not calling for an inherently dangerous or defective condition it would avail defendant nothing on the record before us. Actual notice of a defect or dangerous condition is not required. Constructive notice satisfies the statute. (Laurenzi v. Vranizan (1945), Cal., 155 P.2d 633; Dawson v. Tulare Union High School (1929), 98 Cal.App. 138, 142, 276 P. 424; Hook v. City of Sacramento (1931), 118 Cal.App. 547, 553, 5 P.2d 643; Bennett v. Kings County (1932), 124 Cal.App. 147, 153, 12 P.2d 47.) Constructive notice is defined by section 19 of the Civil Code as that knowledge of circumstances "sufficient to put a prudent man upon inquiry as to a particular fact" where "by prosecuting such inquiry, he might have learned such fact." The rules governing constructive notice require reasonable diligence in making inspections for the discovery of unsafe or defective conditions. (Laurenzi v. Vranizan (1945), supra, pp. 636, 637 of 155 P.2d; Nicholson v. City of Los Angeles (1936), 5 Cal.2d 361, 364, 365, 54 P.2d 725.) Where the authorities who have planned and constructed an improvement have knowledge of circumstances which reasonably might be expected to result in a dangerous condition as a natural and probable consequence of the work, such authorities are put upon inquiry, and it follows that it is incumbent upon them to make inspections commensurate in scope with the nature and character of their knowledge and the peril which should be avoided.

[7-9] As to what constitutes a dangerous or defective condition no hard-and-fast rule can be laid down, but each case must depend upon its own facts. (Rafferty v. City of Marysville (1929), supra, 207 Cal. 657, 661, 280 P. 118; Hook v. City of Sacramento (1931), supra, 118 Cal.App. 547, 552, 5 P.2d 643.) Whether a given set of circumstances creates a dangerous or defective condition is primarily a question of fact. (Sandstoe v. Atchison, T. & S. F. R. Co. (1938), supra, 28 Cal.App.2d 215, 218, 82 P.2d 216; Bigelow v. City of Ontario (1940), supra, 37 Cal.App.2d 198, 204, 99 P.2d 928.) The findings of the trial court must be sustained if they are supported by substantial evidence. All legitimate and reasonable inferences must be indulged toward upholding the findings. Ap-

pellate courts, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover whether such doubt or conflict exists, the court should be realistic and practical. (Estate of Bristol (1943), 23 Cal.2d 221, 223, 143 P.2d 689.)

[10] Having in mind the foregoing principles we cannot hold that as a matter of law, upon the evidence before us, a dangerous or defective condition was not created by defendant or that injury to the public was not reasonably foreseeable. The testimony of Milton Rader above referred to, showing his knowledge of past occurrences and of eventualities reasonably to be expected in connection with such improvements as those made on West Palm Street, together with the physical facts regarding the hilly terrain, the impending rainy season, etc., satisfactorily supports the finding that the defendant had the requisite notice of a dangerous condition resulting from the jagged termination of the friable oil coating on the dirt sidewalk which was susceptible to deterioration, undermining, and erosion. We do not think that a city should escape liability for damages caused by hidden defects in its sidewalks where it makes no inspections of such sidewalks and does not repair them, although it knows that such defects, while originally potential, are inherent in the plan of street improvement and, under conditions which are bound to occur, should reasonably be expected to become actual and imminent unless vigilance in care and maintenance is exercised. Under such circumstances whether the sidewalk is immediately dangerous when constructed is immaterial because it is at least defective by reason of being potentially dangerous, and the statute requires no more. It is to be remembered in this regard that the city, although expecting erosion, made no effort to inspect, maintain, or repair its "unimproved" sidewalks except as dangerous conditions were reported to it by members of the public.

[11-13] The evidence discloses no necessity, so far as improvement of the roadway was concerned, for spraying oil on the sidewalk to the extent shown here, but an oiled surface did result to the knowledge of the defendant through its responsible officer and nothing was done thereafter to remedy the situation. The oil sprayed over the street and against the curb provided a seal tending to prevent erosion of the street and curb but was wholly ineffectual to prevent erosion of the sidewalk where the oiled surface jaggedly ended. The line of termination of the oil coating could have been expected to obstruct the flow of rain water over the walk toward the street and thus to tend to cause more percolation of rain water at that point. The oil coating ended in the middle of that portion of the sidewalk most used by the public. The portion so oiled may well have conveyed to the plaintiff the impression that it was stronger and the more appropriate part of the walk to use. Plaintiff's Exhibit 2 (a photograph in evidence) shows that in March, 1941, the sidewalk, except a strip 30 inches wide nearest the curb, was not usable because it was gullied and torn by erosion of rainwater coming down from the bank on the north; thus it should have been obvious upon inspection that the strip of sidewalk given the oil surfacing would be the portion most used. Furthermore, in the absence of regulations (of which there were none here) or obvious defects a pedestrian is entitled to use every part of a street or sidewalk and defendant's duty to repair is coextensive with that right. (McLaughlin v. City of Los Angeles (1943), 60 Cal.App. 2d 241, 245, 140 P.2d 416.) Even if we assume that the sidewalk in question was technically "unimproved" it avails defendant nothing. The contention that pedestrians use an unimproved street entirely at their own risk and that a city is not liable for injuries caused by any defect therein is not tenable. Under the Public Liability Act, Stats. 1923, p. 675, Deering's Gen. Laws, 1944, Act 5619, a city is liable for injuries proximately resulting from the dangerous or defective condition of its public street whether such street is improved or unimproved. (McLaughlin v. City of Los Angeles, supra, 60 Cal.App.2d page 243, 140 P.2d 416.)

[14, 15] Defendant attacks the testimony of Mrs. Crawford, who stated that "around the first of January" she had seen the hole into which plaintiff fell; that at that time it was very small but that it became larger after the rains. Defendant urges that this testimony is not worthy of credence for the reasons that the evidence was conflicting and, in particular, that the street improvement was not completed until the 8th of January. Obviously Mrs. Craw-

ford's testimony purported to be only an approximation as to date and the weight thereof was for the trial judge. This witness also testified that about one week before the plaintiff was injured she (Mrs. Crawford) suffered a similar fall, the sidewalk crumbling under her. Upon cross-examination she testified that she "couldn't swear it was at the same spot, but it was right in that neighborhood." This qualification went to the weight of the evidence, not to its competency. The testimony was relevant as tending to show both the dangerous character of the improvement which had been installed and conditions which would tend to charge the city with knowledge or notice of the fact. (See McCormick v. Great Western Power Co. (1932), 214 Cal. 658, 665, 8 P.2d 145, 81 A.L.R. 678; Gorman v. County of Sacramento (1928), 92 Cal.App. 656, 664, 268 P. 1083.)

[16-18] Defendant contends that to hold it bound to foresee and to guard against the development of erosion under the circumstances shown would be to preclude use of this type of improvement; that it would make the city an insurer of the safety of its streets; that a reasonable inspection would not have disclosed the defects in the sidewalk or street or the dangerous character thereof and for such reason alone, if no other, constructive notice cannot be predicated upon the hole in the street, Mrs. Crawford's fall, or other indicia disclosed in the record. We think that no extended discussion is necessary in repect to the points last mentioned. They are largely disposed of by what has already been said. Obviously, the city is not being held as an insurer of anything but it is being held to the standard of ordinary care in planning, constructing, and maintaining its streets and sidewalks. Liability for its failure in that regard is not due to the whimsy of court or jury; it is imposed by the public liability statute. The evidence amply establishes that the improvement here was inherently defective in its original plan. But even if we could regard the plan as proper the evidence shows that a defective and dangerous condition did arise and that defendant is chargeable with notice of it. Such evidence tends to show that the actual danger which was imminent in March was apparent at a much earlier date. Defendant in January directly and knowingly caused or permitted the oil to be sprayed onto a part of the sidewalk and made no effort to clear away the resulting deceptive crust or to mark it as dangerous although it knew that erosion was imminent. It made some provision against erosion on the private property adjacent to the cuts and excavations; it likewise made some provision against erosion of the roadway and curb; but, having opened up and graded a sidewalk which it invited the public to use and which hundreds of pedestrians did use daily, it left that sidewalk uninspected in the rainy season, knowing that it was so graded that run-off water from the hillside would and did flow over it toward the oiled strip and knowing also that no provisions against undermining of that strip had been made. It made some inspections of the roadway and observed damage there but it did not look at the sidewalk. It now seeks to justify its conduct by announcing for itself a rule that it assumes no responsibility for the condition of the sidewalk and that pedestrians must use the same at their own risk. But its legal duty in the premises is defined by general law, Stats. 1923, p. 675, Deering's Gen.Laws, 1944, Act 5619, and negligence and liability therefor do not depend upon, and cannot be limited by, self-formulated standards. Negligence is not the act itself but is a fact which defines the character of an act in respect to its being a civil wrong. (McAllister v. Brown (1931), 114 Cal.App. 239, 240, 299 P. 753.) The determination of that facts rests with the court, not the actor. We are satisfied that the evidence fully supports the essential findings and that no prejudicial error is shown.

For the reasons above stated the judgment is affirmed.

GIBSON, C. J., and SHENK, CARTER, and SPENCE, JJ., concurred.

EDMONDS, Justice (dissenting).

As I read the record in this case there is no evidence of a dangerous or defective condition for which the city is responsible unless rules which have been stated and applied in many decisions of this court are now to be abandoned. In effect, my associates now make a city the insurer of the safety of everyone using its public streets with the obligation to keep them in such repair as to preclude the possibility of injury to one traveling upon them, a standard of care impossible to meet and far beyond any reasonable construction of the statute imposing municipal liability under stated and restricted circumstances.

The trial court found that the city "negligently maintained" the street and the sidewalk and that, at the time of the accident, they were "in a dangerous and defective condition." Also, it is said, the city upon grading and oiling the street and sidewalk, left them in an inherently dangerous condition which was known to the city and not known to the plaintiff. Because of the hole in the street, which had existed some time prior to the date of the accident, the street and sidewalk "were made dangerous and defective." Further, the court found, the city and its officers who had authority to remedy the "dangerous and defective condition" had notice of the situation but failed to remedy it.

Justification for these findings is first placed upon the ground that the testimony of the street superintendent supports the conclusion that the city "had the requisite notice of a dangerous condition resulting from the jagged termination of the friable oil coating on the dirt sidewalk which was susceptible to deterioration, undermining and erosion." But his statement was only to the effect that, during the rainy season, a certain amount of erosion is to be expected; it includes nothing from which the court could reasonably infer that the witness, or anyone else, reasonably could have foreseen that rainwater would undermine the oiled portion of the sidewalk in such a manner as to leave the surface apparently intact. Otherwise stated, the street superintendent, the evidence clearly shows, fully understood that the winter rains would wash across and erode an unimproved sidewalk of a hillside street and, according to his explanation, the city undertook to repair "a bad wash or something * * * reported to us as dangerous." However, there is no evidence in the record tending to show that he had any reason to believe erosion would take place in such a way as to leave a latent defect which was not apparent to one using the sidewalk. To the contrary, he testified that the purpose of oiling the dirt street and curb was to prevent "ordinary erosion."

Yet Mr. Justice Schauer impliedly uses this testimony as the basis for his statement that the undermining of the oil coated surface on the sidewalk was a hidden defect originally potential and inherent in the plan of street improvement under conditions which are bound to occur. "The evidence amply establishes," he says as a second ground of decision, "that the improvement here was inherently defective in its original plan." I find no such evidence, nor any basis for the statement in the succeeding sentence that if the plan of construction may be regarded as proper, "the evidence shows that a defective and dangerous condition did arise and that defendant is chargeable with notice of it." This evidence, it is said, tends to show that the situation which was apparent in March could have been seen at a much earlier date. The reasoning in this regard is that the oil sprayed upon a part of the sidewalk formed a "deceptive crust" and the city "left that sidewalk uninspected in the rainy season, knowing that it was so graded that run-off water from the hillside would and did flow over it toward the oiled strip and knowing also that no provisions against undermining of that strip had been made." Certainly it is not enough that at the time of the accident, there was a defect in the sidewalk; many unusual and unforeseeable things in fact occur.

The record includes no evidence showing that the crust of oil would be undermined by erosion in a manner not readily visible to any user of the sidewalk. Knowledge that erosion would occur is not the equivalent of knowledge that water might work under the oiled surface through subterranean crevices or in some unusual manner. But to extend the effect of the evidence, my associate calls to his aid the strange doctrine stated in Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689, declaring that in reading the record to ascertain whether there is evidence sufficient to sustain a finding, "the court should be realistic and practical." In effect, he says, there is no evidence tending to prove that the oil on the sidewalk created either a dangerous or defective condition, but because, as the street superintendent admitted, rain causes erosion, the court should realistically and practically extend the evidence to support a finding of liability on account of a condition which was known to the city and not known to the plaintiff.

Under these circumstances, in my opinion, the judgment is not sustained by any proof and should be reversed.

TRAYNOR, J., concurred.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

26 Cal.2d 234

## PACIFIC FREIGHT LINES et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. No. 19208.

Supreme Court of California.

March 30, 1945.

1. Workmen's compensation ⇐1604

In proceeding to annul Industrial Accident Commission's award of compensation for truck driver's death as result of truck hurtling from highway, evidence showed that accident was caused by driver's intoxication, so that award was improper. St.1937, pp. 269, 299, §§ 3600(d), 5705(b).

2. Workmen's compensation ⇐1411

In proceeding to annul award of compensation for truck driver's death as result of truck hurtling from highway, Arizona death certificate, purporting on its face to state nothing as to cause of accident except opinion or conclusion of coroner's jury, without foundation in fact, that wheel of truck locked due to some mechanical defect, was subject to rebuttal and explanation, even if it was admissible and constituted prima facie evidence of facts stated therein, and it should have been accorded no greater force than witnesses' or experts' opinions or conclusions. Rev. Code Ariz.1928, § 2740.

3. Workmen's compensation ⇐1411

An Arizona coroner's jury's verdict that evidence showed that wheel of truck locked, due to some mechanical defect, causing truck to leave road, was without probative force on question of cause of truck driver's death in proceeding to annul award of compensation therefor, in absence of other evidence of such defect than witness' speculative comment, when asked what caused accident, that driver was either drunk or asleep, unless brakes went wrong. Rev.Code Ariz.1928, § 2740.

4. Workmen's compensation ⇐1604

Uncontradicted and unimpeached testimony at Arizona coroner's inquest and Industrial Accident Commission's hearing on claim for compensation for truck driver's death that truck was in excellent mechanical condition at time of fatal accident left Commission no reasonable ground for inference, based solely on unsupported coroner's jury verdict, that truck left road and turned over, causing driver's death, as result of mechanical defect rather than driver's intoxication. St.1937, p. 269, § 3600(d); Rev.Code Ariz.1928, § 2740.

5. Workmen's compensation ⇐1939

The application of doctrine that reviewing courts may not invade field of fact-finding body, such as Industrial Accident Commission, and that findings of triers of fact on conflicting evidence are conclusive, is limited to cases where conflict is substantial and real, not fanciful or fictitious.

6. Workmen's compensation ⇐11

The Workmen's Compensation Act is founded on sound public policy and with general objective of compensating injured employee or his dependents for injuries or death resulting from ordinary hazards of employment.

7. Workmen's compensation ⇐1604

Where uncontradicted and unimpeached evidence points unerringly to conclusion that employee's death was caused solely by his intoxication, Industrial Accident Commission's contrary finding and compensation award based thereon are not within Commission's jurisdiction. St.1937, p. 269, § 3600(d).

CARTER, J., dissenting.

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In Bank.

Proceeding by the Pacific Freight Lines, a corporation, and others to annul an award of compensation by the Industrial Accident Commission to Myrtle J. Oates and others for the death of William Graham Oates, employee.

Award annulled.

Crider, Runkle & Tilson, Clarence B. Runkle, and John J. Haydon, all of Los Angeles, for petitioners.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

SPENCE, Justice.

Petitioners seek the annulment of an award made by the Industrial Accident Commission for the death of William Graham Oates. They contend that the commission was without jurisdiction to make the award for the reason that the uncontradicted and unimpeached evidence compelled a finding that the fatal accident was caused by the intoxication of Oates. Under section 3600(d) of the Labor Code,

St.1937, p. 269, liability for compensation exists "Where the injury is not caused by the intoxication of the injured employee." A review of the entire record sustains petitioners' contention that they maintained their burden of proof on this affirmative defense, Labor Code, § 5705(b), and that an award of compensation was therefore improper.

Before discussing the evidence relating to the cause of the fatal accident, the following facts should be stated: The deceased William Graham Oates was employed by Pacific Freight Lines as a truck driver. On Sunday, April 4, 1943, Oates, as relief driver, was scheduled to take a truck and trailer at El Centro, California, at about 11 p. m. and proceed to Phoenix, Arizona, on a trip which had originated in San Diego, California. Gordon Reynolds, a fellow-employee and truck driver, had a like assignment with respect to another truck and trailer coming from San Diego, except that his ultimate destination was Tucson, Arizona. On the morning of April 4th, the two drivers met at El Monte, California, and proceeded by automobile to El Centro, where they arrived in ample time to assume their driving duties. At the appointed hour they started on their assigned trips with their respective trucks and trailers. They traveled together along the same road and met at various designated stopping places en route until they reached the Phoenix-Tucson highway junction about four miles east of Gila Bend, Arizona, where they were scheduled to go their separate ways to their respective destinations. Reynolds had gone only a few miles beyond the highway junction along the road to Tucson when he was overtaken by Oates, who asked for help in placing a call to the office. At that time Oates was driving his truck only, having lost his trailer at the highway junction. Reynolds unhooked his own trailer from his truck, left it at the side of the road, and followed Oates as he backtracked toward the highway junction. On the return trip Oates traveled at a speed between 60 and 65 miles per hour, and Reynolds could not catch him. While Oates was so proceeding across an overpass and without interference from any other traffic whatsoever, he failed to negotiate a slight bend in the road. As a result his truck went through 175 feet of guard-rail, hurtled from the highway, and came to a stop upside down 130 feet or more out into the adjoining field. Oates died almost immediately from the injuries sustained. Oates' trailer was found later by Reynolds at the highway junction, its tongue broken, apparently from buckling due to some sudden stop.

At the hearing before the commission, Reynolds described in considerable detail Oates' intoxicated condition and its progressive development from the time he met Oates at El Monte on the morning of April 4th to the time of the accident, which occurred on April 5, 1943, at about 8:25 a. m. It appears that on the road from El Monte to El Centro, Oates commenced drinking beer and whiskey alternately, and continued so to imbibe while passing several hours at the latter place awaiting the appointed hour of departure; and that after starting from El Centro on his assigned trip with his truck and trailer, Oates persisted in his drinking, over Reynolds' objection, along the route and as they met at various stopping places. Reynolds testified that after crossing the Arizona state line and just before reaching their agreed stop at Welton, Oates "went off the road five or six times * * he was a drunk driver you might say." At Welton, Reynolds tried to persuade Oates to "stop and sleep"; they "had pretty hard, disagreeable words there" because Reynolds "didn't want him to go on" but Oates was determined to proceed. Both men stopped their trucks again about four miles west of Gila Bend; at this point Reynolds said Oates "was pretty fair drunk." Reynolds "left that spot first," drove into Gila Bend and stopped at a restaurant for coffee. While he was sitting there he saw Oates drive down the road—"that truck came off that hill just like a roaring airplane motor; people just running out of there; come near hitting a little girl right down there by the hotel, and he went right on through town. Everybody got out of the way; was scared." Reynolds resumed his trip and did not see Oates again until Oates "caught up" with him some four miles beyond the Phoenix-Tucson highway junction. Oates was driving only his truck, laughed as he said that he had "lost" his trailer, and asked Reynolds to "call the office" for him. Reynolds testified that at that time "his (Oates) eyes looked like, well, just like glaring at you. He wasn't seeing anything, just drunk. * * * He staggered * * * he just seemed like he didn't know what he was saying * * * he was drunk, and he was past drunk,

drinking that hot beer and hot whiskey; the man was absolutely out of his head, that's all that [there] is to it." Riding with Oates in the truck was a hitchhiker, who, however, did no talking because "he was too drunk to; he was out." It was on the return trip toward the Phoenix-Tucson highway junction that Oates' truck ran off the road, as above described. Oates was killed and the hitchhiker was seriously injured.

[1] Reynolds had the opportunity to observe the inception and development of Oates' intoxication by reason of their close association during the two days of travel here in question. His testimony not only stands uncontradicted and unimpeached in the record, but its credibility is emphasized by the statement of Virgil Elmore, Pacific Freight Lines' driver of Oates' truck on the preliminary trip from San Diego to El Centro on April 4th, that when he "turned over" the truck to Oates at the Pacific Freight Lines' Terminal at El Centro, he detected "the odor of alcoholic liquor on his (Oates) breath"; that "you could tell he'd been drinking."

The commission concedes that "the evidence establishes that the employee was intoxicated at the time of the injury," but in support of its finding that "the evidence does not establish that said injury was caused by the intoxication of the employee," the commission claims that the evidence as to the cause of the injury is conflicting. In support of this position it relies solely upon the following statement in the Arizona death certificate in this matter: "Immediate Cause of Death. Coroner's Jury Verdict—The truck he was driving left the road while on a curve. *Evidence shows that right rear wheel locked due to some mechanical defect.*" (Italics added.) Objection was unsuccessfully made to the admission of this certificate on the ground that it was hearsay, not binding on petitioners and immaterial in so far as establishing the fact of death was concerned, as that had been stipulated. Thereafter the complete transcript of the testimony taken at the coroner's inquest in Arizona was introduced before the commission (County of Los Angeles v. Industrial Accident Commission, 123 Cal.App. 12, 15, 11 P.2d 434) to show that the coroner's jury verdict was totally lacking in evidentiary support. An analysis of this point of challenge to the propriety of the commission's finding and consequent award shows it to be well taken.

[2] Assuming the admissibility of the death certificate and that it constituted "prima facie evidence of the facts therein stated" (Arizona Revised Code, 1928, § 2740), it was subject to rebuttal and to explanation. In re Scott's Estate, 55 Cal.App. 2d 780, 782, 783, 131 P.2d 613. On its face the certificate purported to state nothing as to the cause of the accident except the opinion or conclusion of the coroner's jury. Such opinion or conclusion had no foundation in fact when correlated with the transcript of the evidence produced at the coroner's inquest. It should be accorded no greater force than opinions or conclusions of a witness or an expert, the sufficiency of which depends upon whether facts or reasons are given in support thereof. Eisenmayer v. Leonardt, 148 Cal. 596, 600, 84 P. 43; Matter of Chevallier's Estate, 159 Cal. 161, 170, 113 P. 130; In re Smethurst's Estate, 15 Cal.App.2d 322, 335, 59 P. 2d 830; In re Downey's Estate, 51 Cal.App. 2d 275, 284, 124 P.2d 637; In re Pessagno's Estate, 58 Cal.App.2d 390, 394, 136 P.2d 644; In re DuPont's Estate, 60 Cal.App.2d 276, 285, 140 P.2d 866.

[3] The only portion of the testimony at the coroner's inquest which even remotely pertains to the sentence in the coroner's jury verdict reading *"Evidence shows that right rear wheel locked due to some mechanical defect"* is that of M. S. Jameson. By his own account he was not an eyewitness, but he simply rushed to the scene of the accident after he heard the impact "150 feet from" his home as Oates' truck crashed into the guard-rail. When asked "what [in his opinion] caused the accident," Jameson said, "I'd say he was either drunk or asleep *unless the brakes went wrong.* I did notice the two right hand rear tires had been skidded, but there was no sign of skidding on the highway." Such statement was not even an opinion that "the brakes had gone wrong." He eliminated any possible significance that might have attached to his observation that "the two right hand rear tires had been skidded," by adding "there was no sign of skidding on the highway." Thus, Jameson himself was not willing to venture an opinion that "some mechanical defect" had any bearing on the happening of the accident. Moreover, after Oates' truck had hurtled through the guard-rail, it came to

rest "upside-down" in an adjoining field and its wheels were sticking "straight up" in the air. Yet neither Jameson nor any other witness at the coroner's inquest testified that he had examined the truck after the accident, had tried to turn its right rear wheel and had found by such experiment that the wheel was locked; nor did any witness testify that he had noted the skidded place on the tires as being on the bottom of the wheel at the point of road contact in the locked position. In such condition of the record the coroner's jury verdict, based solely upon the above-quoted *speculative comment* of Jameson, had no probative force and it could not be converted into substantial evidence by its inclusion in the death certificate.

[4, 5] It should be further noted that it was established by uncontradicted and unimpeached testimony at both the coroner's inquest and the commission's hearing that Oates' truck was in "A-1 shape" when the accident occurred. To summarize the evidence as to the condition of the truck before and after the wreck, the following points appear in the record: the truck had been completely overhauled only a week before the accident; it had worked perfectly under most gruelling conditions between San Diego and El Centro before Oates undertook his trip; as Reynolds approached the scene of the accident, he saw the wheels of the truck spinning as it rested "upside-down" in the field; and without any repairs or adjustments of any kind, the truck was put back on its wheels immediately after the accident and towed to Los Angeles, resting on its rear wheels, all of which revolved freely. This complete picture of the truck's excellent mechanical condition at the time in question would leave the commission no reasonable ground for an inference based solely on the unsupported coroner's jury verdict and contrary to the facts established by clear, positive and direct proof. Crouch v. Gilmore Oil Co., Ltd., 5 Cal.2d 330, 334, 54 P.2d 709. The principle is well stated in Moquin v. Industrial Accident Comm., 33 Cal.App.2d 511, 515, 516, 92 P.2d 413, 415, as follows: "Conceding that reviewing courts may not invade the field of the fact-finding body, and that under well settled rules where a conflict in the evidence exists the findings of the triers of fact are conclusive, it is nevertheless equally well settled that the application of the foregoing doctrine is limited to cases *where the conflict is substantial and real, and not fanciful or fictitious.*"

[6, 7] The law under which the commission functions is founded upon sound public policy and with the general objective of compensating the injured employee or his dependents for injuries or death resulting from the ordinary hazards of the employment. But where, as here, the uncontradicted and unimpeached evidence points unerringly to the conclusion that the death was caused solely by the intoxication of the employee, and there is no substantial evidence in conflict therewith, a finding to the contrary and an award based on such finding is not within the jurisdiction of the commission. Eagles Home Ass'n v. Industrial Accident Comm., 140 Cal.App. 646, 648, 35 P.2d 591. To hold otherwise would nullify the defense of intoxication given under the applicable statute. Labor Code, § 3600(d). Here no "rational view of the evidence", North Pacific Steamship Co. v. Industrial Accident Comm., 174 Cal. 500, 502, 163 P. 910, 911, supports the challenged finding of the commission.

The award is annulled.

SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

CARTER, Justice.

I dissent. There are several controlling factors in this case which the majority opinion has failed to consider, and which compel a conclusion contrary to that reached in said opinion. *It is conceded that the accident which caused the death of Oates occurred in and arose out of the course of the employment.* When this fact was established the applicants had made out their case. The death certificate and verdict of the coroner's jury showing the cause of death were *not a necessary part of applicants' case,* for they had made out their case once they established that the accident which caused the death of Oates arose out of the employment. The issue as to where the blame for the accident might be lodged was, up to that point, *wholly immaterial,* because negligence of the employer need not be shown and contributory negligence is no defense. The freedom from liability afforded the employer when the employee is intoxicated, and that intoxication is the cause of the

accident, is an *affirmative defense. The burden of proving it is squarely placed upon the employer by the workmen's compensation law.* Labor Code, § 5705. Thus, we have a case of the employer coming forward with evidence to establish a defense, the applicants having made out their case. The death certificate must be considered in the light of a rebuttal to the employer's evidence rather than a part of applicants' case. We must therefore examine that defense and the rebuttal thereto to see whether the commission could have disbelieved or disregarded the employer's evidence and found that the *employer did not sustain his burden.* That it could have done so is clear. It is true that Reynolds, the truck driver who was driving a truck on the same route as Oates, the decedent, testified that between about noon and 4:30 in the afternoon while the two drivers were en route to El Centro to pick up their trucks, Oates had a quart of beer and half a pint of whiskey; that on arrival in El Centro he had more whiskey, but when he arrived at the truck terminal at 10 p. m. he walked all right, and the only evidence of consumption of liquor was that he was "talkative" and had the smell of liquor on his breath. Oates then ate some food. At Yuma, Arizona, Oates had a pint of whiskey but as far as Reynolds' testimony is concerned there was nothing in Oates' conduct to indicate intoxication. He was driving his truck. Later at Welton, Reynolds expressed the opinion that Oates was a "drunk driver," and shortly before the accident, that Oates was drunk. However, it is very pertinent to observe that at the coroner's inquest he was evasive about Oates' intoxication. He testified: "Would you say the driver had had plenty to drink? Ans. I'd say he had a *few.* He had another drink at Tonys where we ate." Moreover, it should be remembered that Reynolds was an employee of Oates' employer and cannot be said to have been unbiased. This court said in Gray v. Southern Pacific Co., 23 Cal.2d 632, 637, 145 P.2d 561, 564: "It must be remembered that practically all of the witnesses were employees of the defendant and thus cannot be said to be disinterested witnesses. * * * The jury could have disbelieved those witnesses." How can it be said under these circumstances that Reynolds was wholly unimpeached and that the commission was absolutely bound to accept his evidence? Further it is to be noted that the question of whether or not a person is intoxicated is entirely a matter of opinion (2 Cal.Jur. 10-Yr.Supp., Automobiles, § 26) and *such evidence is not binding upon the trier of fact. It may be disregarded.* It was said in Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 548, 55 P.2d 847, 849: "* * * opinion evidence which is not conclusive either upon the trial court or an appellate court." See, also, 10 Cal.Jur. 971, 972. In the face of that rule the opinion evidence as to Oates' intoxication was not binding and could have been disregarded by the commission. Hence, it cannot be said that the evidence on the issue of intoxication was beyond question and that the commission was required to give it full credit and sustain the defense based thereon.

In addition to proving intoxication the employer had the burden of proving that *the intoxication was the sole cause of the accident.* The evidence on that subject is of only two kinds, that is, *expressions of opinion,* which, as above shown, were *not binding* on the commission, or an inference that because Oates was intoxicated when the accident occurred, the accident was caused by that intoxication. In the first place, the commission was not *obligated* to draw that inference. "An inference is a deduction which the reason of the jury makes from the facts proved, without an express *direction of law* to that effect." (Italics added.) Code Civ. Proc., § 1958 and as expressed in Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 870: "The jury is *not compelled* to draw the inference, however, *even in the absence of contrary evidence and may refuse to do so.* Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn, in any given case, is a question of fact for the jury." (Italics added.) Therefore, in the instant case, the commission was not required as a matter of law to infer that the intoxication caused the accident, at least, unless it is the only reasonable inference. Not being compelled to do so, how can this court say in this case, that it must? It is clear from the record in this case that the inference of intoxication as the sole cause of the accident is not the sole inference that may flow from the evidence. For illustration, at the coroner's inquest, Mr.

Bell, who arrived at the scene of the accident immediately after it occurred, testified: "Did you observe anything that could have caused the accident? Ans. I couldn't figure it out, unless he dropped off to sleep." Mr. Jameson under like circumstances testified: "In your opinion, what caused the accident? Ans. I'd say he was either drunk or asleep unless the brakes went wrong. I did notice the two right hand rear tires had been skidded, but there were no sign of skidding on the highway." The circumstances of the scene of the accident, a down grade with a curve, indicate that the truck may merely have gotten out of control, and that may have occurred without regard to intoxication. The traffic officer who examined the scene of the accident and the truck testified: "In your opinion, what was the cause of the wreck? Ans. Excessive speed." To reach the result arrived at in the majority opinion, it is necessary to say that whenever there is an automobile accident, and the driver has been drinking intoxicating liquor, the sole and inevitable conclusion is that the drinking caused the accident. That is not reasonable.

In addition to the foregoing there is the rule that the death certificate is prima facie evidence of the facts therein stated. That is equivalent to saying that it is presumptive evidence, or that a presumption is raised that the facts therein stated are true. People v. Fitzgerald, 14 Cal.App. 2d 180, 58 P.2d 718; Miller & Lux v. Secara, 193 Cal. 755, 227 P. 171, and as stated in People v. Fitzgerald, supra, at page 193 of 14 Cal.App.2d, at page 725 of 58 P.2d: "It is the rule in this state that against a proved fact, or a fact admitted, a disputable presumption has no weight, but where it is undertaken to prove the fact against the presumption, *it still remains with the jury to say whether or not the fact has been proven; and, if they are not satisfied with the proof offered in its support, they are at liberty to accept the evidence of the presumption.*" Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529. (Italics added.) The application of that rule to the facts of the instant case compels the conclusion that the commission's finding is supported. No reason has been advanced why the above rule is not applicable, and I am sure none exists.

If the majority opinion is correct, then the just claim of an applicant can be defeated by the perjury of a fellow employee who gives false testimony favorable to his employer to save his job or obtain some other perquisite, even though such testimony is disbelieved by the commission, the trier of fact, which is the sole judge of the credibility of witnesses. Such result should not be permitted in a civil action where contributory negligence is a defense, much less in a proceeding under the Workmen's Compensation Act, where such defense is not available, and the burden shifts to the employer whenever it is established, as it was in the instant case, that the accidental death occurred during the course of employment. In my opinion the award should be affirmed.




26 Cal.2d 224

**LELANDE v. LOWERY, County Auditor.**
**L. A. 19159.**

Supreme Court of California.
March 30, 1945.

**1. Newspapers ⇐2**

The provisions of statute prohibiting assignment of moneys due newspapers under county's contracts therewith for publication of tax notices entered into and formed part of county's contracts with newspaper owners for publication of notices of sale of tax deeded realty as fully as if such provisions were referred to or incorporated in such contracts. St.1943, p. 1199, § 161.

**2. Newspapers ⇐5(1)**

An order of county board of supervisors that county auditor issue warrants on assigned claims for moneys due under county's contracts with newspaper owners for publication of notices of sale of tax deeded realty was void as in violation of statute prohibiting assignment of county's contracts for publication of tax notices. St.1943, p. 1199, § 161.

**3. Counties ⇐112**
**States ⇐97**

The Legislature has power, within constitutional limitations, to enact terms on which state or counties will contract to expend public moneys for public works,

and its action touching such matter is final so long as its regulations do not infringe personal rights of others.

**4. Newspapers ⇐6¼**

Advertisement of state's offers to sell tax deeded properties is properly a function of state government, and publication of tax notices under contracts with county is "public work", not private business enterprise.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Work".

**5. Newspapers ⇐5(1)**

The statute prohibiting assignment of moneys due under contracts with county for publication of tax notices is not void as beyond state's "police power", as such statute is not a police measure regulating intercourse between private citizens. St. 1943, p. 1199, § 161.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

**6. States ⇐86**

The state's power to prescribe terms on which public work shall be done does not depend on its police power.

**7. Constitutional law ⇐276, 278(1)**
**Newspapers ⇐5(1)**

The statute prohibiting assignment of moneys due under county's contracts with newspapers for publication of tax notices is not unconstitutional as arbitrarily depriving assignees of property and restricting their liberty of contract without "due process of law". St.1943, p. 1199, § 161.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

**8. Constitutional law ⇐276**

A statute is not unconstitutional as restricting liberty of contract merely because it creates a condition of affairs which renders ineffective a related contract lawful in itself.

**9. Newspapers ⇐2, 5(1)**

The statute requiring counties to contract directly with newspapers for publication of tax notices and prohibiting assignment of such contracts or moneys due thereunder is valid as enacted for legitimate purposes of protecting counties from harassment by multiplication of number of persons with whom they must deal and embroilment in conflicting claims, with resulting delay and possibility of multiple liability, and preventing fraud on public funds. St.1943, p. 1199, § 161.

**10. Constitutional law ⇐70(3)**

The means of promoting public purpose by legislative action are ordinarily for legislative, not judicial, determination.

**11. Constitutional law ⇐276**
**Newspapers ⇐2, 5(1)**

The statute absolutely prohibiting voluntary assignments of contracts with counties for publication of tax notices or moneys due thereunder, instead of providing for recordation of such assignments and approval thereof by public contracting agencies before they become effective or some method whereby contractors may obtain financial assistance, is not invalid as unreasonably interfering with private interests. St.1943, p. 1199, § 161.

**12. Constitutional law ⇐240(1)**
**Newspapers ⇐2**

The statute prohibiting assignments of contracts with counties for publication of notices, delinquent lists or other documents required under Revenue and Taxation Code is not unconstitutional as denying assignees "equal protection of laws" by adopting unreasonable, arbitrary or discriminatory classification. St.1943, p. 1199, § 161.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of Law".

**13. Statutes ⇐77(1)**

A law is "special", when not founded on natural, intrinsic or constitutional distinction reasonably justifying difference in treatment.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Law".

**14. Statutes ⇐77(1)**

The Legislature can make reasonable classifications, that is, classifications having substantial relation to legitimate object to be accomplished by statute without violating constitutional prohibition of special laws.

**15. Constitutional law ⇐209**
**Statutes ⇐68, 72**

A law is general and uniform and affords "equal protection" in its operation

when it applies equally to all persons within reasonable classification.

**16. Statutes ⇐66**

The Legislature is not debarred from classifying by statute according to general considerations and prevailing conditions and is not bound to extend statutory regulation to all cases which it might possibly reach in order to support constitutional validity thereof, but may be guided by experience in dealing with practical exigencies, recognize degrees of harm, and confine its restrictions to classes of cases in which need for regulation is deemed clearest.

**17. Constitutional law ⇐48**

The existence of any state of facts, which can be reasonably conceived to sustain statutory classification, is presumed, and one assailing such classification has burden of showing that it is arbitrary.

**18. Constitutional law ⇐48**

The law favors the more reasonable of two possible constructions of statute in determining whether it is unconstitutional as arbitrarily discriminating against certain class.

**19. Constitutional law ⇐70(3)**

In passing on constitutionality of statute, Supreme Court is not concerned with question whether Legislature adopted what court thinks to be wisest and most suitable means of accomplishing objects of statute.

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In Bank.

Original proceeding by H. J. Lelande for a writ of mandate to compel J. M. Lowery, as County Auditor of the County of Los Angeles, to issue warrants on claims assigned to petitioner for moneys due under contracts with the county for publication of notices of sales of tax-deeded realty. On respondent's general demurrer to the petition.

Demurrer sustained, petition denied, and alternative writ discharged.

Rollin L. McNitt and Edythe Jacobs, both of Los Angeles, for petitioner.

J. H. O'Connor, County Counsel, and S. V. O. Prichard and Jesse J. Frampton, Deputies County Counsel, all of Los Angeles, for respondent.

SCHAUER, Justice.

Petitioner is the assignee of the claim of F. C. Roueche, in the sum of $53.82, and the claim of the Hawthorne Advertising Press, Ltd., in the sum of $19.98, against the county of Los Angeles. Each claim is for moneys due under a contract with the county for publication of notices of sale of tax deeded real property. Each assignor is the owner of a newspaper of general circulation, authorized (at least insofar as the issues of this case are concerned) to publish such notices. Petitioner, as assignee, presented the claims to respondent, County Auditor of the County of Los Angeles. Respondent disallowed the claims. Petitioner then presented the claims to the Board of Supervisors of the County of Los Angeles, which approved and allowed them and ordered respondent to issue warrants thereon to petitioner. Respondent refused to comply with such order. Respondent's refusal to issue warrants on the claims is based on section 161 of the Revenue and Taxation Code (Stats. 1943, ch. 280, p. 1199). Such section provides: "Whenever any notice, delinquent list or other document required to be made under this code is to be published, the county shall contract directly with the newspaper in which publication is proposed to be made. Any contract so made or any moneys due thereunder shall not be assignable. The newspaper shall not pay, or contract to pay, to any person, firm or corporation, by way of commissions, any part of the moneys received from the county in payment of said publication."

Petitioner seeks mandate to compel issuance of warrants on the claims assigned to him. He argues that the statutory prohibition of assignment of moneys due under contracts for publication of tax notices (1) is beyond the police power of the state in that it in no way relates to the public peace, health, safety, morals, general welfare, or convenience of the people of the State of California, (2) deprives him of property and restricts his liberty of contract without due process of law, and (3) denies to him the equal protection of the laws. To the petition for writ of mandate respondent demurs generally. We have concluded that the demurrer must be sustained.

According to the allegations of the petition the Board of Supervisors of Los Angeles County has adopted, as the most ad-

vantageous method of selling tax deeded properties (thus making possible collection of delinquent taxes thereon and return of such properties to the assessment rolls), the policy of advertising tax sales in local newspapers which circulate in the vicinities of the properties to be sold. Payment on advertising contracts of the county with such local newspapers is often delayed for periods of 90 to 120 days after publication of the notices. Therefore, the publishers of such newspapers frequently find it necessary or expedient, after completing publications under such contracts, to assign the moneys due thereunder as collateral security or at a discount. It is asserted (inherently a conclusion or opinion) that if publishers cannot assign such moneys they will not contract to publish tax notices. Thus, it is contended, by the prohibition of section 161 of the Revenue and Taxation Code against assignment of moneys due, the effectiveness of the program of the board of supervisors will be jeopardized, to the immeasurable loss of the people of the State of California and particularly the taxpayers of Los Angeles County, and petitioner will be prevented from lending moneys to publishers on the security of such contracts and from acquiring claims for moneys due thereunder.

[1, 2] The contracts between the county and petitioner's assignors were entered into subsequent to August 4, 1943, the effective date of section 161 of the Revenue and Taxation Code. Hence, the provisions of section 161, if the section is valid, entered into and formed a part of such contracts as fully as if the provisions were referred to or incorporated in their terms. (See e. g., Welsh v. Cross (1905), 146 Cal. 621, 624, 81 P. 229, 106 Am.St.Rep. 63, 2 Ann.Cas. 796; Hub Hardware Co. v. Ætna Accident, etc., Co. (1918), 178 Cal. 264, 267, 173 P. 81; Meriwether Inv. Co., Ltd., v. Lampton (1935), 4 Cal.2d 697, 703, 53 P.2d 147; Brown v. Ferdon (1936), 5 Cal. 2d 226, 230, 54 P.2d 712; Fernelius v. Pierce (1943), 22 Cal.2d 226, 243, 138 P. 2d 12; Baugh v. Rogers (1944), 24 Cal.2d 200, 209, 148 P.2d 633, 152 A.L.R. 1043.) The realities of this case warrant us in recognizing, however, that the moneys payable under the contracts, if they are not assignable, are thus because of the statutory provision and not because of volition of the parties to the contracts. Indeed, as above stated, the board of supervisors, despite the statute, ordered that respondent issue warrants to petitioner on the claims purported to be assigned. Unless the statute is invalid such order was void. (Pol. Code, § 4005.)

[3] It cannot be doubted that the Legislature has the power, within constitutional limitations, to enact terms upon which the state (or counties, its political subdivisions) will contract to expend public moneys for public work. (See City of Pasadena v. Charleville (1932), 215 Cal. 384, 396, 10 P.2d 745; Metropolitan Water Dist. v. Whitsett (1932), 215 Cal. 400, 407, 10 P.2d 751.) "[I]t belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. * * * Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others." (Atkin v. Kansas (1903), 191 U.S. 207, 222–224, 24 S.Ct. 124, 127, 48 L.Ed. 148; Heim v. McCall (1915), 239 U.S. 175, 191, 36 S.Ct. 78, 60 L.Ed. 206, Ann. Cas.1917B, 287; see Ellis v. United States (1907), 206 U.S. 246, 255, 27 S.Ct. 600, 51 L.Ed. 1047, 11 Ann.Cas. 589; Perkins v. Lukens Steel Co. (1940), 310 U.S. 113, 127, 60 S.Ct. 869, 84 L.Ed. 1108.)

[4] It may be confidently asserted that it is properly a function of state government to advertise its offering of tax deeded properties which it proposes to sell. The publication of tax notices contracted to be made by petitioner's assignors is "public work," not a private business enterprise. (State v. Defiance County (1894), 1 Ohio Dec. 584, 32 Ohio Weekly Law Bulletin 88; State ex rel. Woare v. Board of Com'rs. (1924), 70 Mont. 252, 275, 225 P. 389.)

[5, 6] Specifically as to petitioner's first contention—*that the prohibition of assignment is beyond the police power of the state and is therefore void*—it is to be observed that section 161 of the Revenue and Taxation Code is not a police measure regulating the intercourse of private citizen with private citizen, and need not be justified as such. That the state's power to prescribe the terms upon which public work shall be done does not depend upon its "police power" appears from a comparison (see three following paragraphs) of Atkin v. Kansas (1903), supra, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148, with Lochner v. New York (1905), 198 U.S. 45, 25 S.Ct.

539, 49 L.Ed. 937, 3 Ann.Cas. 1133, and of Heim v. McCall (1915), supra, 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206, Ann.Cas. 1917B, 287, with Truax v. Raich (1915), 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283. Implications to the contrary in Ex parte Kuback (1890), 85 Cal. 274, 276, 24 P. 737, 9 L.R.A. 482, 20 Am.St.Rep. 226, are disapproved.

In Atkin v. Kansas (1903), supra, the Supreme Court of the United States held constitutional an act, Laws Kan.1891, c. 114, which provided that " it shall be unlawful for" any person who contracts with the State or its political subdivisions to do public work "to require or permit any * * * person to work more than eight hours per calendar day in doing such work" and which made violation of the provisions of the act a criminal offense. The court noted (at page 218 of 191 U.S., at page 126 of 24 S.Ct., 48 L.Ed. 148) that "No question arises here as to the power of a state, consistently with the Federal Constitution, to make it a criminal offense for an employer, in purely private work in which the public has no concern, to permit or require his employees to perform daily labor in excess of a prescribed number of hours," and stated (page 222 of 191 U. S., at page 127 of 24 S.Ct., 48 L.Ed. 148) that "It may be that the state, in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees * * * will be subserved if labor performed for eight continuous hours was taken to be a full day's work * * *. We have no occasion here to consider these questions * * * for whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work *for it or for one of its municipal agencies,* should permit or require an employee on such work to labor in excess of eight hours each day."

In Lochner v. New York (1905), supra, 198 U.S. 45, 57, 58, 25 S.Ct. 539, 543, 49 L.Ed. 937, 3 Ann.Cas. 1133, the Supreme Court of the United States held unconstitutional a statute, Laws N.Y.1897, c. 415, which provided that no employee "shall be required or permitted" to work more than sixty hours a week in a bakery, on the ground that the statute involved "neither the safety, the morals, nor the welfare, of the public" and was not "necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker." The court stated (at page 55 of 198 U.S., at page 542 of 25 S.Ct., 49 L.Ed. 937, 3 Ann.Cas. 1133): "Nor does Atkin v. Kansas, 191 U.S. 207, 24 S.Ct. 124, 48 L. Ed. 148, touch the case at bar. The Atkin case was decided upon the right of the state to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality." (See, also, Adkins v. Children's Hospital (1923), 261 U.S. 525, 547, 43 S.Ct. 394, 67 L.Ed. 785, 24 A.L.R. 1238. We are, of course, not here concerned with the present status of the holdings of the Lochner and Adkins cases that the laws there considered were not a legitimate exercise of the police power.)

In Truax v. Raich (1915), supra, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A. 1916D, 545, Ann.Cas.1917B, 283, a statute, Laws Ariz.1915, p. 12, which provided that any employer of more than five persons "shall employ not less than eighty (80) per cent qualified electors or native born citizens of the United States" was held unconstitutional. The court pointed out (at page 40 of 239 U.S., at page 10 of 36 S.Ct.) that "the act is not limited to persons who are engaged on public work or receive the benefit of public moneys," and said (at page 41 of 239 U.S., at page 10 of 36 S.Ct.) that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Citations.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." In Heim v. McCall (1915), supra, 239 U.S. 175, 36 S.Ct. 78, 60 L.Ed. 206, Ann.Cas.1917B, 287, decided during the same term as the Truax case, a statute, Laws N.Y.1915, c. 51, which provided that "In the construction of public works * * * only citizens of the United States shall be employed" was held constitutional on the authority of Atkin v. Kansas (1903), supra. (See, also, People v. Crane (1915), 214 N.Y. 154, 160, 108 N.E. 427, L.R.A.1916D, 550, Ann.Cas. 1915B, 1254, 1256, affirmed, Crane v. New

York (1915), 239 U.S. 195, 36 S.Ct. 85, 60 L.Ed. 218.)

[7] In disposing of petitioner's second contention—*that the statute deprives him of property and restricts his liberty of contract without due process of law; i. e., arbitrarily*—it is not necessary for us to determine the existence or exact extent of limitations which, by virtue of the concept of due process, may circumscribe the power of the state to prescribe by statute the terms on which public work shall be done. Assuming for the purposes of this opinion that the general proposition that the state cannot arbitrarily deprive anyone of liberty or property might have application to a general law prescribing the terms upon which public work shall be done, it is a sufficient answer to point out that it is clear, for the reasons hereinafter set out, that section 161 of the Revenue and Taxation Code does not arbitrarily deprive anyone of liberty or property.

It is true that by section 161 those who contract with the county to publish tax notices and those who lend money to such publishers are, to the extent covered by such statute, prohibited from disposing of and acquiring property (choses in action); their freedom to contract with one another is to that extent limited; they are restrained in the pursuit of their respective occupations. But the very right freely to contract for which petitioner here contends is exercised by the state, rather than denied to petitioner or his assignors, by section 161. "It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state." (Atkin v. Kansas (1903), supra, 191 U.S. 207, 222, 24 S. Ct. 124, 127, 48 L.Ed. 148.)

[8] The fact that section 161 in a limited sense and indirectly restricts the liberty of contract of petitioner, who is not engaged in public work, does not render it objectionable. "A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective." (Bayside Fish Flour Co. v. Gentry (1936), 297 U.S. 422, 427, 56 S.Ct. 513, 515, 80 L.Ed. 772, 776.)

[9] The Legislature of this state has declared, in effect, by the statute in question, that moneys due under certain contracts for public work shall be paid directly to the one who has agreed to do the work, not to his assignee. The prohibition against assignment is for the protection of the state and its political subdivisions, the counties. Among the natural and obvious purposes of such prohibition are protection of the counties from harassment by multiplication of the number of persons with whom they must deal and from embroilment in conflicting claims, with resultant delay and the possibility of multiple liability, and prevention of fraud upon the public funds. (See Hobbs v. McLean (1886), 117 U.S. 567, 576, 6 S.Ct. 870, 29 L. Ed. 940; Freedman's Saving & Trust Co. v. Shepherd (1888), 127 U.S. 494, 506, 8 S.Ct. 1250, 32 L.Ed. 163; Martin v. National Surety Co. (1937), 300 U.S. 588, 594, 57 S.Ct. 531, 81 L.Ed. 822.) Such purposes are legitimate.

[10, 11] Petitioner argues that the Legislature should have adopted some other means of protection than absolute prohibition; that it might, for example, have provided for recordation of the assignment and its approval by the public contracting agency before such assignment could become effective; and that the statute is unreasonable because it does not provide any method by which contractors can obtain financial assistance. The means of promoting a public purpose by legislative action, however, are ordinarily for legislative determination. (Allied Architects' Assn. v. Payne (1928), 192 Cal. 431, 435, 221 P. 209, 30 A.L.R. 1029.) And we cannot agree with petitioner that absolute prohibition of voluntary assignment of a contract for public work, or of the moneys due thereunder, effects an unreasonable interference with private interests or that the Legislature, to protect such interests, should necessarily have devised a comparatively elaborate regulatory scheme instead of the simpler means of absolute prohibition. The statute does not preclude the publishers from borrowing or the petitioner from lending money under arrangements which do not call for an assignment of the contracts or of the moneys accruing thereon; it simply provides, as above indicated, a reasonable means tending to protect the county from involvement in arrangements between publishers and their creditors.

[12] In regard to petitioner's third contention—*that the prohibition (by its limited application) denies him equal protec-*

*tion of the laws*—we are impelled to the conclusion that the Legislature, in limiting its enactment to contracts for publication of "any notice, delinquent list or other document required to be made under this code" (Revenue and Taxation Code, § 161) has not adopted a basis of classification which is unreasonable, arbitrary, or discriminatory within the meaning of constitutional guaranties.

[13-15] A law is special within the prohibitions of the California Constitution (art. I, §§ 11, 21; art. IV, § 25) when it is not founded on a natural, intrinsic, or constitutional distinction which reasonably justifies difference in treatment. (Ex parte Sohncke (1905), 148 Cal. 262, 267, 82 P. 956, 113 Am.St.Rep. 236, 2 L.R.A.,N.S., 813, 7 Ann.Cas. 475; Darcy v. Mayor of San Jose (1894), 104 Cal. 642, 645, 38 P. 500; Rauer v. Williams (1897), 118 Cal. 401, 408, 50 P. 691; Pacific Indemnity Co. v. Myers (1931), 211 Cal. 635, 643, 644, 296 P. 1084.) The Legislature can make reasonable classifications; i. e., classifications which have a substantial relation to a legitimate object to be accomplished. (City of Pasadena v. Stimson (1891), 91 Cal. 238, 251, 252, 27 P. 604; Hollenbeck-Bush P. Mill Co. v. Amweg (1917), 177 Cal. 159, 163, 170 P. 148; In re Sumida (1918), 177 Cal. 388, 391, 170 P. 823; In re Kotta (1921), 187 Cal. 27, 33, 200 P. 957; Martin v. Superior Court (1924), 194 Cal. 93, 100, 227 P. 762; People v. Western Fruit Growers (1943), 22 Cal.2d 494, 506, 140 P.2d 13.) A law is general and uniform and affords equal protection in its operation when it applies equally to all persons within such a classification. (Superior Wheeler C. Corp. v. Superior Court (1928), 203 Cal. 384, 388, 264 P. 488; Rainey v. Michel (1936), 6 Cal.2d 259, 270, 271, 57 P.2d 932, 105 A.L.R. 148, and cases there cited.)

[16] "The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. * * * [T]he legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. [Citation.] It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." (Miller v. Wilson (1915), 236 U.S. 373, 382–384, 35 S.Ct. 342, 344, 59 L. Ed. 628, L.R.A.1915F, 829, affirming In re Miller (1912), 162 Cal. 687, 124 P. 427; Patsone v. Pennsylvania (1914), 232 U.S. 138, 144, 34 S.Ct. 281, 58 L.Ed. 539, and cases there cited.)

[17] When the classification made by the Legislature is questioned, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts is presumed, and one who assails the classification must carry the burden of showing that it is arbitrary. (Lindsley v. Natural Carbonic Gas Co. (1911), 220 U.S. 61, 78, 79, 31 S.Ct. 337, 55 L.Ed. 369, Ann.Cas.1912C, 160; Borden's Farm Prod. Co. v. Baldwin (1934), 293 U.S. 194, 209, 210, 55 S.Ct. 187, 79 L. Ed. 281.)

[18, 19] The only facts before us are those alleged in the petition and those of which we can take judicial notice. It is alleged "that in many instances, the publishers and owners of the newspapers in which it is proposed to advertise said delinquent tax deeded properties for sale will require financing of the said contracts for advertising, that is to say, that following completion of publication under said contracts, some of these publishers will need to assign the moneys due on said contracts as collateral security or at a discount in order to realize thereon" and that the Board of Supervisors of Los Angeles County proposes to sell 90,000 parcels of real property of an assessed valuation of $30,000,000 "by advertising in local newspapers." The claims assigned to petitioner were in the sums of $53.82 and $19.98. From these allegations and other facts hereinabove related it becomes apparent that a large number of small claims arise under contracts to publish tax notices; that the practice of assigning such claims is common; and that, in the light of the legal principles above stated, the Legislature could, and should be presumed to, have found that the factual situation in the case of contracts to publish tax notices differs from the ordinary situation in the case of contracts to do other public work. The alleged fact that many publishers of tax notices operate in such manner that they commonly require financing of these

small contracts suggests some support for legislative determination that there might be more likelihood of controversy between the contractors and their creditors in this field of public work than in other fields. Hence, upon all the facts alleged, it appears not unreasonable to conclude that the protection accomplished by prohibiting assignment of moneys due from the county may be peculiarly necessary in this class of contracts. Cf. State ex rel. Kansas City Loan Guarantee Co. v. Kent (1903), 98 Mo.App. 281, 288, 71 S.W. 1066, 1067, where the court upheld the validity of a municipal ordinance prohibiting assignment of claims against the city and said that among the purposes of such ordinance was "to put a stop to the notorious practice (becoming an evil in municipal employment) of selling claims at ruinous discount, and thus impairing the efficiency of the service of its employés."

It appears, therefore, that the Legislature, in limiting its enactment to contracts for publication of documents required by the Revenue and Taxation Code, cannot be held to have arbitrarily discriminated against the publishers of such documents. We cannot say that, upon the facts alleged, there is no reasonable basis for the classification made. The more reasonable conclusion, and that which the law favors (see, e. g., Stevenson v. Colgan (1891), 91 Cal. 649, 652, 653, 27 P. 1089, 14 L.R.A. 459, 25 Am.St.Rep. 230; Galeener v. Honeycutt (1916), 173 Cal. 100, 104, 159 P. 595; People v. Western Fruit Growers (1943), supra, 22 Cal.2d 494, 499, 140 P.2d 13), is that the Legislature has realistically and by reasonable means attempted to remedy, in the public interest, a situation which it found to be particularly prevalent or likely to become prevalent in that class of public work. With this conclusion our function ends; it is not our concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects. (Otis v. Parker (1903), 187 U.S. 606, 608, 23 S.Ct. 168, 47 L.Ed. 323, affirming Parker v. Otis (1900), 130 Cal. 322, 62 P. 571, 927, 92 Am.St.Rep. 56; Williams v. Mayor (1933), 289 U.S. 36, 42, 53 S.Ct. 431, 77 L. Ed. 1015; City of Pasadena v. Charleville (1932), supra, 215 Cal. 384, 400, 10 P.2d 745; Metropolitan Water Dist. v. Whitsett (1932), supra, 215 Cal. 400, 420, 10 P.2d 751.)

For the reasons above stated the demurrer is sustained, the petition for peremptory writ of mandate is denied, and the alternative writ discharged.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concurred.




68 Cal.App.2d 716

**BAER v. SMITH et al.**

**Civ. 7117.**

District Court of Appeal, Third District, California.

April 13, 1945.

Rehearing Denied May 14, 1945.

Hearing Denied June 12, 1945.

**1. False Imprisonment ⇐7(1)**

That sheriff, prior to plaintiff's commitment as insane person, allegedly placed her in jail without warrant, order, or process, did not make sheriff liable for false imprisonment, especially where plaintiff was later indicted for attempted arson; a warrant not always being necessary for arrest. Pen.Code, § 836.

**2. False Imprisonment ⇐5**

That doctors signed statutory certificates, before plaintiff's commitment as insane person, allegedly without making observation or physical examination did not make them liable for false imprisonment, since statute does not require "physical examination" and, in any event, such term includes even patients' statements of present feelings and pain. St.1937, p. 1124, § 5053.

See Words and Phrases, Permanent Edition, for all other definitions of "Physical Examination".

**3. False Imprisonment ⇐4**

A judge who commits plaintiff as insane person on basis of evidence at proper hearing is not liable for false imprisonment, in absence of malice, even if he erred in judgment.

**4. False Imprisonment ⇐15(1)**

That sheriff, district attorney, and superintendent of state hospital testified at insanity hearing resulting in plaintiff's commitment did not make them liable for false imprisonment, it being for trial judge to determine whether plaintiff was insane.

**5. False Imprisonment ⇐7(1)**

Allegation that district attorney, on same day that plaintiff was committed as insane, and before trial date, moved for dismissal of indictment for attempted arson, stating that evidence was insufficient and that plaintiff was permanently insane, showed no ground of liability for false imprisonment, in view of statute authorizing dismissal of indictment. Pen.Code, § 1385.

**6. False Imprisonment ⇐20(1)**

Where plaintiff, after being indicted for attempted arson, was committed as insane and sued for false imprisonment, allegations that she was at no time insane stated no cause of action, being inconsistent with her plea to indictment of not guilty by reason of insanity. Pen.Code § 451a.

**7. False Imprisonment ⇐5**

Plaintiff, committed as insane person and found sane at time of jury trial almost five years later, was barred from recovering for false imprisonment by failure to take advantage of statute authorizing jury trial of sanity on demand within five days after commitment. St.1937, p. 1131, § 5125.

**8. Criminal law ⇐286**

A plea of not guilty by reason of insanity which, under statute, may be joined with other pleas, is not strictly a defense to a charge of crime, such as attempted arson. Pen.Code, § 1026.

**9. Criminal law ⇐625**

Under statute providing that if, during pendency of action and before judgment, a doubt arises as to defendant's sanity, criminal proceedings shall be suspended until trial is had on question of sanity, the doubt referred to must arise in mind of the trial judge. Pen.Code, § 1368.

**10. Criminal law ⇐625**

Where plaintiff, suing for false imprisonment, had been indicted for attempted arson and pleaded not guilty and not guilty by reason of insanity, court could properly try question of sanity under the Welfare and Institutions Code, and was not required to proceed under the Penal Code, especially where district attorney, as he properly could do, obtained dismissal of indictment prior to trial date. St.1937, p. 1124, § 5053; Pen.Code, §§ 1026–1027, 1367–1372, 1385.

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Appeal from Superior Court, San Joaquin County; R. M. Dunne, Judge.

Action by Anna M. Baer against George M. Smith and others for alleged false imprisonment because of plaintiff's confinement in a state hospital on ground of insanity. Demurrers to plaintiff's amended complaint were sustained, and from judgment for defendants, plaintiff appeals.

Affirmed.

Roy Daily, of Sacramento, for appellant.

Henry S. Lyon, of Placerville, in pro. per., and for respondent George M. Smith.

Robert W. Kenny, Atty. Gen., and Ralph H. Cowing and Raymond McClure, Deputy Attys. Gen., for respondent Margaret H. Smythe.

PEEK, Justice.

This appeal is taken from the judgment entered in favor of the defendants upon the order of the trial court sustaining their demurrers to plaintiff's first amended complaint without leave to amend. By said complaint plaintiff sought to recover the aggregate sum of $111,050.48, alleged to be the amount of damages suffered by her by reason of alleged false imprisonment. The sole question before us is whether the facts alleged therein constitute a cause of action against any of the defendants.

The complaint alleges that on October 7, 1938, the defendants caused plaintiff to be confined in the Stockton State Hospital on an alleged charge of insanity, and that she remained there to and including February 9, 1943; that prior to said confinement, defendant George M. Smith, as sheriff of El Dorado County, placed her in a Placerville jail on September 21, 1938, without a warrant, order or process of any court; that on September 26, 1938, she was arraigned in the Superior Court of said county under an indictment for attempted arson (Sec. 451a, Penal Code), and entered her plea of not guilty, and also not guilty by reason of insanity; that the court fixed Monday, October 10, 1938, as the time for

the trial, and selected Margaret Smythe, Superintendent of the Stockton State Hospital, and Dr. E. M. Wilder, of Sacramento, as alienists, pursuant to Section 1027 of the Penal Code; that before the trial date, to-wit, on October 6, 1938, and while she was in custody, said sheriff signed an "Affidavit of Insanity" and served her with a "Warrant of Apprehension"; that pursuant thereto, on October 6, 1938, at 3 o'clock in the afternoon thereof, a hearing was had on said affidavit of insanity; that at the hearing Drs. A. A. McKinnon and W. A. Reckers signed a "Certificate of Medical Examiners * * * without previously having made a physical, or other examination, or observation, of said plaintiff", and that they concluded she was insane.

Appellant then alleged that the defendants Sheriff Smith, Margaret M. Smythe and District Attorney Henry S. Lyon testified at the hearing on the insanity charge, and thereafter the judge of the trial court signed a "Judgment of Insanity and Order of Commitment of Insane Person" and thereafter on October 7, 1938, appellant was taken to and confined within the Stockton State Hospital; that on October 7, 1938, on the same day that appellant was taken to the hospital, said district attorney appeared before the court and moved for a dismissal of the indictment on the ground of insufficiency of the evidence and upon the further ground that appellant was then permanently afflicted with a form of insanity known as paranoia.

Lastly it is alleged that she filed an action in the Superior Court of Sacramento County for the purpose of having it determined by a jury whether she was sane or insane, and that the jury returned a verdict that she was sane at the time of the trial (the date of trial is not given, but an examination of the record reveals that it took place in 1943, nearly five years after her commitment to the State Hospital); that she "was at no time insane and that defendants, and each of them, well knew that plaintiff was not insane and did intentionally and wilfully cause the detention of plaintiff among insane or alleged insane people in said institution as heretofore alleged without any cause or reason therefor and without any lawful or due process of law."

[1] Plaintiff's first allegation is of no benefit to her in that it is not always necessary that a peace officer have a warrant or other process before taking a person into custody. Section 836 of the Penal Code authorizes such peace officer to make an arrest without a warrant for a public offense committed or attempted in his presence, or, where a person arrested has committed a felony, although not in his presence, or, when a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it. Plaintiff's allegation in this regard is further weakened by the fact that on the second day after she was taken into custody by the sheriff, the grand jury of El Dorado County indicted her on a charge of attempted arson.

[2] The certificate of the doctors, in compliance with Section 5053 of the Welfare and Institutions Code, St.1937, p. 1124, recites that "we have attended before a Judge of said Court at the examination of Anna Baer, and have heard the testimony of all witnesses sworn and examined upon said hearing, and have made a personal examination of Anna Baer, and have testified under oath before the Court to the following facts, which were the result of the examination * * *". Said section as it read in 1938 provided as follows: "The judge shall compel the attendance of at least two medical examiners, who shall hear the testimony of all witnesses, make a personal examination of the alleged insane person, and testify before the judge as to the result of the examination, and to any other pertinent facts within their knowledge." It will thus be observed that appellant has alleged matters not contemplated or contained within said Code section. There is nothing in the statute which requires a "physical" examination, nor is there any requirement as to "observation". Even statements by patients of present feelings and pain are included in the phrase "physical examination". Western Union Telegraph Co. v. Morris, 10 Kan.App. 61, 61 P. 972, 973. Under the circumstances plaintiff's allegations in this regard cannot constitute a cause of action against the doctors as they are immune from an action such as this. Note, 145 A.L.R. 733.

[3, 4] It is not claimed that the institution of the proceedings was done in violation of any law, nor is there any allegation of malice on the part of the trial judge who adjudged the appellant insane after a hearing conducted in the manner prescribed by law. The judge's conclusions from the

evidence are not the subject of an action for false imprisonment. Even though the trial judge had erred in his judgment, still there would be no ground for an action such as this. Malone v. Carey, 17 Cal.App.2d 505, 507, 62 P.2d 166; Platz v. Marion, 35 Cal.App. 241, 169 P. 697. Nor does the fact that the witnesses Smith, Smythe and Lyon testified at the hearing make them liable for false imprisonment; they gave their testimony and it was for the trial judge to determine whether the appellant was insane, and from the evidence he made his findings and entered judgment accordingly.

[5] The allegation relative to the dismissal of the indictment by the District Attorney is likewise without merit. Section 1385 of the Penal Code authorizes the District Attorney, in furtherance of justice, to move the court for dismissal of the indictment, and, in fact, the court was empowered by that section to dismiss the indictment of its own motion.

[6, 7] The last allegations likewise fail to state a cause of action for the reason that it is conceded by appellant that she entered a plea of not guilty by reason of insanity to the indictment charging her with attempted arson. That plea is inconsistent with her allegation that she was at no time insane. Furthermore, if, as appellant alleged, she was at no time insane, she has barred herself by her failure to take advantage of Section 5125 of the Welfare and Institutions Code, St.1937, p. 1131, which then read: "If a person ordered to be committed, or any friend in his behalf, is dissatisfied with the order of the judge committing him, he may, within five days after the making of the order of commitment, demand that the question of his sanity be tried by a jury before the superior court of the county in which he was committed. Thereupon the court shall cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial."

Instead of demanding a trial by jury as above provided, the appellant waited nearly five years before making any complaint that she was unlawfully committed.

The main contention made by appellant is that the inquiry into her sanity should have been conducted in the manner and in conformance with the procedure outlined in Sections 1026–1027 and/or Sections 1367–1372, inclusive, of the Penal Code, and that the procedure taken under the Welfare and Institutions Code was in error. In other words, it is appellant's contention that the trial court was obliged to pursue the procedure outlined by said sections of the Penal Code and should not have invoked any provisions of the Welfare and Institutions Code. This claim is predicated upon the proposition that because appellant stood charged with a crime the court could not proceed to determine her mental condition under the Welfare and Institutions Code so long as the criminal charge was pending. Appellant has referred us to no authority supporting this contention, and admits "this is a case of 'first instance' asking this Court to differentiate between procedure under the Welfare Code and the Penal Code relative to insanity commitment."

Section 1026 of the Penal Code authorizes a plea of not guilty by reason of insanity to be joined with another plea or pleas, such as a plea of not guilty, in which event he shall first be tried on his plea of not guilty, and upon conviction he shall be tried upon his plea of not guilty by reason of insanity. Section 1027 provides that when a defendant pleads not guilty by reason of insanity, the court must appoint two alienists who shall examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. Section 1026 provides for the trial of both pleas by the same jury. Section 1367 of the Penal Code provides that a person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane. Section 1368 provides that if at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial by the court without a jury, or with a jury, if a trial by jury is demanded; and, from the time of such order, all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined. Sections 1369, 1370, 1371 and 1372, refer to procedural matters exclusively.

[8-10] It is to be noted that in the attempted arson case appellant entered the dual plea of not guilty and not guilty by reason of insanity. The plea of not guilty by reason of insanity was not a defense.

In People v. Ellis, 206 Cal. 353, 357, 274 P. 353, 355, the court said: "To denominate the plea of insanity a 'defense' to crime is not strictly accurate. More correctly it is a special plea to the effect that, assuming the homicide to have resulted from the act of the defendant, he is not amenable to punishment under the law." Despite appellant's allegation in her amended complaint that she was not insane at any time, it is conceded she entered a plea of not guilty by reason of insanity to the charge of attempted arson, which plea is entirely incompatible with the position she now takes. The attempted arson case was never called for trial, nor was anything done therein except to take the appellant's plea. As a result, the trial court had no opportunity of proceeding under the cited sections of the Penal Code. By her own conduct appellant forced the trial court to do exactly what was done and required to be done by said sections of the Penal Code, namely, the designation of alienists to examine her. We know of no law that inhibited the district attorney from dismissing the attempted arson charge before the date of the trial. On the authority of People v. Perry, 14 Cal.2d 387, 94 P.2d 559, 124 A.L.R. 1123, and the cases therein cited, we hold that from a consideration of the language employed in Section 1368 of the Penal Code it becomes obvious that the "doubt" as to the sanity of a defendant is one that must arise in the mind of the trial judge, rather than in the mind of counsel for the defendant or in that of any third person. In view of the fact that the trial judge had no opportunity to act under Section 1368, and he being the only person to determine the question of "doubt" as to her sanity, appellant cannot now claim that the trial court pursued the wrong course. Appellant places great reliance upon the cases of People v. Superior Court of Contra Costa County, 4 Cal.2d 136, 47 P.2d 724, and Kellogg v. Cochran, 87 Cal. 192, 25 P. 677, 12 L.R.A. 104, in support of her contention that the procedure designated by the Penal Code was exclusive. The Kellogg case was decided upon the language of the demurrer interposed, and we conclude that it has no application here. We think the case of People v. Superior Court of Contra Costa County is opposed to, rather than supports, appellant's argument. In that case it is expressly stated that after a person has been committed to an insane asylum on a charge of insanity and received into the asylum, no court in this state is authorized to discharge him therefrom, or to restore him to the capacity of a sane person, under any circumstances, except upon a writ of habeas corpus. The power to discharge him otherwise than upon habeas corpus is vested exclusively in the officers of the asylum. The purpose of the procedure under the Welfare and Institutions Code is to protect the alleged mentally ill person by having him committed, thereby affecting his enjoyment of civil rights generally. The Penal Code does not undertake to deal with such subjects. It provides a summary procedure for the determination of the question as to whether the defendant is so far mentally affected as to prevent him from defending himself against the crime with which he is charged. A reading of the case last cited will reveal that the purposes contemplated by the procedure under the Penal Code are distinct from those under the Welfare and Institutions Code.

Had it been the intent of the Legislature to exclude persons charged with crime from the operations of the provisions of the Welfare and Institutions Code regarding the manner of commitment, such an intent could easily have been expressed by appropriate language. See Thompson's Laws of New York, Mental Hygiene Law, Secs. 70, 74, 121. It may be properly concluded that the Legislature intended that an insane person charged with a crime as well as any other insane person should be subject to the provisions of the Welfare and Institutions Code, both for the protection of the person, his property rights, and for the protection of the public. To the present situation has been added the further element that although at the outset the plaintiff was charged with a crime, that charge was dismissed, and all that was before the court was the proceeding under the Welfare and Institutions Code.

In addition to the circumstances above related, the judgment itself recites that a certified copy of the order fixing the time for hearing on the insanity charge was duly served on Oliver, Hilda and Herbert Baer, relatives of the appellant residing in said El Dorado county, and the judgment further recites that during the hearing said relatives of appellant were sworn and examined as witnesses in regard to the mental condition of the appellant, her financial condition and that of persons liable for her care, support and maintenance.

We conclude that the action taken by the trial court was authorized by law.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.




68 Cal.App.2d 577

**EVERTS v. MATTESON et al.**

Civ. 14589.

District Court of Appeal, Second District, Division 2, California.

March 29, 1945.

Hearing Denied May 24, 1945.

**1. Evidence ⇐352(1, 6)**

A communication from a person who has been employed by corporation to appraise a parcel of realty is not a corporate record, original or copy of which is admissible in evidence, nor is it admissible merely because corporation had it among its papers. Civ.Code, § 371.

**2. Mortgages ⇐559(7)**

In determining amount of recoverable deficiency, an appraisal of mortgaged property made for mortgagee about three years prior to sale of property under power of sale was properly rejected as too remote to have any bearing on value of property at time of sale. Code Civ.Proc. § 580a.

**3. Mortgages ⇐559(7)**

Appraisal of realty, made by an inheritance tax appraiser, since deceased, which omitted the recital required by statute that he had truly, honestly, and impartially appraised the property, was not admissible as evidence of value of the property at time of its sale under power of sale, to aid in fixing amount of deficiency recoverable. Code Civ.Proc. § 580a.

**4. Mortgages ⇐559(7)**

Appraisal of realty made by inheritance tax appraiser is admissible merely as only one item of evidence bearing on question of value of mortgaged property at time of sale under power of sale contained in deed of trust, and court which is required to find the market value may base its finding upon all the evidence before the court. Code Civ.Proc. § 580a.

**5. Mortgages ⇐559(7)**

Mortgagor's last minute demand to appoint a new inheritance tax appraiser, to succeed deceased appraiser, so as to have his appraisal admitted in evidence as bearing on market value of mortgaged property sold under power of sale, in connection with determining amount of deficiency recoverable, was properly refused. Code Civ. Proc. § 580a.

**6. Evidence ⇐117**

In proceeding to determine amount of deficiency recoverable after sale of property under deed of trust, witness' opinion as to value of property, arrived at by inspection of the premises several months after the sale, was properly excluded in absence of any showing that there had been no change between dates of sale and inspection. Code Civ.Proc. § 580a.

**7. Evidence ⇐543(3)**

In order to qualify as an expert on value of real estate, one must have a knowledge of intrinsic properties and of the general selling price of neighboring land at the time.

**8. Evidence ⇐548, 555**

An expert testifying as to realty values must confine his testimony to his own personal observations and must eliminate from his consideration the findings of another.

**9. Evidence ⇐498½, 546**

The trial court is vested with discretion in determining competency of a witness testifying as to value of realty.

**10. Evidence ⇐113(19)**

Tax assessor's appraisal of realty for taxation was not evidence of market value of the property in that year, where assessor stated he had no opinion as to the reasonable market value thereof.

**11. Evidence ⇐474(18)**

Former ownership alone does not entitle one to testify as to value of property, but in order to qualify he must demonstrate such familiarity with the land, its uses, and its value as to satisfy the trial judge of his competency.

**12. Evidence ⇐547**

The testimony of plaintiff's expert witness as to value of realty, at time of sale under power of sale contained in trust

deed, was not inadmissible merely because it contradicted allegations of the complaint in that value fixed by him was less than that alleged. Code Civ.Proc. § 580a.

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Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by H. W. Everts against C. A. Matteson and others for a deficiency judgment after a sale of realty under power contained in a trust deed. From the judgment, the defendant Raymond H. Vanderbush and another appeal.

Affirmed.

A. P. G. Steffes, of Los Angeles, for appellants.

Edmund Nelson, John E. Walter, and James A. McLaughlin, all of Los Angeles, for plaintiff and respondent.

MOORE, Presiding Justice.

In this action to recover the deficiency on a note after sale of the property pursuant to the deed of trust given as security for the obligation, the only contentions relied upon for reversal arose out of the court's rulings upon offers of evidence on the trial of the issue as to the value of the property at the time of the sale. This is the second appeal, the first judgment having been reversed because of its error in denying to appellants, as purchasers of the property from the trustors, the benefits of section 580a Code Civil Procedure. That section limits the amount of a recoverable deficiency to the difference between the entire amount of the indebtedness at the time of the sale and the fair market value of the property at the same time. See 21 Cal.2d 437, 132 P.2d 476, where the facts are fully stated.

[1, 2] Appellants complain that their offer to prove that the bank had in its files an appraisal of $35,000 made for the bank December 12, 1935, was erroneously rejected. They contend that the bank having carried such appraisal through 1938, its record was admissible as a declaration against interest. They sought to accentuate the value of the document by offering to show that such appraisal had resulted from the reduction of a former valuation in the sum of $51,000. A communication from a person who has been employed to appraise a parcel of realty is not a corporate record, Civil Code, sec. 371, nor is it admissible because his employer has it among his papers. Both offers were properly rejected as having been too remote from the date of the sale. The correctness of that ruling is readily apprehended by anyone acquainted with the vacillations of realty values and with their rapid depreciation due both to decay of improvements and to the demands for improved facilities or to new architectural trends.

[3-5] The Lichtenberger appraisal was properly rejected. While the document declares the amount of the deceased appraiser's valuation, he had omitted therefrom the recital required by the statute, towit, that he had "truly, honestly and impartially appraised the property." Code Civil Proc. sec. 580a. An objection based upon such omission had been made at the former trial. Mr. Lichtenberger having thereafter deceased, it was incumbent upon appellants to rely upon other experts, as they did, or to procure the appointment of another inheritance tax appraiser who might be available for cross-examination. Inasmuch as "any party" may cross examine such appraiser his report was not admissible under the circumstances. Even though it had been admitted, the statute does not require the court to appropriate the valuation fixed by the inheritance tax appraiser as its finding of value. Where it is properly admitted such appraisal is to be considered merely as one item of evidence and is not a prerequisite to a determination by the court of the value to be found. The court is required merely to find the market value "as of the time of sale" and this may be based upon all of the evidence before the court. The vice in appellants' argument that the court should upon appellants' motion have appointed another inheritance tax appraiser to make a report during the trial lies not only in the law that such a report is not a sine qua non to a finding of value but also in the fact that appellants made no showing to warrant such indulgence. Their counsel had in April moved to fix the date of trial. He left Los Angeles on August 13 on other matters, returning one week later. He stated that he "had intended" to have the appraiser in court and had always known Mr. Lichtenberger to be available when needed. Counsel chose to proceed upon such assurance and permitted the day of trial to arrive without attempting to ascertain the whereabouts of the expert. That fact he first learned on August 20. With five days

remaining before the commencement of the trial, he made no effort to procure a substitute for the deceased witness. Nor did he finally move until the second day of the trial and after four expert witnesses had given their separate opinions as to value. No good reason was shown why appellants should have been permitted to bolster the evidence of their two witnesses by a last minute demand for the appointment of another inheritance tax appraiser as suggested by section 580a.

[6-9] One Craighead, called as a witness on behalf of appellants, had inspected and appraised the property in March 1939. He testified that its value then was $21,600, which sum was derived by observing some conditions of the building and that "the nature of the building is not conducive to good maintenance." Here was no appraisal of the property as of the date of sale. It was incumbent upon appellants to prove that there had been no change between the dates of sale and of Craighead's inspection. On cross-examination the witness disclosed that at the time he had derived the value of $21,600 he had no knowledge of the prices or of any sales in the vicinity and that he had no information regarding sales other than the facts reported to him by another. He had not learned whether a recent earthquake had damaged the building nor had he consulted the office of the city engineer with reference to essential repairs. While he had, as employee of the assessor, fixed the value of the improvements at $4,310 for 1939, the total of his knowledge of value of the realty and been supplied by the witness Scott whose appraisement of the ground was $13,000. Besides such information and his own inspection Craighead had no other facts from which to fix the reasonable market value at $21,600. In the absence of proof of change of condition between June 1938 and March 1939 his opinion was properly excluded. In order to qualify as an expert on the value of real estate one must have a knowledge of the intrinsic properties and of the state of the market, that is, the general selling price of neighboring lands at the time. 3 Jones Commentaries, 2d Ed., p. 2495. An expert must confine his testimony to his own personal observations and must eliminate from his consideration the findings of another. Maggart v. Bell, 116 Cal.App. 306, 2 P.2d 516. The authorities cited by appellants to the effect that it is proper to admit the testimony of an expert with only slight qualifications (Lutz v. Allegheny County, 327 Pa. 587, 195 A. 1; Davis v. Southern Surety Co., 302 Pa. 21, 153 A. 119; Delaware & C. Steam Towboat Company v. Starrs, 69 Pa. 36; Yorkshire Worsted Mills v. National Transit Company, 28 Del.Co., Pa., 402; Wray v. Fairfield Amusement Company, 126 Conn. 221, 10 A.2d 600; Cincinnati St. Ry. Co. v. Hickey, 29 Ohio App. 399, 163 N.E. 310) are all from other jurisdictions. They merely invest the trial court with discretion to determine the competency of a witness. Such holding is not contrary to the law of this state. Weil v. California Bank, 219 Cal. 538, 27 P.2d 904; Mirich v. Balsinger, 53 Cal. App.2d 103, 127 P.2d 639; Taylor v. Fishbaugh, 26 Cal.App.2d 300, 79 P.2d 174; White v. Citizens National Bank, 46 Cal. App.2d 418, 116 P.2d 117; Hood v. Bekins Van & Storage Co., 178 Cal. 150, 172 P. 594.

[10] The tax assessor of Whittier was called by appellants as an expert on values. On voir dire he answered that he had no opinion as to the reasonable market value of the property in 1938. His appraisal for taxation was not evidence of market value. Yolo Water & Power Co. v. Edmands, 50 Cal.App. 444, 450, 195 P. 463. It was not error to exclude his testimony. Mirich v. Balsinger, supra.

[11] Appellant Vanderbush offered himself as a witness to prove the value of the property which he had as owner sold in 1937. Former ownership alone does not entitle one to testify as to the value of a property. In order for him to qualify he must demonstrate such familiarity with the land, its uses, and its value as to satisfy the trial judge of his competency. See Sternes v. Sutter Butte Canal Company, 99 Cal. App. 465, 278 P. 921; Westinghouse Air Brake Co. v. City of Pittsburgh, 316 Pa. 372, 176 A. 13. He disclosed on his voir dire examination no such knowledge. While the owner may testify as to the value of his property (Winklemen v. Sides, 31 Cal.App.2d 387, 88 P.2d 147), the privilege has not been extended to former owners as such. Dexter v. Aronson, 282 Mass. 124, 184 N.E. 455.

[12] It is contended that the court erred in denying appellants' motion to strike the testimony of respondent's experts on the ground that it contradicted the allegations of the amended complaint. The sole basis

of such demand is that while its value on June 24, 1938, was alleged to have been $19,000, the testimony of respondent's expert was that its value at that time was approximately $14,000. We know of no authority requiring any witness to testify that the value of a property is exactly the sum alleged or claimed to be by either litigant. In deriving the value of $19,000 the court necessarily considered all the proof received.

In the absence of prejudicial error it is ordered that the judgment be and the same is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.




68 Cal.App.2d 705

**PEOPLE v. COELHO.**

**Cr. 3888.**

District Court of Appeal, Second District, Division 2, California.

April 10, 1945.

**1. Infants ⇐20**

Evidence sustained conviction of sex perversion. Pen.Code, § 288.

**2. Criminal law ⇐1160**

Incompatibility and discrepancies in testimony, and uncertainties of witness in giving testimony, are matters solely for consideration of the trier of facts in the first instance, and for consideration of trial judge on motion for new trial, and cannot be considered by appellate court where there is substantial evidence to support the findings.

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Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Antone R. Coelho was convicted of a violation of section 288 of the Penal Code, and he appeals.

Affirmed.

Robert W. Kenny, of San Francisco, and Everett W. Mattoon, of Los Angeles, for plaintiff.

Maurice A. Gleason, of Los Angeles, for defendant.

McCOMB, Justice.

Defendant was convicted after trial before the court without a jury of violating section 288 of the Penal Code. This appeal is from the judgment and order denying his motion for a new trial.

The evidence being viewed in the light most favorable to the People (respondent), the essential facts are:

On August 4, 1944, defendant committed an act prohibited by section 288 of the Penal Code, to wit, he placed his tongue on the private parts of the prosecuting witness, a female eleven years of age.

[1] Defendant urges reversal of the judgment on this proposition:

*The verdict is contrary to the evidence.*

This proposition is untenable. We have examined the record and are of the opinion that there was substantial evidence considered in connection with such inferences as the trial judge may have reasonably drawn therefrom to sustain the finding of facts hereinabove mentioned and each and every other material fact upon which the judgment of guilty was predicated. For example, the prosecuting witness testified that defendant put his tongue on her private parts. Further discussion of the sordid details would serve no useful purpose.

[2] Incompatibility and discrepancies in testimony, if any; the uncertainties of a witness in giving testimony, as well as contradictions in the evidence, are matters solely for the consideration of the trier of fact in the first instance and for the consideration of the trial judge on a motion for a new trial. Such matters cannot be considered by us if, as in the instant case, there is substantial evidence to support the findings of the trier of fact. See People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P. 2d 732, for a full statement of the applicable rule.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

## WILLIAMS v. DAVIS.

**Civ. 14617.**

District Court of Appeal, Second District, Division 2, California.

April 10, 1945.

Rehearing Granted May 9, 1945.

See 158 P.2d 748.

**1. Appeal and error ⇐607(1)**

Under new rules on appeal, power to terminate proceedings for preparation of transcript on appeal is vested solely in court in which appeal is pending.

**2. Appeal and error ⇐607(1)**

The superior court did not have jurisdiction, after effective date of new rules on appeal, to make order terminating proceedings for preparation of transcript on appeal.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Edna I. Williams against Everly M. Davis, Sr. From an order granting defendant's motion to terminate proceedings for preparation of transcript on appeal, plaintiff appeals.

Reversed.

See, also, 154 P.2d 22.

Edna I. Williams, pro se.

Edward R. Young, Frank R. Johnston, and E. L. Searle, all of Los Angeles, for respondent.

McCOMB, Justice.

From an order of the trial court granting defendant's motion to terminate proceedings for the preparation of a transcript on appeal, plaintiff appeals.

This is the undisputed fact:

On November 26, 1943, the trial court granted defendant's motion to terminate the proceedings for the preparation of a transcript on appeal.

The sole question necessary for us to determine is:

*Did the superior court on November 26, 1943, have jurisdiction to make an order terminating proceedings for the preparation of a transcript on appeal?*

[1] This question must be answered in the negative. Since the new Rules on Appeal became effective, the *trial court* (superior court) has been without jurisdiction to make an order terminating proceedings for the preparation of a transcript on appeal, such an order having been eliminated from our practice by the adoption of the new Rules on Appeal. Averill v. Lincoln, 24 Cal.2d 761, 764, 151 P.2d 119. The power to terminate proceedings for the preparation of a transcript on appeal is now, and has been since July 1, 1943, vested solely in the court in which the appeal is pending, that is, either the District Court of Appeal or Supreme Court. (Averill v. Lincoln, supra.)

[2] Applying the foregoing rule to the facts of the present case, since the order from which the appeal is taken was made on November 26, 1943, a date subsequent to the effective date of the new Rules on Appeal (July 1, 1943), the order of the trial court was one which the superior court did not have jurisdiction to make and was thus a nullity.

For the foregoing reasons the order is reversed.

MOORE, P. J., and W. J. WOOD, J., concur.



68 Cal.App.2d 640

## THOMASSON v. JONES, County Surveyor, et al.

**Civ. 14636.**

District Court of Appeal, Second District, Division 2, California.

April 3, 1945.

**1. Mandamus ⇐1, 10**

A writ of mandate will not be granted unless it is necessary to protect a substantial right and upon a showing that substantial damages will be suffered by petitioner if writ is denied.

**2. Mandamus ⇐23(1)**

A writ of mandate will only be issued upon application of party beneficially interested, and will not issue when petitioner has no direct interest in compelling defendant to perform function mentioned in writ. Code Civ.Proc. §§ 367, 1086.

**3. Mandamus ⇐23(1)**

Surveyor, who was a mere employee of powder company, was not entitled to a writ of mandate to compel county surveyor and county recorder to accept a map for recordation without joining employer as a petitioner where it appeared that employer was sole party interested in recordation of map. Code Civ.Proc. §§ 367, 1086; St.1939, p. 430 et seq., § 8700; St.1943, p. 865 et seq., §§ 11500 to 11628.

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Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus by Frederick Thomasson against Alfred Jones, County Surveyor of the County of Los Angeles, and Mame Beatty, County Recorder of such county, to compel defendants to accept for recordation a record of survey of a tract of land. From a judgment for defendants, petitioner appeals.

Affirmed.

Jerrell Babb, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Ernest Purdum and Edward H. Gaylord, Deputy Co. Counsels, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

The appellant, a licensed surveyor, filed a petition in the superior court asking for a writ of mandate to compel the county surveyor and the county recorder of Los Angeles County to accept for recordation a record of survey of a tract of approximately 10 acres of land situated near Newhall. The trial court sustained a demurrer to the complaint, giving plaintiff permission to amend and "to join Bermite Powder Company as a petitioner". Petitioner declined to amend and judgment was entered in favor of defendants from which the appeal is prosecuted.

Petitioner is an employee of Bermite Powder Company, which is engaged in national defense work for the war effort, operating a plant situated on approximately 120 acres of land near Newhall. Petitioner alleges that he was employed to make a survey of a part of this land for the purpose of preparing living quarters for employees of the plant and that petitioner's employer has arranged to borrow money in order to build the housing units for the employees. Petitioner also alleges that he has prepared a record of survey pursuant to the provisions of Chapter 15, Division 3 of the Business and Professions Code of California, St.1939, p. 430 et seq. designated by section 8700 of the code as the Land Surveyors Act; that he had tendered the filing fee but that the defendants refuse to record his record of survey. It is the contention of defendants that sections 11500 to 11628, appearing in Chapter 2, Part 2, Division 4 of the Business and Professions Code, St.1943, p. 865 et seq., and referred to in the code as the Subdivision Map Act, merely adds additional requirements to those set forth in the Land Surveyors Act before a record of survey can be filed if the survey is of a subdivision; that petitioner's survey is of a subdivision and that he has not met the additional requirements contained in these sections.

Petitioner asserts in his brief that, due to the delay caused by the objection to the recordation of his record of survey, his employer the Bermite Powder Company was not in position to await the outcome of the litigation and was forced to employ a licensed civil engineer under and pursuant to the provisions of the Subdivision Map Act; that a map prepared under the provisions of the Subdivision Map Act has in fact been filed for record.

[1-3] A writ of mandate will not be granted unless it is necessary to protect a substantial right and upon a showing that substantial damages will be suffered by the petitioner if the writ is denied. Ault v. Council of City of San Rafael, 17 Cal.2d 415, 110 P.2d 379. The writ of mandate is to be issued only upon the application of the party beneficially interested. Code of Civil Procedure, sec. 1086. The writ will not issue when the petitioner has no direct interest in compelling the defendants to perform the function mentioned in the writ. Ellis v. Workman, 144 Cal. 113, 115, 77 P. 822. In the instant proceeding petitioner concedes that he is merely an employee of Bermite Powder Company. He asserts that he prepared a map under certain specified sections of the Business and Professions Code but that due to his inability to have the map recorded his employer engaged the services of another surveyor, who has made a different map and has placed it upon record. It is apparent that Bermite Powder Company is the party which is interested in the recordation of maps covering its property. It is also apparent that petitioner, being merely an em-

ployee of the Bermite Powder Company, has no direct interest in the matter. It is suggested in the briefs that perhaps petitioner seeks an adjudication by the court on the question whether the Subdivision Map Act is applicable to rural territory such as that in the neighborhood of Newhall, but it is clear that if petitioner's object is to seek such adjudication he should do so with a map of his own property, or at least give the real owner of the property an opportunity to be represented in the court proceeding. The court very properly ruled that Bermite Powder Company should be joined as petitioner if it desired to have an adjudication on the question whether the map of its property prepared in accordance with the provisions of the Land Surveyors Act should be filed for recordation. The action should be prosecuted in the name of the real party in interest. Code of Civil Procedure, sec. 367.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.




68 Cal.App.2d 523

## HOYT HEATER CO. v. HOYT.

Civ. 14815.

District Court of Appeal, Second District, Division 2, California.

March 27, 1945.

**1. Trade-marks and trade-names and unfair competition ⇐99**

Trial court's finding, on which judgment restraining defendant from using his name in a business in competition with plaintiff was based, sufficiently showed that defendant perpetrated an act of deception or of unfair dealing in advertising his business under his own name, in view of express statement in finding that defendant did so for purpose of misleading plaintiff's customers and general public into belief that defendant was plaintiff's authorized dealer.

**2. Appeal and error ⇐907(3)**

On an appeal on judgment roll alone, findings are conclusively presumed to be supported by evidence.

**3. Trade-marks and trade-names and unfair competition ⇐97**

Where it was evident from finding that defendant could not use his own name in advertising his business without confusing public to detriment of plaintiff, injunction restraining defendant from using his name in a business in competition with plaintiff either alone or in combination with other words was not too broad.

**4. Trade-marks and trade-names and unfair competition ⇐73(1)**

One must use his own name honestly and not as a means of pirating the good will and reputation of a business rival; and where one cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business.

**5. Trade-marks and trade-names and unfair competition ⇐97**

In suit to enjoin alleged unfair competition in use of defendant's name in a competing business because such name had allegedly acquired a secondary meaning indicating plaintiff's product, where plaintiff waived, upon stipulation of counsel, the right to an accounting and damages in excess of a nominal amount, court did not err in issuing an injunction notwithstanding a finding of inconsequential damages.

**6. Trade-marks and trade-names and unfair competition ⇐87**

Plaintiff was not estopped to prosecute suit to enjoin alleged unfair competition in use of defendant's name in competing business because such name had acquired a secondary meaning indicating plaintiff's product by reason of dismissal for want of prosecution of a prior suit brought by plaintiff's predecessor against the same defendant for same relief.

**7. Appeal and error ⇐173(10)**

Under rule that defense of laches may not be raised for first time on appeal, such defense was not available when not pleaded or raised at time of trial.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Hoyt Heater Company, a limited copartnership, against Charles H. Hoyt, to enjoin defendant from using his name in a competitive business, either alone or in combination with other words. Judgment for plaintiff, and defendant appeals.

Affirmed.

Peyton H. Moore, of Los Angeles, for appellant.

Harry J. McClean, of Los Angeles, for respondent.

McCOMB, Justice.

Defendant appeals on the judgment roll alone, from a judgment in favor of plaintiff, after trial before the court without a jury, in an action to restrain defendant from using his name in a competitive business either alone or in combination with other words.

The undisputed facts are these:

The defendant, whose trade name is Charles H. Hoyt, has been engaged in the business of a plumber and water heater repairer in Los Angeles county for more than twenty years. Plaintiff and its predecessors in name and interest have been engaged in the business of manufacturing, selling, repairing and servicing water heaters in Los Angeles since 1911 under the trade name of Hoyt Heater Company and Hoyt Automatic Water Heater Company.

In January, 1931, the predecessors in interest of plaintiff filed in the superior court an action seeking to enjoin defendant from listing in the classified directory published by the Southern California Telephone Company, the trade name or names of defendant under or in connection with the word Hoyt. On January 21, 1931, the superior court on stipulation of counsel for the respective parties issued a temporary injunction restraining defendant from using the name of Hoyt unless said word was immediately followed by the letters or words, "C.H.", "Chas. H.", or "Charles H.", in the same type, on any truck, sign, or invitation to the public or trade. No further court action was taken in said cause until June, 1942, when proceedings were taken to compel defendant to enter a plea to the complaint filed in such action. At this time defendant moved to dismiss the action for lack of prosecution. The motion was granted. Thereafter the present suit was instituted and the trial court found that defendant, with the express intent and calculated purpose to deceive and mislead the public and customers of plaintiff, was advertising his business in the classified telephone directory under the following fictitious trade names:

"Hoyt C. H. Co.

"Hoyt C. H. Automatic Water Heater Repair Service and Supply Co.

"A. A. Automatic Hoyt A-1 Water Heating Co.

"Automatic Hoyt Hot Water Heater Repair Service Co." [1]

The trial court also found that by reason of the use of the word Hoyt by the defendant as above described, customers of plaintiff, of plaintiff's predecessors, and the general public have been deceived and misled into believing that defendant was

[1] Finding VI reads thus:

"That with the intent and for the purpose of diverting business from the plaintiff and the predecessors of the plaintiff to the defendant and for the purpose of misleading the customers of the plaintiff and its predecessors and the general public into the belief that the said defendant is the authorized dealer and/or representative of the plaintiff and/or the manufacturer of the said Hoyt Heater and that in dealing with the said defendant they are doing business with the plaintiff, the said defendant has advertised his said business in the classified telephone directory published by the Southern California Telephone Company under the name of Hoyt inserted in bold type in a multiplicity of combinations with other words, all with the express intent and calculated purpose to deceive and mislead the public, customers of the plaintiff and plaintiff's predecessors and users of heaters manufactured and serviced by the plaintiff; that by the use of the name Hoyt displayed in such advertising media it was the intent of defendant that it should be understood by customers of the plaintiff and users of plaintiff's products and service and by the general public that the defendant is the manufacturer of the Hoyt Heater and/or the authorized dealer and/or representative of the plaintiff.

"That *as* the date of the trial the defendant, whose true name is Charles H. Hoyt, sometimes used as Chas. H. Hoyt and C. H. Hoyt, was doing and advertising his business in the classified telephone directory published by the Southern California

the manufacturer and/or authorized representative of the plaintiff.[2]

There are four questions presented for our determination which will be stated and answered hereunder seriatim:

First: *Did the trial court's finding show that defendant perpetrated an act of deception or of unfair dealing in advertising his business under his own name?*

[1] This question must be answered in the affirmative. Finding VI, quoted in footnote 1, specifically found that defendant, "for the purpose of misleading the customers of plaintiff and its predecessors and the general public into the belief that" defendant was the authorized dealer and/or representative of the plaintiff, had advertised his name in the classified telephone directory published by the Southern California Telephone Company under the name of Hoyt with the express intent and calculated purpose to deceive and mislead the public.

[2] Since the present appeal is on the judgment roll alone the findings will be conclusively presumed to be supported by the evidence. (Estate of Mautner, 38 Cal. App.2d 521, 522, 101 P.2d 520; Coffey v. Los Angeles Firemen's Relief Ass'n, 22 Cal.App.2d 510, 511, 71 P.2d 328.)

The foregoing mentioned finding clearly demonstrates that defendant perpetrated an act of deception and unfair dealing in advertising his business under his own name.

Second: *Was the injunction too broad in not permitting defendant to operate and to advertise his business under his own name?*

[3, 4] This question must be answered in the negative, and is governed by this rule: That one must use his own name honestly and not as a means of pirating the goodwill and reputation of a business rival; and where he cannot use his own name without inevitably representing his goods as those of another he may be enjoined from using his name in connection with his business. (Hat Corporation of America v. D. L. Davis Corporation, D.C., 4 F. Supp. 613, 619; Kaufman v. Kaufman, Sup., 123 N.Y.S. 699. See also 50 A.L.R. [1944], pages 1098 and 1107; L. Martin Co. v. L. Martin & Wilckes Co., 75 N.J. Eq. 39, 50, 71 A. 409.)

It is evident from the findings of the trial court that defendant could not use his own name in advertising his business without confusing and misleading the public to the detriment of plaintiff; therefore the trial court was justified in making the order here attacked.

Dunston v. Los Angeles Van & Storage Co., 165 Cal. 89, 131 P. 115, is inapplicable to the present case for the reason that in such case there was no finding of fraud, deceit or unfair competition, while in the instant case the trial court expressly found that there was fraud, deceit and unfair competition.

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Telephone Company under the following fictitious trade names:

Hoyt C. H. Co.

Hoyt C. H. Automatic Water Heater Repair Service & Supply Co.

A. A. Automatic Hoyt A–1 Water Heating Co.

Automatic Hoyt Hot Water Heater Repair Service Co.

"That no one is interested in the defendant's business except the defendant."

[2] Finding VII reads thus:

"That by reason of the use of the word Hoyt by the defendant as herein found to be used in advertising said business and listing said business in the said classified directory customers of the plaintiff and of the plaintiff's predecessors and the general public have been deceived and misled into believing that the said defendant conducts at the place in his advertisements and listings, which was at the time of trial 2044 Hillhurst Avenue, Los Angeles, California, an authorized Hoyt agency for the repair of Hoyt Heaters and/or that the said defendant was and is the manufacturer and/or authorized representative of the manufacturer of the Hoyt Heater and that the defendant rendered service on the said heater either as its manufacturer or as authorized by the manufacturer; that numerous customers of the plaintiff and the general public have authorized the defendant to render repair service believing that the said defendant was the manufacturer or the manufacturer's agent for the rendering of service on the so-called Hoyt Heater; that much work has been done by the defendant in the repair of Hoyt Heaters which would not have been authorized by the respective owners except for the confusion caused by the defendant's use of the name Hoyt as herein shown to be used and for the deception practiced by the defendant and the confusion resulting from such use of the name of Hoyt; that in consequence of such confusion and misleading the plaintiff's profits have been decreased and customers lost by the plaintiff."

Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879, is inapplicable to the facts in the instant case since in such case there was no issue of secondary meaning, while in the case at bar the trial court expressly found that the word Hoyt had acquired a secondary meaning, thus bringing the case within the application of the rule of law hereinbefore stated.

American Automobile Ass'n v. American Automobile Owners' Ass'n, 216 Cal. 125, 13 P.2d 707, 83 A.L.R. 699, and Ida May Co. v. Ensign, 20 Cal.App.2d 339, 66 P.2d 727, are likewise not in point. In such cases the court found as a fact that the defendants had not resorted to any artifice or act calculated to mislead the public or customers of the plaintiffs, while in the instant case the court found expressly to the contrary.

Third: *Did the trial court commit prejudicial error in issuing the injunction where there was a finding that the plaintiff's damages were inconsequential?*

[5] This question must likewise be answered in the negative for the reason that plaintiff waived, upon stipulation of counsel, the right to an accounting and damages in excess of a nominal amount. The trial court's finding being: "That upon stipulation of counsel for the plaintiff waiving an accounting and damages in excess of a nominal amount the court finds no necessity for an accounting and [fixes] damages in the sum of $5.00."

Fourth: *Was plaintiff (a) estopped to prosecute the present action, or (b) guilty of laches?*

This question must also be answered in the negative.

[6] a) The trial court expressly found that plaintiff was "not estopped to institute or prosecute" the present action.[3]

[7] b) The defense of laches was not pleaded or raised by defendant at the time of the trial, and such defense may not be raised for the first time on appeal. (Allen v. Meyers, 5 Cal.2d 311, 316, 54 P.2d 450; Lotts v. Board of Park Com'rs of City of Los Angeles, 13 Cal.App.2d 625, 636, 57 P.2d 215.)

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.




68 Cal.App.2d 713

**HEINZ v. HEINZ.**

**Civ. 14876.**

District Court of Appeal, Second District, Division 2, California.

April 12, 1945.

Hearing Denied May 31, 1945.

**1. Parent and child ⇐2(3)**

A court does not have jurisdiction to award custody of minor child to a stranger as against a parent who is found to be a proper person to have its custody, and who can take care of the child.

**2. Parent and child ⇐2(4)**

Court, having found that father was and mother was not a proper person to have custody of minor son, erred in awarding physical custody of the son to a nursery school for one year or until further order of the court.

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3 Finding XIV reads thus:

"That on the issue of estoppel tendered by the second defense to plaintiff's first cause of action the court finds that in January 1931 the predecessor of the plaintiff herein filed in the above-entitled court a bill in equity to enjoin the defendant from listing in the classified directory published by the Southern California Telephone Company trade name or trade names of the defendant under or in connection with the word Hoyt; that on January 26, 1931, the above-entitled court on stipulation of counsel of respective parties in said action issued a temporary injunction restraining the defendant from using the name Hoyt unless said word was immediately followed by the words C. H., Chas. H., or Charles H. in the same type on any truck, sign or other invitation to the public or trade; that no further court action was taken in said proceeding until June 1942, when said action was dismissed upon motion of the defendant in said action who is also the defendant in the above-entitled action; the court further finds that the plaintiff in the action at bar is not estopped to institute or prosecute the bill in equity herein."

**3. Parent and child ⇐2(4)**

On appeal from judgment which awarded custody of minor child to a nursery school notwithstanding court found that father was and mother was not a proper person to have custody of the child, that father might be inducted into military service was immaterial, since if such event should take place, court upon proper application could then award custody after making proper finding supported by substantial evidence.

**4. Parent and child ⇐2(1)**

A father who is entitled to custody of children has the right to name any reasonable place in which they shall abide with him. Civ.Code, § 213.

**5. Parent and child ⇐2(4)**

Where trial court found that father was a proper person to have custody of his minor child and there was no finding that child's welfare would be prejudiced by his removal from Los Angeles county, order restraining father from removing the child from the county was erroneous. Civ. Code, § 213.

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Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action by Clifford Stanton Heinz against Elizabeth Heinz to obtain the exclusive custody of the minor son of the parties. From a judgment giving the custody of the minor son to a nursery school and enjoining plaintiff from removing the son from the county of Los Angeles, the plaintiff appeals on the judgment roll alone.

Modified, and, as modified, affirmed.

A. E. Coppleman and Louis Bean, Jr., both of Los Angeles, for appellant.

Maurice Rose, of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by plaintiff from a judgment (1) giving the physical custody of the minor son of the parties hereto to the Ambassador Gardens Nursery School for a period of one year, and (2) enjoining plaintiff from removing his minor son from the county of Los Angeles. This appeal is on the judgment roll alone.

The undisputed facts are these:

Plaintiff instituted the present action to obtain the exclusive custody of the minor son, age five, of the parties hereto. After a trial the court found that the plaintiff was a fit and proper person to have the care and custody of his minor son.[1] The court also found that defendant was not a fit and proper person to have the permanent custody of said child.[2] Thereafter the court entered a judgment containing among others these provisions:

"It is ordered, adjudged and decreed, that the custody of the minor child, Clifford Stanton Heinz, the Third, is awarded to the plaintiff, Clifford Stanton Heinz, provided that the said minor child shall be placed in the Ambassador Gardens Nursery School for a period of one year or until further order of the Court. * * *

"It is further ordered that both parties are hereby enjoined from removing the said minor child from the County of Los Angeles, State of California."

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Having found that plaintiff was a fit and proper person to have the custody of his minor son and that the defendant was not a fit and proper person for such purpose, did the court exceed its jurisdiction in awarding the physical custody of the child to the Ambassador Gardens Nursery School?*

[1] This question must be answered in the affirmative. The law is established in California that a court does not have jurisdiction to award the custody of a minor child to a stranger as against a parent who is found to be a fit and proper person to have its custody and who is in a position to take care of the child. (Stever v. Stever, 6 Cal.2d 166, 169, 56 P.2d 1229; In re White, 54 Cal.App.2d 637, 640, 129 P.2d 706; In re Guardianship of De Ruff, 38 Cal.App.2d 529, 530, 101 P.2d 521; Eddlemon v. Eddlemon, 27 Cal.App.2d 343, 344, 80 P.2d 1009; Newby v. Newby, 55 Cal.App. 114, 116, 202 P. 891.)

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1 Finding VI read: "That the plaintiff is a fit and proper person to have the care and custody of Clifford Stanton Heinz, the Third, the minor son of the parties hereto."

2 Finding VII read: "That the defendant is not a fit and proper person to have the permanent custody of the said minor son, Clifford Stanton Heinz, the Third."

[2] Applying the foregoing rule to the facts in the instant case, since the trial court found that plaintiff was a fit and proper person to have the custody of his minor son the court erred in awarding the physical custody of the child to the Ambassador Gardens Nursery School.

[3] Defendant's argument that plaintiff may be inducted into military service is immaterial on the present appeal. Should such an event take place, the trial court upon proper application could then award the custody of the child after making proper findings supported by substantial evidence in such manner as may appear to be for the best interests of the minor.

Peterson v. Peterson, 64 Cal.App.2d 631, 149 P.2d 206, is not in point for the reason that in the Peterson case it was necessary to determine which of the parents, both of whom were fit and proper to care for the child, should be awarded the minor's custody. In the present case the question is whether the court can award the custody of a minor child to a stranger as against the claim of a parent who has been found to be a fit and proper person to have the child's custody.

Second: *Did the trial court err in ordering plaintiff not to remove his minor son from Los Angeles County?*

This question must likewise be answered in the affirmative. Section 213 of the Civil Code reads thus:

"A parent entitled to the custody of a child has a right to change his residence, subject to the power of the proper court to restrain a removal which would prejudice the rights or welfare of the child."

[4] In Luck v. Luck, 92 Cal. 653, 655, 28 P. 787, our Supreme Court states the rule thus: "* * * if he [the father] is entitled to the custody of the children at all, he has the right to name any reasonable place in which they shall abide with him. * * *"

[5] Applying the foregoing rule to the facts of the present case, since the trial court found that plaintiff was a fit and proper person to have the custody of his minor child and there was no finding that the child's rights or welfare would be prejudiced by his removal from Los Angeles County, the court's order in restraining plaintiff from removing his son from Los Angeles County was erroneous.

For the foregoing reasons the following provisions in the judgment are stricken:

"* * * provided that the said minor child shall be placed in the Ambassador Gardens Nursery School for a period of one year or until further order of the Court.

"It is further ordered that the plaintiff pay the charges for tuition at the said school in the sum of $125.00. * * *

"* * * in accordance with the rules and regulations of the said school, said visitation shall take place at 528 South Normandie, Los Angeles, California * * * nor at the ranch of said school in San Fernando Valley.

"It is further ordered that during such period of time the said minor child shall be in the said school one of the parties is entitled to have the child on one weekend and two weeks thereafter, on the weekend, the other party may have the child and so to alternate in taking the child, always, however, allowing two weeks to elapse wherein the child shall not be taken from the said school. Said child shall at all times be subject to the rules and regulations of said school; defendant to have the said minor child at her home for the first weekend of October, 1944, and the plaintiff to have the said minor child at his home during the third weekend of October, 1944.

"It is further ordered that both parties are hereby enjoined from removing the said minor child from the County of Los Angeles, State of California."

As thus modified the judgment is affirmed.

MOORE, P. J., concurs.

Hearing denied; SCHAUER, J., dissenting.

## ALLEN et al. v. CALIFORNIA WATER & TELEPHONE CO. *

Civ. 3332.

District Court of Appeal, Fourth District, California.

April 6, 1945.

Rehearing Denied April 25, 1945.

Hearing Granted May 31, 1945.

1. Appeal and error ⇐900

The appellate court must presume correctness of proceedings leading up to trial court's judgment.

2. Appeal and error ⇐919

In absence of contrary showing, appellate court must presume in support of judgment that cross-complaint was regularly dismissed against all cross-defendants named in judgment. Code Civ.Proc. § 581.

3. Waters and water courses ⇐42, 130, 143, 144

The rights of riparian owner or appropriator are limited to amount of water awarded and put to a reasonable and beneficial use, allowing a reasonable margin for safety, and such reasonable and beneficial use as may be reasonably anticipated, and rights to use of balance is in state and is subject to appropriation by other users under regulations adopted by state. Const. art. 14, § 3.

4. Waters and water courses ⇐42, 144

The purpose of law governing rights of riparian owners or appropriators in use of water is to prevent waste of waters and to preserve them for beneficial use of inhabitants of state. Const. art. 14, § 3.

5. Constitutional law ⇐92
Waters and water courses ⇐42, 144

The law limiting rights of riparian owner or appropriator to reasonable and beneficial use of water cannot of itself destroy vested right of use by an owner, but that right is limited to reasonable and beneficial use and cannot now extend to waste of water. Const. art. 14, § 3.

6. Evidence ⇐571(1)

In action by riparian owners to enjoin water company from transporting from watershed underground waters of river basin, finding that annual safe net yield of water in basin was 1000 acre feet less than annual reasonable and unofficial use was sufficiently supported by testimony of expert witness to that effect. Const. art. 14, § 3.

7. Appeal and error ⇐994(3), 1012(1)

The credibility of testimony of expert witness and weight to be given to his testimony are for trial judge, whose conclusions thereon are final on appeal, even though appellate court might entertain belief that weight of evidence might lead to a contrary conclusion.

8. Waters and water courses ⇐87, 107(3), 152(11)

Where evidence in suit to restrain water company from pumping and transporting water from river basin showed that if underground fresh water level was lowered from 10 to 15 feet below ground surface, danger of infiltration of salt waters into basin would become immediate, trial judge properly refused to permit such reduction of level as against claim that failure to do so would result in waste of water. Const. art. 14, § 3.

9. Waters and water courses ⇐87, 107(3), 152(11)

Where findings were supported by substantial evidence that because of salt sloughs protruding inland from ocean there would be serious danger of salt water intrusion into underground fresh waters of river basin if water level were lowered by pumping operations of water company which transported water from basin and that continued pumping especially during drought materially increased hazards of such intrusion, court properly refused to permit withdrawals of water which would lower underground water level from 10 to 15 feet. Const. art. 14, § 3.

10. Waters and water courses ⇐87, 107(3), 152(8)

In action by riparian owners to enjoin water company from pumping and transporting from watershed underground waters of river basin, evidence sustained finding that there was no surplus water in basin subject to appropriation and removal. Const. art. 14, § 3.

11. Waters and water courses ⇐190

A water company pumping and transporting water from river basin could not base its estimated annual safe yield of water in basin nor its right to pump and export water therefrom on years of heavy or above average rainfall, but determination of any such right should take into con-

* Subsequent opinion 176 P.2d 8.

sideration years of normal or subnormal rainfall. Const. art. 14, § 3.

**12. Waters and water courses ⇐87, 107(3), 152(10)**

A finding that there was no surplus water in river basin subject to export to a certain city by defendant water company was not inconsistent with finding permitting defendant to export 1100 acre feet for two years and a smaller amount during third year, in view of fact that during preceding years there had been unusually heavy rainfall and that because of war conditions there was excessive demand for water in such city. Const. art. 14, § 3.

**13. Waters and water courses ⇐42, 140, 143, 144**

Riparian owners and prior appropriators are entitled to water which they put to reasonable and beneficial use in dry as well as in wet years, if that supply is available, and in years of deficient supply their rights may not be invaded by another having a subordinate right. Const. art. 14, § 3.

**14. International law ⇐12**

A citizen of United States cannot, in absence of treaty, either by use, prescription, or otherwise, gain any rights under which he can compel Republic of Mexico to release any of waters impounded by dam in such Republic which without such dam would flow into United States.

**15. Waters and water courses ⇐87, 107(3), 152(8)**

The leakage of water from a dam in Mexico and return flow from a Mexican water project, on entering California became subject to laws of California and might properly be considered in determining annual safe yield of water of river valley in California, as against contention that such waters were merely waste waters or foreign waters. Const. art. 14, § 3.

**16. Waters and water courses ⇐130, 131**

Under constitutional provision relating to conservation of water and statutory provisions that waters flowing in stream or other natural channel are subject to appropriation, "foreign waters" in stream are subject to appropriation by riparian owners. Const. art. 14, § 3; St. 1943, p. 1604, §§ 1200, 1201.

**17. Waters and water courses ⇐87, 107(3), 152(11)**

Where at time of judgment in action to enjoin water company from pumping and transporting water from river basin, a Mexican water project and dam in Mexico impounding water of river flowing into such basin had been in operation only about five years, they were of too recent origin to permit leakage and return flow therefrom to be considered a fixed and dependable source of water supply to basin in United States so as to enable trial court to base injunctive relief thereon, but any future modification of judgment should include consideration of such source of supply. Const. art. 14, § 3.

**18. Waters and water courses ⇐87, 107(3), 152(8)**

That leakage and return flow from dam and water project in Mexico might be interrupted and waters recaptured in Mexico at future date should not prevent consideration of such source of supply in portion of river basin in United States into which such waters flowed. Const. art. 14, § 3.

**19. Waters and water courses ⇐87, 107(3), 152(11)**

The granting of injunction restraining water company from pumping and transporting underground waters of river basin from watershed without finding present actual damage to riparian owners and prior appropriators was not error where court on ample evidence found threatened damage. Const. art. 14, § 3.

**20. Injunction ⇐12**

A party threatened with damage is not required to wait until his property is injured or destroyed before seeking a prohibitory injunction.

**21. Injunction ⇐12**

A prohibitory injunction will issue to prevent threatened damage.

**22. Injunction ⇐12**

A mandatory injunction will issue to remove the cause where damage has been done.

**23. Waters and water courses ⇐100, 101**

A riparian owner is not required to obtain his water from underground sources from supply exactly underlying each part of his holdings.

**24. Waters and water courses ⇐101, 102**

Riparian owners whose lands were located beyond fresh water barrier of river basin and above salt sloughs had same right to protection of underground water supply

as had riparian owners of land overlying fresh water basin, where their lands were cultivated and were producing crops irrigated with fresh water coming from the basin. Const. art. 14, § 3.

**25. Waters and water courses ⇐87, 107(3), 152(11)**

Where trial court found on sufficient evidence that net safe yield of river basin was less than reasonable and beneficial needs of riparian and prior appropriative owners, contention of water company sought to be enjoined from pumping and exporting water from basin that certain owners could not be injured by such pumping operations and, therefore, were not entitled to injunctive relief could not be sustained under circumstances. Const. art. 14, § 3.

**26. Judgment ⇐707**

Riparian owners not made parties to action to enjoin water company from pumping water from river basin for export were not bound by judgment therein. Const. art. 14, § 3.

**27. Waters and water courses ⇐87, 107(3), 152(5)**

Where underground waters in river basin had characteristics of a lake, action by certain riparian owners to enjoin water company from pumping water from basin for export could not be determined without determination of reasonable and beneficial needs of all owners of water rights superior to those of defendant. Const. art. 14, § 3.

**28. Compromise and settlement ⇐15(1)**

A resolution of city's governing body approving contract settling controversy with water company and providing that company would endeavor to develop additional and independent supply of water to lessen burden on city did not estop city from suing to enjoin company from pumping water from river basin for export. Const. art. 14, § 3.

**29. Waters and water courses ⇐87, 107(3), 152(10)**

Where, in riparian owners' action to enjoin water company from pumping and exporting underground waters of river basin, trial court because of war conditions and other reasons did not adopt its own proposed physical solution of unified control and distribution of available waters through a district or corporation, trial court's failure to refer matter to Division of Water Resources for solution or advice under statute was not error under circumstances. Const. art. 14, § 3; St.1943, p. 1630, § 2000 et seq.

**30. Waters and water courses ⇐87, 107(3), 152(10)**

The Water Commission Act does not place positive duty on trial court to refer a problem involving conflicting water rights to Division of Water Resources for solution or advice, but such reference is discretionary. Laws 1943, p. 1630, § 2000 et seq.

**31. Waters and water courses ⇐87, 107(3), 152(11)**

In action to enjoin water company from pumping and exporting underground waters of river basin, decree permitting company to take only such part of surface flow of stream as would otherwise waste into sea was susceptible of construction precluding company from operating pumps because they would draw upon underground waters of basin, and would, therefore, be modified by adding paragraph permitting company to pump when surface waters would otherwise waste into the sea. Const. art. 14, § 3.

**32. Waters and water courses ⇐87, 107(3), 152(12)**

Decree enjoining water company from pumping and transporting underground waters from river basin and surface flow over a specified quantity, but excepting waters wasting into ocean, was modified for trial court to retain jurisdiction so that it could take into consideration amount of water returning to river as result of leakage and return flow from Mexican dam and water project if and when amount of water from such source could be reasonably determined. Const. art. 14, § 3.

**33. Waters and water courses ⇐87, 107(3), 152(12)**

Decree enjoining defendant water company from pumping and transporting underground waters from river basin in excess of specified quantity was modified to reserve jurisdiction in trial court to modify decree as occasion might require, in view of fact that even if defendant should acquire riparian rights of majority of landowners decree would prohibit defendant from exporting underground waters though defendant was willing to supply remaining landowners with sufficient water. Const. art. 14, § 3.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Marvin L. Allen and others against California Water & Telephone Company to enjoin defendant from pumping and transporting from watershed underground waters of the Tia Juana River Basin, for a declaration of rights, and for other relief, wherein defendant filed cross-complaint for a determination of the interests of the various cross-defendants, and for other relief. From an adverse judgment, defendant appeals.

Judgment modified and as so modified affirmed.

See also 157 P.2d 680.

Philip Storer Thacher, of San Diego, and Bacigalupi, Elkus & Salinger, of San Francisco, for appellant.

Phil D. Swing and Charles C. Crouch, both of San Diego, for respondents other than City of San Diego.

J. F. DuPaul, City Atty., and Shelley J. Higgins, Sp. Atty. for City of San Diego, both of San Diego, for respondent City of San Diego.

Robert W. Kenny, Atty. Gen., C. C. Carleton, Spencer Burroughs, and Henry Holsinger, all of Sacramento, A. L. Cowell, of Stockton, Ronald B. Harris, of Fresno, Harry W. Horton, of El Centro, W. H. Jennings, of LaMesa, C. F. Metteer, of Sacramento, and Maurice M. Myers, of Encinitas, amici curiæ.

MARKS, Justice.

This is an appeal from a judgment restraining defendant from pumping, and transporting from the watershed, underground waters of the Tia Juana River Basin after December 31, 1944.

The record is long and there are many exhibits before us. Without an opinion of unconscionable length it will be impossible to review the evidence with any degree of particularity. Many of the fundamental facts are not in dispute. There is an unusual lack of conflict in much of the testimony of the experts called by the respective parties, their opinions differing more on the conclusions to be drawn than on many of the facts upon which those conclusions are based. We will confine our statement principally to those facts not in dispute and those other facts tending to support the findings and judgment and as far as possible will not notice conflicting evidence.

The complaint was filed on June 30, 1936. All plaintiffs claimed water rights in the Tia Juana River. They filed an amended and supplemental complaint on December 21, 1939, upon which the action was tried. They alleged their respective ownerships of land; that each tract of land was riparian to the Tia Juana River; that each plaintiff obtained water for domestic use or irrigation by pumping from the water percolating through the sands and gravels underlying the surface of the Tia Juana River Basin and fed by the waters of that stream; that large portions of the lands are devoted to agriculture and others to orchards and vineyards; that many of the properties are improved with homes occupied by the owners or their tenants; that there is no other water supply available, and without that water the lands would become barren and unproductive. The amount of water required for reasonable and beneficial use on the respective ownerships is particularly alleged. It is also alleged that defendant is the owner of land and wells in the Tia Juana River Valley and is constructing a large pipe line to convey the water pumped from the basin to distant places which are not riparian and are not in the Tia Juana River watershed; that after the large quantity of water which defendant proposes to transport, is removed, there will not remain in the basin sufficient water for plaintiffs' use and the water level will be so lowered that the water in plaintiffs' wells will become salty, alkaline, brackish and unfit for either domestic or agricultural use.

Plaintiffs pray that defendant be enjoined and restrained from removing and transporting the water from the Tia Juana River Basin; that the court determine and declare the amount of water necessary for each parcel of land required for present and future reasonable and beneficial use; that the rights of plaintiffs be declared prior and paramount to any right of defendant to any of such water; that defendant be restrained from asserting any right adverse to the prior rights of plaintiffs in those waters.

The answer of defendant put in issue some of the riparian rights claimed by plaintiffs. It alleged that the water that could be put to a reasonable and beneficial use by plaintiffs was much less than that claimed and that there was a sufficient annual safe yield from the Tia Juana River and its basin to supply the

reasonable and beneficial demands of plaintiffs and permit defendant to export annually 3200 acre feet of water without an undue drain on the supply and without doing any damage to plaintiffs or injuring them in any way.

Defendant filed a cross-complaint against plaintiffs and against, presumably, all of the other riparian and appropriative owners of rights to waters of the Tia Juana River and its basin, and also the holders of liens on many of the riparian lands. By this cross-complaint it was sought to have determined the interests of the various cross-defendants in the waters of the Tia Juana River and the waters underlying the Tia Juana River Valley, and the rights of the cross-complainant and of each cross-defendant in those waters. It was also the purpose of the cross-complainant to have the trial court make reasonable regulations for the use of those waters by the parties with the court reserving to itself the right to change or modify its decree as occasion might demand.

Cross-complainant attached to the pleading copies of two permits, the first dated May 15, 1924, and issued by the Acting Chief of the Division of Water Rights, Department of Public Works, and the second, dated May 21, 1932, issued by the Department of Public Works, which permitted cross-complainant to export 3200 acre feet of water annually from the Tia Juana Basin to distant points. The permits were made subject to the prior rights in those waters of any other persons and contained conditions which need not be detailed here.

Many cross-defendants filed answers, but more did not appear. We are referred to no part of the record showing service of summons on any of the cross-defendants. The trial judge filed an exhaustive opinion in deciding the case, from which it appears there was no proof of service of process on any of the cross-defendants and that no defaults had been entered.

It is stated in the briefs that the cross-complainant filed with the clerk of the court a voluntary dismissal of the cross-complaint as against all non-appearing cross-defendants. Respondents, other than the City of San Diego, assert, without reference to the record, that this dismissal was filed on July 13, 1942, after the decision of the case by the trial judge and therefore was not effective under the provisions of section 581 of the Code of Civil Procedure. See MacDermot v. Grant, 181 Cal. 332, 184 P. 396; Jalof v. Robbins, 19 Cal.2d 233, 120 P.2d 19.

[1, 2] In both the findings and judgment it is recited that the cross-complaint had been dismissed against numerous cross-defendants, presumably all of those who had not appeared. We are required to presume the correctness of proceedings leading up to the judgment, so, in the absence of any showing to the contrary, we must presume that the cross-complaint had been regularly dismissed against all of those cross-defendants named in the judgment as having had the cross-complaint against them dismissed. Jones v. Wilton, 42 Cal.App.2d 45, 108 P.2d 29; Estate of Hart, 11 Cal.2d 89, 77 P.2d 1082.

Besides filing its amended answer to the cross-complaint the City of San Diego filed an amended cross-complaint seeking to quiet its title, as against defendant, to 420 acre feet of water per annum from the waters of the Tia Juana River and its underground basin as necessary for the irrigation of about 105 acres of riparian land owned by it. The trial court awarded the City 224.50 acre feet of water per annum.

The trial court found that the annual safe net yield of water from the Tia Juana River Basin in the United States was 6000 acre feet, and that the present annual reasonable and beneficial consumptive use of those having riparian or appropriative rights prior and superior to those of defendant and cross-complainant was 7000 acre feet, with a future use of 500 additional acre feet per annum. The judgment was dated December 1, 1942, and enjoined defendant from pumping and removing from the Tia Juana River watershed any of the underground waters of the basin and any of the surface flow of the Tia Juana River, except that which was wasting into the ocean, and subject to the exception that it could divert and export 1100 acre feet for the year ending December 31, 1942, 1100 acre feet for the year ending December 31, 1942 (probably a typographical error and should be 1943), and 550 acre feet for the year ending December 31, 1944. The court reserved jurisdiction in order that, on application made before December 31, 1944, it might modify the judgment.

Defendant has appealed from the judgment. The principal ground urged for

its reversal is that the trial court erred in concluding that there were no surplus waters in the Tia Juana River Basin over and above the reasonable and beneficial use of the owners of riparian and appropriative rights which admittedly were prior and superior to any right of defendant to water in the underground basin of the river. It is argued that the evidence conclusively shows such a surplus to exist so that defendant may pump and transport it without infringing on any of the rights of the successful parties and without injury to any of them. While there are numerous other questions argued at length, this one is of primary importance.

The Coronado Water Company was a California corporation engaged in the business of supplying water to the City of Coronado and other communities around San Diego Bay. In 1935, defendant California Water & Telephone Company purchased all of the business and assets of the Coronado Water Company which was then disincorporated. Defendant continued to furnish water to Coronado and the other Bay communities as well as to government installations on North Island and elsewhere in the South Bay District.

The Southern California Mountain Water Company was a corporation engaged in the business of developing, distributing and selling water. In 1912 the City of San Diego purchased its water rights and system on the Otay River, subject to the Company's obligations to furnish water, and continued and expanded its system.

Early in 1912, the Southern California Mountain Water Company had entered into a contract with the Coronado Water Company to furnish the latter with water. This contract, which was modified in 1936, is sufficiently described in the case of City of Coronado v. City of San Diego, 48 Cal.App.2d 160, 119 P.2d 359. It furnishes one of the grounds for the estoppel urged by defendant against the City of San Diego in this action.

The Tia Juana River rises in Mexico some 60 miles easterly from its mouth at the Pacific Ocean. In speaking of the river emptying into the Pacific Ocean we will not distinguish between that portion which may empty into the ocean proper and the other which flows into the southern end of San Diego Bay.

The entire river runs through Mexico except for the westerly six miles from the point where it crosses the International Boundary Line between Tia Juana, Mexico, and San Ysidro, United States. The watershed of the Tia Juana River is entirely within the Republic of Mexico except for a small area in the United States drained by the Arroyo Seco and that drained by Cottonwood Creek which is one of its principal tributaries.

Cottonwood Creek rises in the mountains about 45 miles east of the Pacific Ocean. Its drainage area is chiefly in the United States although Rio de Tecate flows into it from Mexico. Cottonwood Creek crosses the International Boundary at a point about 20 miles easterly from the Pacific Ocean and continues in a southwesterly direction until it joins the Tia Juana River about half way between the Rodriguez Reservoir in Mexico and the International Boundary. Thus all of the water which flows in the portion of the Tia Juana River within the United States, and fills the portion of the Tia Juana River Basin there, flows or percolates from Mexico across the International Boundary.

The Tia Juana River and its tributaries originally drained an area of about 1668 square miles. Various dams have been constructed in Mexico and the United States restraining the flow of various streams so that the uncontrolled drainage area of the Tia Juana River and its tributaries has been reduced to about 469 square miles. In order to determine the total water supply of the Tia Juana River Basin, other than that falling during rains, there must be added to the water originating in this area, the water released from the dams during periods of high water, and the leakage and percolation from the dams.

Like most Southern California streams, the flow of the Tia Juana River is intermittent. During years of excessive rainfall the Tia Juana Valley, both in Mexico and the United States, has been swept by disastrous floods. During years of very deficient rainfall there has been practically no surface water running in the river bed in the United States.

The records of rainfall in the Tia Juana river Drainage Basin have been kept for a relatively few years. The same is true of measurements of the flow of the river.

Plaintiffs have produced records of rainfall in the City of San Diego from 1849–

1850 to 1942–1943, inclusive, which shows an average annual precipitation of 10.04 inches. While it may not be exact it gives some indication of the rainfall of the Tia Juana River Basin. The record shows substantial periods of subnormal rainfall interspersed with years of near normal, normal, or more than normal precipitation. In the years from 1856–57 to 1863–64, inclusive, the average rainfall was 7.25 inches, from 1869–70 to 1872–73, inclusive, it was 5.666 inches, from 1891–92, to 1901–02, inclusive, it was 7.786 inches, and from 1922–23 to 1924–25, inclusive, it was 5.943 inches. From 1925–26 to 1942–43, inclusive, there were six years of subnormal rainfall, and seven years in which it was considerably in excess of normal, with the balance of the years slightly in excess of normal. Thus it is apparent that the district is subject to periods of rather serious drought interspersed with periods of normal or above normal rainfall which in years of excessive rainfall have produced serious floods with the wastage of water into the ocean.

Plaintiffs produced as their expert witness, Mr. Lee, who testified at great length during the trial. He estimated that during a seven year period of drought, including one year of normal rainfall, the annual average underground flow of the Tia Juana River from all sources at the International Boundary Line would be 1736 acre feet, plus a surface flow for each of two years out of seven during the non-run-off period of 218 acre feet. On the other hand Mr. Bowen, an expert called by defendant, estimated the annual average run-off of the Tia Juana River, calculated over a 53 year period, at 19,200 acre feet. Of course no figures are available showing the flow of the river for any such period, his conclusion being based on records of the flow of other streams in San Diego County. Further, the drainage area of the Tia Juana River has been greatly reduced in recent years by the construction of various dams.

Mr. Lee estimated the storage capacity of the Tia Juana River Basin in the United States at 20,620 acre feet, while Mr. Bowen estimated it at over 40,000 acre feet. Mr. Lee considered only the storage capacity of the upper 45 feet of the fill due to the difficulty of sinking wells into the large gravel and boulder formations nearer its bottom, while Mr. Bowen calculated the storage capacity down to bed rock, so the figures of the two experts are not so far apart as they might seem.

There is a station for measuring the surface flow of the river at Nestor Bridge which crosses the stream just east of the east line of the property on which defendant's wells are located and about 2-1/2 miles east from the ocean. The following is the record of the surface flow of the river, up to the time of trial, for the years in which any accurate records are available:

| Season | No. of Months with run-off | Amt. of run-off acre feet |
|---|---|---|
| 1914–15 | 5 | 121,568 |
| 1920–21 | 0 | 0 |
| 1921–22 | – | 254,600 |
| 1922–23 | 5 | 19,722 |
| 1923–24 | 2 | 417 |
| 1924–25 | 0 | 0 |
| 1925–26 | – | — |
| 1926–27 | 4 | 242,070 |
| 1927–28 | 4 | 1,346 |
| 1928–29 | 0 | 0 |
| 1929–30 | 1 | 300 |
| 1930–31 | 1 | 1,751 |
| 1931–32 | 4 | 87,386 |
| 1932–33 | 2 | 7,999 |
| 1933–34 | 0 | 0 |
| 1934–35 | 3 | 20,485 |
| 1935–36 | – | — |
| 1936–37 | 5 | 66,560 |
| 1937–38 | 3 | 48,200 |
| 1938–39 | 5 | 20,800 |
| 1939–40 | – | 3,336 |
| 1940–41 | 10 | 334,849 |

The Tia Juana River Basin starts at the Agua Caliente Narrows east of the town of Tia Juana. From that point it broadens into a valley that passes through Mexican territory, thence into the United States, and thence in a general easterly and westerly direction for about six miles, terminating at the Pacific Ocean. It is an alluvial fill from one to one and one-half miles wide. It is bounded on the south by uncultivated bench land and on the north by a mesa called Nestor Terrace which is about 25 feet above the valley floor. The valley was originally formed by erosion which was gradually filled with various materials which vary from place to place, from sand to silt and some clay, with gravel and boulders underneath. Counsel for defendant state in their brief that "There is sufficient interconnection between all of the material in the valley fill to make it one solid body of water", and the evidence indicates it to be true.

Bed rock is about 40 feet below the surface at Agua Caliente and about 90 feet at the International Boundary Line from which point it descends to 100 or more feet below the surface near the ocean. The surface of the valley fill descends from an elevation of about 50 feet sea level near the International Boundary Line to about 10 feet above sea level at roughly a mile east of the ocean.

The northerly and southerly limits of the basin are under the mesas we have mentioned although there is percolation of fresh water from the basin during periods of high water level into sands or gravel underlying Nestor Terrace, and a drainage of both fresh and salt conate waters into the basin from the sands underlying Nestor Terrace when the water level in the basin is sufficiently low. The parties to this action owning lands on Nestor Terrace bordering the basin, with one exception, were found to have obtained their water supply by means of wells from the underground percolating waters of the basin and to have rights to those waters superior to those of defendant.

The westerly boundary of the fresh water basin is largely described by evidence produced by defendant. According to that evidence the valley fill along and easterly of the shore line is more dense and less permeable than the main body of the fill. There is a fresh water barrier that rises above the level of the salt water which prevents the salt water from seeping into the fresh water basin. According to defendant this fresh water barrier is rather clearly defined although it is broken by salt water sloughs extending from the lower reaches of San Diego Bay easterly beyond the line chosen by defendant as the westerly edge of the fresh water barrier. This barrier was described by one of the counsel for defendant during the oral argument as follows: "There is a water table which exists approximately in here, five feet above sea level, that is maintained at a level five feet above, and I think it has gotten down to three feet, and that will be maintained and it has kept any possible encroachment of sea water from coming in the valley. In other words, it (sea water) cannot come in over fresh water higher than it is. There is this wall of water here for a mile or over that is over five feet above sea level and that prevents any possibility of water intrusion from the ocean except, as is argued by appellants, that there is some water coming in from the salt water slough."

Rodriguez Dam was constructed on the Tia Juana River by the Mexican Government about twelve miles upstream from the International Boundary and upstream from the junction of Cottonwood Creek with that river so that the waters impounded by the dam originate almost entirely in Mexico. It will store 110,000 or more acre feet. It was completed in 1936 and first commenced to store water in January, 1937. The only water flowing over its spillway was released during the heavy rainfall of 1940–1941.

It was constructed to furnish irrigating water for about 4000 acres of land below it which we will refer to as the Rodriguez Project. About two years after the dam began to function a return flow developed from the Rodriguez Project into the Tia Juana River. For the purpose of this opinion it will be sufficient to assume that this return flow was about 2000 acre feet annually.

Another unlooked for factor developed after the Rodriguez Dam was filled which has an important bearing on the available water supply of the Tia Juana River Basin in the United States. A serious leak developed in a rock wall of Matanuco Canyon so that considerable water escaped from the body restrained by the dam and found its way back into the Tia Juana River. While the parties do not agree as to the volume of this leakage, for the purpose of this opinion we will assume it to be 2500 acre feet annually which probably represents a minimum estimate. This leakage is continuous throughout the year.

Thus the Rodriguez Dam and the Rodriguez Project have produced a controlled supply of water to the Tia Juana River which we will assume is at least 4500 acre feet per annum. In this connection we should note that the tables of annual rainfall in San Diego show that the rainfall for the years 1939–40 to 1942–43, inclusive, were in excess of normal, with 1940–41 showing the heaviest rainfall since the season 1883–84. What the effect of a series of dry years and lowering the level of water behind the Rodriguez Dam would have on the leakage through the wall of Matanuco Canyon cannot be determined from any past experience. While at the present time this must be a matter for speculation it might not be unreasonable to expect that when the water level behind

the dam was low the water pressure against the canyon wall would be reduced so there might be less leakage.

In speaking of the leakage from Rodriguez Dam and the return flow from Rodriguez Project, the attorney general in his brief candidly admits that "A final and accurate figure on total amount is not presently available but it appears to be substantial." Defendant seems to take a similar view when it states in its reply brief, "The admitted change in the regime of the Tia Juana wrought by Rodriguez Dam occurred in 1937, and five years of experience is certainly not sufficient to permanently freeze the amount of the flow." Plaintiffs seem to agree with this statement.

There is evidence in the record on the appeal from an order refusing to modify the judgment that there was a surface flow in the Tia Juana River in the United States for a greater part of the year 1943, and that the water level in the test wells in the basin had not been materially reduced by the pumping operations of defendant and the owners of other water rights. It is also clear that the leakage from the Rodriguez Dam had continued. During that year defendant pumped and exported 1164.25 acre feet of water from the valley basin and since its operations started in 1936 had pumped and exported more than 8000 acre feet of water. From this it is forcefully argued that the finding to the effect that the net safe yield of the basin is less than that reasonably required for beneficial use by owners with rights prior and superior to those of defendant is conclusively and finally contradicted by the evidence of the valley itself which has demonstrated that the withdrawal of water by defendant during a period of seven years has injured no owner of a prior water right and has conclusively established that there is surplus water in the basin subject to appropriation and export by defendant at least up to the amount of those past withdrawals. It is also urged that the leakage from the Rodriguez Reservoir and the return flow from the Rodriguez Project provided a new and substantial source of supply of water to the Tia Juana Water Basin in the United States and that the trial court in determining the net safe yield of the portion of the Basin in the United States erred in not considering this water as a substantial addition to the source of supply.

Before considering the question of the sufficiency of the evidence to support the finding to the effect that there is no surplus water in the Basin subject to appropriation and export by defendant over and above the water put to reasonable and beneficial use by those having prior rights, we should briefly set forth the rules of law which must govern the decision of the case.

The adoption of section 3 of Article XIV of the Constitution changed some of the rules theretofore in effect governing riparian rights in California. In Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486, 491, after quoting the cited section of the Constitution, the Supreme Court said:

"The constitutional amendment, from its effective date, and as interpreted in the Gin Chow case [infra], has enjoined the doctrine of reasonable use as between the riparian owner and an appropriator. The limitations and prohibitions of the constitutional amendment now apply to every water right and every method of diversion. Epitomized, the amendment declares:

"1. The right to the use of water is limited to such water as shall be reasonably required for the beneficial use to be served.

"2. Such right does not extend to the waste of water.

"3. Such right does not extend to unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

"4. Riparian rights attach to, but to no more than so much of the flow as may be required or used consistently with this section of the Constitution.

"The foregoing mandates are plain, they are positive, and admit of no exception. They apply to the use of all water, under whatever right the use may be enjoyed." See, also, Gin S. Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5; City of Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 316, 60 P.2d 439; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 81 P.2d 533; Meridian, Ltd. v. City and County of San Francisco, 13 Cal.2d 424, 90 P.2d 537, 91 P.2d 105.

[3–5] It is now settled in California that the rights of a riparian owner or an appropriator are limited to an amount put to a reasonable and beneficial use, allowing a reasonable margin for safety, and such

reasonable and beneficial use as may be reasonably anticipated. The rights to the use of the balance of the waters is in the State and is subject to appropriation by other users under regulations adopted by the State. The purpose of the law is to prevent waste of waters and to preserve them for the beneficial use of the inhabitants of the State. The law cannot of itself destroy the vested right of use by an owner, but that right is limited to reasonable and beneficial use and cannot now extend to the waste of water. The cited cases support these rules which govern us in the decision of this case.

[6] As we have observed, the trial court found the annual safe net yield of the basin to be 6000 acre feet with an annual reasonable and beneficial use of 7000 acre feet and a future annual reasonable and beneficial use of an additional 500 acre feet. This is in almost exact accordance with the testimony of Mr. Lee which is sufficient to support the finding.

[7] Defendant makes numerous attacks on this testimony which in effect are attacks on the credibility of the witness and the weight to be given his evidence and are an endeavor to put these questions in issue here. They are questions committed to the decision of the trial judge and his conclusions on them are final on appeal even though we might entertain the belief that the weight of the evidence might lead to a contrary conclusion.

[8] It is argued that the trial judge erred in determining the quantity of water withdrawn from the basin and put to beneficial use by including within his total withdrawals, waters which were not put to any reasonable and beneficial use, the loss of which could be prevented, thus leaving a surplus in the basin for appropriation by defendant.

The river bed is sand and gravel and is not fit for cultivation. Other lands have only salt grass and brush growing upon them which in the natural course draw water from the basin in an amount which defendant estimates to be at least 3000 acre feet. It is argued that this water is wasted and is of no beneficial use; that if the water level were reduced to a depth of from ten to fifteen feet instead of being permitted to stand at about five or a few more feet below the surface of the ground it would be below the roots of the largest brush and there would be no loss of water through these sources; that defendant should be permitted to reduce the water level by its pumping operations and thus save the 3000 acre feet for its own use.

This argument overlooks the danger of the intrusion of sale water into the fresh water basin of the valley. According to defendant this is now prevented by a fresh water barrier from three to five feet above the level of the sea which barrier must be maintained to protect the fresh water in the basin from being mixed with the salt water of the ocean.

The westerly contour line appearing on the maps before us show an elevation of ten feet above sea level with the general slope of the ground descending westerly towards the sea. This contour line, generally speaking, is more than a quarter of a mile east of what defendant describes as the west end of the fresh water in the valley basin. If the fresh water level is reduced from ten to fifteen feet below the level of the ground the danger of the infiltration of salt water into the fresh water basin would become immediate. It is not questioned that once salt water has intruded into a fresh water basin it is very difficult if not impossible to leach it out. The intrusion of the salt water into the basin would render all wells affected worthless as salt water cannot be used in agriculture.

Defendant suggests that if it were permitted to lower the water level in the basin (at one point it suggests 45 feet) it would create voids in the upper strata of the basin which would be filled during the floods of wet years and thus save the amount of flood water so absorbed from wasting into the sea. Under ordinary conditions this might be an appealing argument. Under the special conditions prevailing here there is the ever present danger of the intrusion of salt water into the fresh water basin. Thus the question of providing underground storage for flood waters by substantially lowering the water level should be eliminated from serious consideration.

It is true that the trial court found "it to be untrue that the pumping by the defendant and cross-complainant has hitherto increased the saline or alkaline content of the water in any of the wells of plaintiffs or cross-defendants, or caused any of them to become brackish or unfit for use, and that it has not been established that there has been up to this time any substantial intrusion of sea water in the Tia Juana

River Basin as a result of such pumping by defendant and cross-complainant."

[9] The trial court went on to find that because of long salt sloughs protruding inland from the ocean, with fresh water springs in the bottom, there would be serious danger of salt water intrusion into the fresh water of the basin if the water level were lowered by the pumping operations of defendant, and "that the continued pumping by defendant and cross-complainant, especially during drouths would materially increase the hazard of such salt water intrusion by lowering the water table to a point where it would substantially reduce the efficiency of or totally destroy the effectiveness of the fresh water barrier normally operating to hold back said sea waters from said basin."

These findings, supported as they are by evidence, should effectively dispose of the two arguments last considered.

Also there is evidence to the effect that land west of the present fresh water barrier was at one time productive, even supporting a walnut orchard on a parcel of it. Much of this land is now so impregnated with salt that it is unproductive. While this cannot be charged to the operations of defendant it shows an encroachment of salt eastward from the ocean.

Several owners or tenants testified that their wells formerly producing usable water, produced alkaline water after defendant's pumping operations started. While, under the findings, this cannot be charged to defendant it shows the danger of salt water intrusion into the fresh water basin if the water level is sufficiently lowered.

[10] We must now turn to the contention that the finding to the effect that there is no surplus water in the basin subject to appropriation and removal from the valley is contrary to the evidence of the valley itself. In this connection it will be necessary to consider the leakage from the Rodriguez Dam and the return flow from the Rodriguez Project which the trial court refused to consider as a dependable part of the water supply of the basin in California.

In approaching this question we should first note the testimony of several property owners and tenants to the effect that after the pumps in defendant's wells had been operating the amount of water pumped from wells on the lands of the witnesses was seriously reduced so that the hours of pumping had to be extended and labor and power costs were increased thereby.

Of course it is easy to understand the reason for this lessened production in wells in the actual cone of depression caused by taking water from defendant's wells. Mr. Lee explained the phenomenon affecting wells well beyond the cone of depression. He was of the opinion that pumping from defendant's wells created a cone of depression of considerable size which reduced the water pressure for considerable added distances so that the flow towards the land owners' wells was slowed and reduced leaving a smaller supply subject to removal by their pumps.

Defendant maintains that the finding that there is no water in the basin subject to removal by defendant is contradicted by other findings and the portion of the judgment permitting it to pump and export 1100 acre feet in 1942, 1100 acre feet in 1943, and 550 acre feet in 1944, and by the further fact that since starting its operations in 1936, defendant has pumped and exported over 8000 acre feet of water from the basin without materially lowering the water level there.

The reasons impelling the trial court to permit defendant to pump and export water from the basin as well as some of the reasons why the water level of the valley had not been materially lowered by the pumping operations is set forth in the findings which may be summarized as follows:

Because of the increased population of the San Diego Bay District due to war conditions, causing need for additional water, it is desirable that defendant be given temporary permission to pump and export more water from the basin than would otherwise be permissible. Due to the unusually heavy rainfall during 1940–41, large quantities of water were stored behind Rodriguez Dam and because of seepage and return flow the basin in the United States has been recharged during that and the two succeeding years so that defendant may be permitted temporarily to pump and export water without injury to other owners of water rights. This right cannot be extended indefinitely because the surplus exists by reason of this seepage and return flow which may be intercepted by pumping or other operations in Mexico.

Further, the records before us show an annual average rainfall during the years 1936–37 to 1942–43, inclusive, (being the years in which defendant operated its

pumping plants) of 13.66 inches, while the average annual rainfall since 1850 has been 10.04 inches. Thus the average annual rainfall since July 1, 1936, has exceeded the average annual rainfall over the longer period by over one-third. This might furnish one reason why the water levels were not lowered in 1943.

[11-13] Defendant cannot base its estimated annual safe yield of the valley nor its right to pump and export water therefrom on years of heavy or above average rainfall. The history of rainfall in Southern California for 162 years shows considerable periods of serious drought broken by other periods of above average rainfall. Nature may repeat its performances of the past, and probably will, so the inequity of basing the annual safe yield of any watershed in Southern California on the supply in wet years without considering years of normal or subnormal rainfall is immediately apparent and cannot be approved. Under the circumstances disclosed here we find no inconsistency in the findings on this subject, nor any error in permitting defendant to take water from the basin to relieve the excessive demand for water which the great increase of population in the San Diego Bay district has placed on all water supplies. If the above average rainfall of the past few years has produced a surplus of water in the Tia Juana River Basin, as the evidence indicates and the trial court found, it was common justice to permit defendant to pump and export that surplus to supply the very considerable demand placed upon it by war conditions. It does not follow that the above average rainfall will continue indefinitely nor that the net safe yield of the Basin may be determined from the water available during those years. Riparian owners and prior appropriators are entitled to the water which they put to reasonable and beneficial use in dry as well as wet years, if that supply is available, and in years of deficient supply the right may not be invaded by another having a subordinate right.

We must now consider the question of the regulated supply of water resulting from seepage from the Rodriguez Dam and the return water from the Rodriguez Project which we assume was about 4500 acre feet per annum.

The trial court refused to consider this water as a safe, established and dependable source of supply in replenishing the portion of the Basin in the United States for two reasons.

First, it was held that the construction in Mexico was of such recent origin that the annual future yield could not be safely estimated and therefore furnished no safe basis for a judgment which would permit the future removal from the basin of water finding its origin in that source. This is probably true and is supported by the evidence and by the admissions already quoted from the briefs of defendant and of the attorney general who is supporting some of the arguments of defendant. This may be true as to past performances but it also furnishes an argument for the trial court's retaining jurisdiction over the case with the right to determine available water supply and to modify its findings and judgment if and when it could be made to appear that the leakage from the Rodriguez Dam and the return waters from the Rodriguez Project, or either of them, were sufficiently dependable and determined to furnish a reasonably definite supply of water to the portion of the Basin in the United States. We will return to this subject when we reach the question of the advisability of modifying the judgment so that the trial court will retain jurisdiction over the case.

[14, 15] Second, the trial court refused to consider the leakage from the Rodriguez Dam and the return flow from the Rodriguez Project as a legal and dependable source of supply of water to the portion of the Basin in the United States, because, before crossing the International Boundary Line those waters were entirely within the Republic of Mexico which, in the absence of a treaty, could reclaim them or prevent their entry into this country. The city attorney of San Diego informs us that a treaty bearing on this question has been negotiated but not ratified so we must assume the truth of the facts on which this conclusion is based, for it is true that no citizen of the United States, either by use, prescription or otherwise could gain any rights under which he could compel the Republic of Mexico to release any of this water into the United States in the absence of a treaty on the subject.

If this argument is sound it would apply to all the water in the Tia Juana River and its tributaries entering the United States as those waters flow entirely in Mexico for several miles before crossing the International Boundary Line and thus are subject

to interruption and appropriation in their entirety by Mexico or her citizens. Thus if the conclusions of the trial court are sound, to the effect that waters which escape from Rodriguez Dam and the return flow from the Rodriguez Project cannot be considered a legal and dependable source of supply to the portion of the Basin in the United States because they may be recaptured or their flow interrupted in Mexico, then there is practically no legal and dependable supply of water upon which any of the parties before us may rely because all of the water of the Tia Juana River upstream from the International Boundary Line could be taken in Mexico which might prevent any of those waters from crossing the International Boundary Line.

Plaintiffs seek to support the conclusions of the trial court to the effect that the leakage from Rodriguez Dam and the return flow from Rodriguez Project could not be considered in determining the annual safe yield of the valley because those waters were merely waste waters. Defendant adds the term "foreign waters" to its designation of those waters.

Plaintiffs rely on Albaugh v. Mt. Shasta Power Corp., 9 Cal.2d 751, 73 P.2d 217, to support their argument. This case decided several actions which finally resolved themselves into suits for damages by plaintiffs for diminution of the supply of water to their lands riparian to the Pitville Pool. Involved in the question of the supply of the Pool was water from the McArthur Canal and the Knoch Pipe Line, certain rights to which were based on prescription. As no riparian owner had gained any such legal right to the use of any of such waters the court concluded that the water from those sources could not be considered because they could be interrupted or taken away at any time.

We do not regard the Albaugh case as controlling here. That was an action for damages to plaintiffs' lands caused by diversion of waters. As plaintiffs had no riparian nor appropriative rights in the waters of the McArthur canal or the Knoch pipe line no property right of any of them could have been invaded by the interruption of their flow.

We do not regard the terms "waste waters" or "foreign waters" an appropriate designation for the waters escaping from the Rodriguez Dam or returning from the Rodriguez Project. Such waters are and always have been part of the waters of the Tia Juana River. It is true that their natural flow down that river has been interrupted by the dam but they return to the river and proceed to flow towards the ocean either in the surface channel or through a well defined underground channel partly in Mexico and partly in the United States. To hold that those waters, after they enter the United States, are not subject to the laws of California would be as illogical and destructive of established rights as would a similar holding as to waters of streams and rivers within the State which are released after such flow has been interrupted by dams constructed on them.

[16] What was said in Crane v. Stevinson, 5 Cal.2d 387, 54 P.2d 1100, 1104, concerning foreign waters is applicable here: "* * * there should remain no present doubt that the so-called foreign waters are now subject to appropriation under the laws of this state. The fact that, where such waters have been brought into a stream as the result of abandonment by another appropriator, there is no way to compel him to continue such abandonment, necessarily affects the value of the subsequent appropriation right, but does not affect the existence of the right, subject to the limitation caused by the nature of the water supply in question. In section 11 of the Water Commission Act it is provided that all waters flowing in any river, stream, canyon, ravine, or other natural channel (with stated exceptions) 'is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act.'" Sec. 11, Water Commission Act, Stats.1913, p. 1012, as amended, superseded by secs. 1200, 1201, Water Code, Stats.1943, p. 1604. See, also, Bloss v. Rahilly, 16 Cal.2d 70, 104 P.2d 1049.

[17, 18] Of course at the time of the decision of this case the leakage from the Rodriguez Dam and the return flow from Rodriguez Project were of too recent origin to be considered as a fixed and dependable source of water supply to the portion of the basin in the United States to enable the trial court to base its injunctive relief on that source of supply. Time will remedy this situation and when it does any modification of the judgment in this case should include and be based on a consideration of that source of supply to the water of the Tia Juana River and its underground basin in the United States. The

fact that this source of supply might be interrupted in Mexico at some future date should not prevent its consideration any more than the further fact that the entire surface and underground flow of the river might be cut off in Mexico. This is a strong reason why the trial court should have retained jurisdiction over the case. The purpose of the law as it now exists is to prevent the waste of water, and evidence produced at the hearing of the motion to modify the judgment at least suggests that such waste may be occurring and that further investigation might show there may be surplus water from Rodriguez Dam and Rodriguez Project finding its way into the basin in the United States so that it might prove true there will be some water to at least partially supply some of the needs of defendant. This is a matter for future determination and any further discussion of it here would partake of speculation on future events.

[19-22] Defendant maintains that the trial court erred in granting an injunction without finding present actual damage to riparian owners and prior appropriators from pumping operations of defendant.

It is not necessary for the party threatened with damage to wait until his property has been injured or destroyed before he seeks the protection of equity. A prohibitory injunction will issue to prevent threatened damage and a mandatory injunction to remove the cause where damage has been done. Island Rec. Dist. No. 776 v. Floribel Alfalfa Syndicate, 167 Cal. 467, 140 P. 4; Allen v. Stowell, 145 Cal. 666, 79 P. 371, 68 L.R.A. 223, 104 Am.St. Rep. 80; Eames v. Philpot, 72 Cal.App. 151, 236 P. 373; Harlow v. Feder, 89 Cal. App. 435, 264 P. 782. Here the trial court found threatened damage and there is ample evidence to support the finding so the power of the trial court to issue the prohibitory injunction must be sustained on appeal.

It is contended that the trial court erred in not differentiating between various classes of the plaintiffs and cross-defendants who appeared, and in issuing an injunction in favor of all of them as it is maintained that some of them cannot be injured by the pumping operations. Defendant divides these owners into several groups.

It seems to be conceded by all parties that the underground basin is so interconnected that it forms a lake of water lying in sand and gravel and that there is a continuous movement of the water towards the ocean.

The danger of the intrusion of salt water into the basin and the consequent damage to land owners has been considered. Just how far east of the present fresh water barrier the salt water might percolate if the water table is seriously reduced is not made clear. However the contour maps show the elevation of the surface of the ground above sea level and the evidence shows the depth of the bed rock below the surface which might indicate that salt water would intrude into the basin for some distance east of defendant's pumping plant if the water level is sufficiently lowered. It is an established fact that the bed rock at the International Boundary is a number of feet below sea level. This intrusion of sea water is a threatened danger, especially during periods of drought, admitted by witnesses for defendant as well as those of plaintiffs.

Defendant points out that there are certain clay deposits in the valley fill which are not water bearing and that the lands of some of the parties lie over and west of the fresh water barrier and that there is no usable water west of that line.

[23, 24] There is no certainty that the fresh water barrier exists on the exact line marked on the exhibits of defendant. In fact the trial court expressed doubt on this subject and did not find its exact location. All of the lands overlying the valley fill are riparian and as such are entitled to the use of water. We do not know of any rule of law that requires a riparian owner to obtain his water from the supply exactly underlying each part of his holdings. There is evidence indicating that some of the land lying west of the line claimed by defendant to be the line of the fresh water barrier was cultivated and was producing crops irrigated with fresh water coming from the valley fill, at the time of the trial. Those riparian owners have the same right to the protection of their water supply as have the other riparian owners of land overlying the fresh water basin. The same is true of owners of land overlying the clay deposits. There is no showing that all of the land of any owner is over a clay deposit. That land is capable of cultivation and is entitled to its rightful share of the waters of the basin. This is also true of the lands on Nestor Terrace.

[25] Defendant contends that those riparian or prior appropriative owners in the east end of the valley could not be injured by the pumping operations of defendant and therefore were not entitled to injunctive relief.

The trial court found on sufficient evidence that the net safe yield of the valley was 1000 acre feet less than the reasonable and beneficial needs of the riparian and prior appropriative owners and 1500 acre feet less than their prospective reasonable and beneficial needs which should be a sufficient answer to this argument. As the water in the basin has the characteristics of an underground lake, pumping by defendant of water for export would increase the deficit and thereby lessen the available supply of all land owners. Further, Mr. Lee testified that the pumping operations of defendant created what he termed "pressure shock", that is a lessening of the water pressure in the valley fill far beyond the actual cone of depression. This reduction in pressure reduced the amount of water which could be pumped from other wells and interfered with the land owners' water supply.

[26, 27] Defendant contends there was serious error in enjoining its pumping operations when many riparian owners were not parties to the action when the judgment was signed and entered.

It is true that those owners are not bound by the judgment. Further, the judgment does not specifically run in their favor but only inferentially in determining the net safe yield of the valley and the reasonable and beneficial needs of the owners, present and prospective.

By its cross-complaint defendant sought to have determined that there was a surplus of water in the valley, subject to its appropriative rights, over and above the present and prospective reasonable and beneficial use of all of those having rights prior to the rights of defendant. As the waters in the valley had the characteristics of a lake we cannot see how this question could have been settled without a determination of the reasonable and beneficial needs of all the owners of water rights superior to those of defendant. We find no error in this phase of the case as the issue was raised by the pleadings of the defendant.

Defendant points out that there is an error in the description of the lands of cross-defendants Henry B. Clark and Lena S. Clark. This is true and we will correct it.

[28] Defendant contends that the City of San Diego is estopped from contesting defendant's claim by a resolution of its governing body approving a contract settling a controversy with defendant's predecessor, in which resolution the following appears: "California Water & Telephone Company will endeavor to develop an additional and independent supply of water to lessen the burden now resting on the City."

We can see nothing in the foregoing upon which estoppel in this action can be based. There is no representation, express or implied, that the city would not object to defendant taking water from the Tia Juana River Basin to which it was not entitled and to the damage of the City of San Diego and other owners.

One position taken by the City of San Diego in its brief is unusual to say the least and may represent a complete change of the position taken in its pleadings and during the trial which resulted in a judgment in its favor. Some explanation of this may be found in the fact that there has been a change in the legal staff of the city.

It is stated in its brief that San Diego is interested in constructing a dam across Cottonwood Creek at the Marron Damsite where the creek crosses the International Boundary Line; that a treaty between the United States and Mexico has been signed, but not ratified, authorizing "investigation looking to the construction by the City of San Diego and the Republic of Mexico of the Marron Dam and the impounding and storage of water in a reservoir behind such dam." The present position of the City of San Diego is thus expressed by her counsel: "However, we do sincerely believe that we are justified in making the claim that, if this Judgment is res judicata and forecloses the City from asserting or exercising its right to impound and use for public purposes the waters of the Tia Juana River and its tributaries above the Marron Damsite, public policy and the public interest of the hundreds of thousands of people residing in this area of the State demands some action on the part of the Appellate Court which will enable the City

to utilize these waters for public purposes. If, on the other hand, the Judgment is not res judicata as to the City's rights to develop and utilize the waters of this river and its tributaries above the Marron Damsite, we respectfully ask this Court to affirm the Judgment of the lower Court."

The construction of the Marron Dam, as far as we are advised, was only mentioned incidentally in this action. Certainly its construction and impounding of waters behind it was not an issue presented to or decided by the trial court. Thus we have no facts before us upon which to base an answer to the question presented. However, it might not be out of place to mention in passing that the City of San Diego, the plaintiffs and the other cross-defendants were not adverse parties in this action (Hardy v. Rosenthal, 2 Cal.App.2d 442, 38 P.2d 412) and that the right to construct the Marron Dam and to store water behind it was not litigated between them.

[29] Defendant presented a physical solution of the problems presented in this action which the trial court considered but did not adopt. The trial court proposed its own physical solution which it did not adopt because of the considerable delay incident to putting it into effect. The one it proposed was unified control and distribution of the available waters of the basin through the means of some entity such as a district or corporation organized for that purpose which, it was believed, would conserve sufficient water to permit defendant to export part of it for use by its customers.

It is now urged that it was the duty of the trial court to adopt and enforce some physical solution; that if one were not found it then became its further duty to refer the whole matter to the Division of Water Resources for solution; that it was a breach of judicial discretion to fail to so refer the question.

In City of Lodi v. East Bay Municipal Utility District, 7 Cal.2d 316, at page 339 et seq., 60 P.2d 439, at page 449, the court said: "The question is, Can the right of the city be fully protected without requiring the tremendous releases entailed in this decree? Those releases, after they serve the purpose of forcing a relatively small quantity of water into the surrounding underground water table, for the most part, waste into the sea. Under such circumstances, the 1928 constitutional amendment, as applied by this court in the cases cited, compels the trial court, before issuing a decree entailing such waste of water, to ascertain whether there exists a physical solution of the problem presented that will avoid the waste, and that will at the same time not unreasonably and adversely affect the prior propriator's vested property right. * * * The court possesses the power to enforce such solution regardless of whether the parties agree. If the trial court desires competent expert evidence on this or any other problem connected with the case, it possesses the power to refer the matter to the division of water rights of the board of public works, or to appoint it as an expert. (Citing cases.)"

Plaintiffs maintain that the trial court did actually decree and put into effect a physical solution, which was to permit plaintiffs and cross-defendants to pump and use the water from the underground basin that was necessary for their reasonable and beneficial use and to permit defendant to take and export the surface flow of the river that otherwise would waste into the sea. This is perhaps a physical solution of a temporary nature, it clearly appearing that the trial court believed that unified control was the only practical physical solution. This practical physical solution was not ordered put into effect because of the impossibility of obtaining necessary materials due to war conditions and the considerable delay incident upon organizing an entity to put unified control into effect and to gather into it all of the respective water rights involved. That this may present a workable physical solution may be possible. At least the trial judge so believed. These conditions furnish an added reason why the trial court should have retained jurisdiction over the case so that some physical solution could have been worked out at an appropriate time. It is clear that the trial court regarded the physical solution proposed by defendant too cumbersome, involved and unsatisfactory to adopt it.

[30] The law does not place a positive duty on the trial court to refer a problem, such as the one before us, to the Division of Water Resources for solution or advice. The matter of such reference is one of discretion. Sec. 24, Water Commission Act, Stats. 1913, p. 1012, as amended, superseded by sec. 2000 et seq., Water Code; Peabody v. City of Vallejo, supra; Tulare

Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972; Rancho Santa Margarita v. Vail, supra; Fleming v. Bennett, 18 Cal.2d 518, 116 P.2d 442. Under the facts before us we cannot regard the failure to refer the matter to the Division of Water Resources as reversible error.

[31] The question of the interpretation to be placed on the decree was stressed on the motion for new trial. Defendant maintained that the decree permitted it to take only such part of the surface flow of the stream as would otherwise waste into the sea and in doing this it could not operate the pumps in its wells as they would draw upon the underground waters of the basin. A careful study of the decree indicates that this is not an unreasonable construction to place upon it.

That the trial judge did not intend any such result is made clear by the following remarks in denying the motion for new trial: "The next and fourth point is that it is claimed that the judgment is too strictly worded. * * * I don't believe that the language as it now stands would forbid pumping from underneath the surface when the surface stream was running into the ocean and so far surrounded and over-run the cone of depression as to practically instantly fill the areas which the pump should void, and thus leave no substantial cone of depression at all. The inhibition obviously is intended to prohibit such pumping from the underground basin as shall result in leaving voids there. The mere mechanical use of the pumps to get water from beneath the ground at such times as no voids would result would hardly be an infringement of the language of the Court."

At the hearing of the motion for new trial one of the counsel for plaintiffs made the following statement: "All I think the judgment should provide is that they should only be allowed to pump at such times as the water is wasting into the sea. If that condition prevails and there is a wastage into the sea, it is immaterial to us whether they take water from underground or from a pipe from the surface flow."

In order to remove any doubt on the question and carry out the expressed intention of the court we will add a paragraph to the judgment permitting defendant to pump water from its wells when the surface waters of the Tia Juana River are flowing by the pumping plant and, without the operation of the pumps, would waste into the sea.

[32] We have already expressed the opinion that the trial court should have retained jurisdiction over this case, especially in view of the possibility of the leakage from the Rodriguez Dam and the return flow from Rodriguez Project providing such an added dependable supply of water, that the net safe yield of the Basin might be so increased as to create a surplus of water beyond the present and prospective reasonable and beneficial needs of the land owners so that defendant might be able to pump and export part of it. We are of the opinion that if and when the amount of water from this source may be reasonably determined it should be taken into consideration in determining the net safe yield of the valley. However, these conclusions do not require a reversal of the judgment but merely its modification. Under the decision of the case of City of Lodi v. East Bay Municipal Utility District, supra, we believe we should modify the judgment so that the trial court would retain jurisdiction over the case.

Some of the facts in the City of Lodi case are somewhat similar to those of the instant case. The city of Lodi obtained its municipal water from wells which penetrated sands which were fed from waters percolating from the Mokelumne River. The East Bay Municipal Utility District had constructed a dam on the river upstream from Lodi and was transporting water so stored to the East San Francisco Bay District. The city of Lodi was situated in what is called the Lodi Basin comprising about 34,000 acres. About 2000 wells penetrated sands fed by waters from the Mokelumne River to supply water to lands owned by various persons. The trial court refused to retain jurisdiction over the case and required the district to release large and fixed quantities of water down the river to replenish the sands of the Lodi Basin.

[33] On one phase of the case the Supreme Court said: "The District may find it necessary to condemn or otherwise acquire the water rights of the private riparian and overlying owners in this area. But, if the District should so acquire every private water right in the area, it would still be compelled under the decree to release the tremendous quantities of water above mentioned to protect the plaintiff's

prior right." This is equally true in the instant case. If the defendant should acquire the riparian rights of a majority of the land owners the present decree would prohibit it from pumping and exporting any of the underground waters even though it was willing to supply the remaining land owners with water sufficient for their needs.

In the City of Lodi case, in speaking of the duty of the trial court to retain jurisdiction so the decree might be modified to fit any new condition that might arise, the Supreme Court said: "The trial court should by its judgment preserve its continuing jurisdiction to change or modify its orders and decree as occasion may require. * * * It would accord to the District the right, and place upon it the duty, of working out a physical solution unhampered by a rigid decree which, with changing conditions and new methods of conservation constantly being developed, may not only operate inequitably but might actually encourage waste."

The City of Lodi case differs from the instant case in one important particular. In that case there was no danger of salt water intrusion resulting from lowering the water level in the Lodi Basin. Thus what was said in the Lodi case about lowering the water table in the Lodi Basin is not applicable here.

It is ordered: That the following be and is hereby stricken from finding XVI (xx): "All that portion of the West Half (½) of the Northeast Quarter (¼) of Section Five (5), Township Nineteen (19) South, Range Two (2) West, S.B.M., described as follows:" And in lieu thereof insert the following: "All that portion of the West Half (½) of the Northwest Quarter (¼) of Section Five (5), Township Nineteen (19) South, Range Two (2) West, S.B.M., described as follows:"

That the following paragraph, to be numbered VII–A, be and is hereby added to the judgment: "Defendant and cross-complainant, California Water & Telephone Company may operate its pumping plants and pump water from its wells on its land in the Tia Juana Valley and export that water for use by its customers when surface river waters are flowing in the bed of the Tia Juana River and which surface waters, if not intercepted by such pumping operations, would waste into the Pacific Ocean or into San Diego Bay."

That paragraph VIII be and is hereby stricken from the judgment and in lieu thereof the following is substituted: "That the Court hereby reserves jurisdiction in this action over the parties and the subject matter so that on application of any party hereto or the successor in interest of any party, it may take new evidence (1) on the amount of water seeping or released from the Rodriguez Dam and the amount of the return waters from the Rodriguez Project reaching and crossing the International Boundary Line between the Republic of Mexico and the United States of America either in the underground sands and gravels or by the surface flow of the Tia Juana River, and (2) on the subject of the water supply and reasonable and beneficial use of water in the portion of the Tia Juana River Basin in the United States indicating any condition of such water supply or use which have changed since the date of this judgment with the right to make modified or additional findings of fact and conclusions which may be supported by such evidence and to modify this judgment in accordance therewith under the law in force at that time."

As so modified, the judgment is affirmed.

No party will recover any costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.




**ALLEN et al. v. CALIFORNIA WATER & TELEPHONE CO. ***

**Civ. 3337.**

District Court of Appeal, Fourth District, California.

April 6, 1945.

Rehearing Denied April 25, 1945.

Hearing Granted May 31, 1945.

**Appeal and error ⇐790(3)**

Where all issues presented by appeal from order denying motion to modify prior judgment in the action had been decided on appeal from the judgment, such issues were moot and would not be decided on appeal from the order and appeal was therefore dismissed.

* Subsequent opinion 176 P.2d 24.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Marvin L. Allen and others against the California Water & Telephone Company to enjoin defendant from pumping and transporting from watershed underground waters of certain river basin, and for other relief, wherein defendant filed a cross-complaint. From an order denying a motion to modify the judgment in the action, defendant and cross-complainant appeals.

Appeal dismissed.

Philip Storer Thacher, of San Diego, and Bacigalupi, Elkus & Salinger, of San Francisco, for appellant.

Phil D. Swing and Charles C. Crouch, both of San Diego, for respondents other than San Diego.

J. F. DuPaul, City Atty., and Shelley J. Higgins, Sp. Atty., for City of San Diego, both of San Diego, for respondent City of San Diego.

MARKS, Justice.

This is an appeal from an order made after the entry of a judgment dated December 1, 1942, which order denied a motion to modify the judgment by striking therefrom the paragraphs under which defendant was restrained from pumping water from the underground basin of the Tia Juana River in the United States, and also to modify the judgment so that the trial court would retain jurisdiction with the right to modify the judgment at any time before it becomes final.

By an opinion filed this day, Cal.App., 157 P.2d 663, we have decided the appeal from the judgment. That opinion contains a full statement of facts which need not be repeated here.

The portion of the judgment restraining the defendant's pumping operations was properly presented and has been decided on the appeal from the judgment, and we have modified the judgment so that the trial court will retain jurisdiction over the case. All issues presented here have been decided in the appeal from the judgment so they have become moot and need not be decided again.

The appeal from the order is dismissed.

BARNARD, P. J., and GRIFFIN, J., concur.

26 Cal.2d 173

**GRIMM v. GRIMM et al.**

**L. A. 18998.**

Supreme Court of California.

March 27, 1945.

Rehearing Denied April 23, 1945.

**1. Husband and wife ⇐249**

A life insurance policy, for which all premiums were paid with community funds of insured and his wife, named as beneficiary, was "community property" at time of spouses' property settlement agreement providing for division of community property.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

**2. Husband and wife ⇐265, 273(1)**

Though life insurance policy, naming insured's wife as beneficiary, provides that insured may change beneficiary without wife's consent, such a change, without her consent and without valuable consideration, is voidable, and she may maintain action for her community share of proceeds of policy after insured's death.

**3. Husband and wife ⇐266, 273(1)**

Where wife, named as beneficiary in husband's life insurance policy, releases her community interest in policy and husband revokes such designation of beneficiary, wife has no right to proceeds of policy on husband's death, but where he fails to revoke designation, wife is entitled to such proceeds, in absence of agreement between spouses that no rights shall accrue to wife even if she remains beneficiary at time of husband's death.

**4. Insurance ⇐586**

The interest of life insurance policy beneficiary, designated by insured having right to change beneficiary, is mere expectancy of gift at time of insured's death.

**5. Assignments ⇐8**

An assignment or release of expectancy becomes enforceable in equity when expectancy develops into a right.

**6. Assignments ⇐31**

A contract constitutes equitable assignment or renunciation of expectancy only if it so provides expressly or by necessary implication.

**7. Husband and wife ⇐279(1)**

Courts weigh carefully language of spouses' property settlement agreements before concluding that they eliminate rights disavowal of which is not necessarily connected with purpose of agreements.

**8. Husband and wife ⇐279(1)**

General expressions or clauses in spouses' property settlement agreements may not be construed as including assignment or renunciation of expectancy, as of gift of proceeds of life insurance policy on insured's death to his wife named as beneficiary.

**9. Husband and wife ⇐266**

A wife, named as beneficiary in husband's life insurance policy or will, retains such status after execution of spouses' property settlement agreement, unless it clearly appears from such agreement that it was intended to deprive wife of right to take husband's property under will or policy, as well as to segregate spouses' property.

**10. Insurance ⇐587**
**Wills ⇐717**

Expectancies under will or insurance policy are regarded as waived by contract only when it appears that parties' attention was directed to such expectancies and their intention to disclaim future rights which may develop from such expectancies is made clear in contract.

**11. Husband and wife ⇐265**
**Wills ⇐77**

A husband's failure to revoke his will or change beneficiary of his life insurance policy, naming his wife as beneficiary, amounts to confirmation of will or wife's designation in policy as beneficiary.

**12. Insurance ⇐146(1)**
**Wills ⇐481**

A decedent's will and insurance policy must be read as expressing his intentions at time of his death.

**13. Husband and wife ⇐266**

Under spouses' property settlement agreement, providing that husband should have right to change beneficiary of his life insurance policy naming wife as beneficiary, that she would execute any instrument necessary to accomplish such change, and that she transferred, released and relinquished to husband all interest in policy

and avails thereof, wife did not relinquish right to proceeds of such policy after husband's death without having changed beneficiary.

SCHAUER and CARTER, JJ., dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Clara Grimm against Walter E. Grimm and others, as administrators of the estate of Lewis Grimm, deceased, for declaration of plaintiff's rights as beneficiary under an insurance policy on decedent's life. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 150 P.2d 553.

John J. Craig and Rush M. Blodget, both of Los Angeles, for appellants.

Stephen Monteleone, of Los Angeles, for respondent.

TRAYNOR, Justice.

In January, 1941, plaintiff and Lewis Grimm were divorced. In December, 1939, they entered into a property settlement agreement that provided for a division of their community property, which included an insurance policy on the life of the husband, issued in 1930 and naming the wife as beneficiary. The agreement made this policy the separate property of the husband and gave him the right to change the beneficiary. He died in April, 1943, without having made such a change. He had not remarried, and he left no issue. After his death, plaintiff claimed the proceeds of the insurance policy as the beneficiary thereof and brought this action for a declaration of her rights. The insurance company under stipulation paid the money due on the policy into court and was dismissed from the action. The trial court entered judgment for plaintiff, and defendants, the administrators of Lewis Grimm's estate, appeal. Defendants contend that the estate is entitled to the proceeds on the ground that the agreement between the spouses terminated all rights of plaintiff with respect to the policy, including the right to receive the insurance money as the beneficiary thereof.

[1] All premiums were paid with community funds and the policy was therefore community property at the time of the property settlement agreement. Travelers' Ins. Co. v. Fancher, 219 Cal. 351, 356, 26 P.2d 482; Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 99, 243 P. 431; New York Life Ins. Co. v. Bank of Italy, 60 Cal.App. 602, 606, 214 P. 61; Jenkins v. Jenkins, 112 Cal.App. 402, 409, 297 P. 56.

[2, 3] It is settled that even though the insurance contract may provide that the insured husband has the right to change the beneficiary without the wife's consent where she is named as such, any change of beneficiary without her consent and without a valuable consideration is voidable, and after the death of the husband the wife may maintain an action for her community share in the proceeds of the policy. Mazman v. Brown, 12 Cal.App.2d 272, 275, 55 P.2d 539; Travelers' Ins. Co. v. Fancher, supra, 219 Cal. page 356, 26 P.2d 482; Dixon Lumber Co. v. Peacock, 217 Cal. 415, 418, 19 P.2d 233; Blethen v. Pacific Mut. Life Ins. Co., supra, 198 Cal. page 101, 243 P. 431; see 3 Cal.Jur. 10-Yr.Supp. 622; 114 A.L.R. 545, 554. A wife, however, can release this community interest in the insurance policy and still be a beneficiary thereof. If she executes such a release and the husband revokes his designation of her as beneficiary she has no right to the insurance proceeds upon his death; but if he fails to revoke his designation of her as beneficiary, she is entitled, like any other beneficiary, to the proceeds of the policy at the time of his death. She would not be entitled to such proceeds, however, if the parties agreed that no rights were to accrue to her, even though she remained the beneficiary at the time of the husband's death. It remains to be determined, therefore, whether the spouses in the present case agreed, not only that the policy should become the separate property of the husband, but that no rights should accrue to plaintiff even though she remained the beneficiary at the time of the husband's death.

[4, 5] The interest of a beneficiary designated by an insured who has the right to change the beneficiary is, like that of a legatee under a will, a mere expectancy of a gift at the time of the insured's death. Page v. Washington Mutual Life Ass'n, 20 Cal.2d 234, 242, 125 P.2d 20; Cook v. Cook, 17 Cal.2d 639, 644, 111 P.2d 322; Blethen v. Pacific Mut. Life Ins. Co., 198 Cal. 91, 98, 243 P. 431; Mahony v. Crocker, 58 Cal.App.2d 196, 202, 136 P.2d 810; Mutual

Life Ins. Co. v. Franck, 9 Cal.App.2d 528, 537, 50 P.2d 480; Hack v. Metz, 173 S.C. 413, 176 S.E. 314, 95 A.L.R. 196; see 14 Cal.Jur. 583; 29 Am.Jur., Insurance, § 1276, p. 952. An assignment or release of an expectancy becomes enforceable in equity when the expectancy has developed into a right. Bennett v. Forrest, 24 Cal.2d 485, 492, 150 P.2d 416; Estate of Crane, 6 Cal.2d 218, 57 P.2d 476, 104 A.L.R. 1101; Anglo California Nat. Bank v. Kidd, 58 Cal.App.2d 651, 655, 137 P.2d 460; Bridge v. Kedon, 163 Cal. 493, 500, 126 P. 149, 43 L.R.A.,N.S., 404; Estate of Edelman, 148 Cal. 233, 238, 82 P. 962, 113 Am.St. Rep. 231; Estate of Garcelon, 104 Cal. 570, 584, 38 P. 414, 43 Am.St.Rep. 134, 32 L.R.A. 595; see 17 A.L.R. 597; 44 A.L.R. 1465; 121 A.L.R. 450; 3 Cal.Jur. 251; 9 Cal.Jur. 478; 4 Am.Jur., Assignments, § 51, p. 270.

[6-12] It is settled, however, that a contract constitutes an equitable assignment or renunciation of an expectancy only if it expressly or by necessary implication so provides. Estate of Jones, 118 Cal. 499, 502, 50 P. 766, 62 Am.St.Rep. 251; see 4 Pomeroy, Equity Jurisprudence, § 1290. In interpreting property settlement agreements courts weigh carefully the language of the agreements before concluding that they eliminate rights the disavowal of which is not necessarily connected with the purpose of such agreements. Estate of McNutt, 36 Cal.App.2d 542, 549, 98 P.2d 253; Girard v. Girard, 29 N.M. 189, 221 P. 801, 35 A.L.R. 1493. This court and other courts have therefore applied to property settlement agreements the rule that general expressions or clauses in such agreements are not to be construed as including an assignment or renunciation of expectancies and that a beneficiary therefore retains his status under an insurance policy or under a will if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take property under a will or an insurance contract of the other. Sandrosky v. Prudential Ins. Co., 217 Cal. 578, 20 P.2d 325; Jenkins v. Jenkins, 112 Cal.App. 402, 407, 297 P. 56; Estate of Crane, supra, 6 Cal.2d page 221, 57 P.2d 476, 104 A.L.R. 1101; Merchants' Nat. Bank v. Hubbard, 220 Ala. 372, 125 So. 335; Equitable Life Assur. Soc. v. Stilley, 271 Ill.App. 283; see Girard v. Girard, 29 N.M. 189, 221 P. 801, 35 A.L.R. 1493; In re Swords, 120 Misc. 427, 199 N.Y.S. 672, affirmed 208 App.Div. 852, 204 N.Y.S. 952; In re Brown's Will, 153 Misc. 282, 274 N.Y.S. 924, 931; In re Griffith's Will, 167 Misc. 366, 3 N.Y.S.2d 925, 927; Weir v. King, Tex.Civ.App., 166 S.W.2d 187; Lindey, Separation Agreements, p. 283. In Estate of Crane, supra, this court set forth the considerations that commend the rule that expectancies under a will or an insurance policy are regarded as waived only when it appears that the attention of the parties was directed to such expectancies and their intention to disclaim future rights that might develop from such expectancies was made clear in the contract. Since the husband has the power to revoke his will or to change the beneficiary named in an insurance policy his failure to do so ordinarily indicates that he did not wish to effect a change so that in effect his failure to act amounts to a confirmation of the will or the designation of the wife in the insurance policy. Both instruments are to be read as expressing the decedent's intentions at the time of his death. As was said in Estate of Crane, supra, 6 Cal.2d at page 221, 57 P.2d at page 478, 107 A.L.R. 1101: "It is to be remembered that although the will in which the legacy is contained had been executed prior to the date of the contract, the testator lived more than two years thereafter. And a will speaks from and as of the date of the testator's death. If the testator had not executed this will until after the date of the property settlement agreement, it would not be reasonable to say that he was without right to make such subsequent will and thereby give additional property to his wife. But in substance and effect he did the same thing by leaving his will unchanged after the date of said contract." Moreover, while a property settlement agreement provides for what the husband is conceding to his wife as a matter of right, frequently he is willing to grant more to her as a matter of bounty, for as recognized in Estate of Crane, supra, 6 Cal.2d at page 221, 57 P.2d 476, 104 A.L.R. 1101, the affection of spouses for each other may survive separation agreements and divorce proceedings.

[13] The property settlement agreement in the present case provided: "The parties hereto do mutually covenant and agree that this agreement is intended and shall be construed as, and the same shall be, a complete property settlement between the

parties hereto, and that it comprises, settles and discharges all claims arising or existing, or which may hereafter arise by reason of the marriage of the parties hereto, and that second party accepts the provision herein made for her in full satisfaction of her right to support and maintenance." This clause sets forth two conditions of the property settlement agreement: the wife relinquishes her rights in all the property that was or by virtue of the agreement became separate property of the husband, and either spouse discharges all claims then existing or in the future arising as a result of the marital relationship of the parties. Plaintiff bases her claim to the insurance proceeds on a contract made by the husband in her favor while they were married and left in effect by him after the property settlement agreement and the divorce. She makes no claim arising out of the former marital relationship, nor does she assert a right contrary to her general waiver of all rights in the separate property of the husband.

The property settlement agreement setting forth the community property described the insurance policy as one in which the wife was named as beneficiary. As to the property that was to be separate property of the husband, the agreement (designating the husband as first party and the wife as second party) provided: "All funds and property of every nature described or referred to in said Exhibit A, other than the property hereinabove provided to be paid or conveyed to second party, and all property hereinabove referred to as now being the separate property of the first party hereto, together with all property of any nature hereafter possessed or acquired by first party shall be and remain the sole and separate property of said first party, and second party hereby conveys, relinquishes and releases to first party all right, title, interest and claim which she has or might have therein or thereto. Said first party shall have the right to change the beneficiary of the life insurance policy, described in Article VIII of said Exhibit (A), and second party agrees to execute upon request any instrument necessary or convenient to accomplish such change, and second party hereby transfers, releases and relinquishes to first party all interest in and to said policy of insurance and the premiums paid thereunder and the avails thereof." Under this provision the insurance policy was like any other community property that was to become separate property of the husband. There was no indication that anything else was intended with respect to the policy. The express reference in the agreement to the right of the husband to change the beneficiary indicates that there was no immediate change and that the wife would remain the beneficiary of the policy unless the husband exercised his right to change the beneficiary. It was for the husband to decide whether he wished his wife or someone else to get the proceeds of the policy. If the decedent intended that plaintiff, who was his wife for more than thirty years, should have the insurance proceeds, he would naturally suppose that his intention would be fulfilled if he did not change the beneficiary. It is significant that he lived for several years after the agreement without making such a change. Plaintiff's agreement to execute upon the husband's request any instrument necessary or convenient to change the beneficiary also makes it apparent from the face of the agreement that there was no present renunciation of the wife as beneficiary. Plaintiff's relinquishment of her interest in the "avails" of the policy does not show an intention to give up more than her community rights, which included a share in the proceeds of the policy. The intention of the spouses to exclude from the agreement rights that might accrue to plaintiff at the death of the husband as a result of his bounty is indicated by the provision of the agreement in which plaintiff waived all rights of inheritance in her husband's estate "except in such manner and upon such terms as may be provided in any will and/or codicil thereto of first party in effect at the date of his death." Since the position of a beneficiary named in a life insurance policy as an object of the bounty of the insured is similar to that of a beneficiary of a will (Cook v. Cook, 17 Cal.2d 639, 646, 111 P.2d 322), plaintiff no more relinquished the right to take as beneficiary of her husband's insurance policy than she relinquished the right to take as beneficiary of his will. In this respect there is a clear distinction between the present case and Sullivan v. Union Oil Co., 16 Cal.2d 229, 105 P.2d 922, 925, on which defendants mainly rely. In that case the parties to the property settlement agreed that " 'each hereby waive any and all right to the estate of the other *left at his or her death* and forever quitclaim any

and *all* right to share in the same of the other, * * * and hereby release and waive all right to inherit under any will of the other * * * and from the date of this agreement * * * they shall have all the rights of single persons and maintain the same relation of such toward the other.'" There was no provision, as in the present case, to indicate that the parties contemplated no present renunciation by the husband of the wife as beneficiary, but left it to him to decide in the future whether or not to change the beneficiary. Moreover, the Sullivan case involved, not a contract with an insurance company, but an "Employees' Provident Fund" maintained by the husband's employer, to which the husband contributed by monthly deductions from his salary. Under the facts of that case all interests of the wife in the fund were regarded as part of her interest in the community property and as such released in favor of the husband.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, and SPENCE, JJ., concur.

SCHAUER, Justice.

I dissent. The majority opinion takes from the estate of decedent and gives to plaintiff property ("avails" of a specifically described life insurance policy) in which the latter has no right, title, or interest. By formal written agreement for a valuable consideration the plaintiff *conveyed* to the decedent all of her interest in the *avails* of the policy. The exact language used by the parties is: "second party [plaintiff] hereby *transfers,* releases and relinquishes to first party [decedent] all interest in and to said policy of insurance and the premiums paid thereunder *and the avails thereof.*" (Italics added.) We cannot give effect to the words "second party hereby *transfers* * * * to first party all interest in and to said policy * * * and the *avails* thereof" and still permit plaintiff to recover. We have no right to give no effect to those words. They are clear and definite in meaning. The word "transfer" means "to convey from one * * * person * * * to another." Webster's New Int. Dict. 2d Ed. The majority opinion does not assert, and the evidence does not suggest, that the decedent ever reconveyed to plaintiff any interest in, to, or under the policy, or its "avails." I think that such majority opinion fails to reckon squarely with the essential problem when it declares that "Plaintiff's *relinquishment* of her interest in the 'avails' of the policy does not show an intention to give up more than her community rights, which included a share in the proceeds of the policy." (Italics added.) The instrument effects an out and out conveyance of all interest in the avails of the policy. An actual conveyance is more than a relinquishment.

Neither do I find convincing the argument in the opinion based on the statement that "The intention of the spouses to exclude from the agreement rights that might accrue to plaintiff at the death of the husband as a result of his bounty is indicated by the provision of the agreement in which plaintiff waived all rights of inheritance in her husband's estate 'except in such manner and upon such terms as may be provided in any will and/or codicil thereto of first party in effect at the date of his death.'" The foregoing exception is specific and exclusive. It excepts from operation of the relinquishment of plaintiff's rights of inheritance from the decedent only such rights as are encompassed in the language "in such manner and upon such terms as may be provided in any will and/or codicil thereto of first party in effect at the date of his death." It seems almost trite to have to point out that the asserted right claimed in this action by plaintiff is *not* one which is evidenced or created by "terms * * * provided in any will and/or codicil thereto of first party."

It is an established rule of construction that a proviso or exception is used to limit and qualify that which immediately precedes it and to expressly negative a construction or effect that would prevail in the absence of the proviso or exception; that which is specifically excepted from the operation of the general clause would, in the absence of the proviso or exception, have been included within the operation of such general clause. 17 C.J.S., Contracts, § 343, pp. 796, 797 (rule as to contracts); see, also, People ex rel. Happell v. Sischo, 1943, 23 Cal.2d 478, 493, 144 P.2d 785, 150 A.L.R. 1431 (rule of statutory construction). Furthermore, the express enumeration of exceptions indicates the exclusion of any other exceptions. 17 C.J.S., Contracts § 343, p. 797 (rule as to contracts); see, also, Belloc v. Rogers, 1858, 9 Cal. 123, 128; Tynan v. Walker, 1869, 35 Cal. 634, 639, 95 Am.Dec. 152; Rothschild

v. Superior Court, 1930, 109 Cal.App. 345, 348, 293 P. 106; C.I.T. Corp. v. Biltmore Garage, 1934, 3 Cal.App.2dSupp. 757, 761, 36 P.2d 247; In re De Neef, 1941, 42 Cal. App.2d 691, 694, 109 P.2d 741 (rule of statutory construction). There is no presumption in favor of plaintiff. She had sued Mr. Grimm, the decedent, for divorce. She contracted with him freely, upon an equal footing.

The declaration in the opinion that "Since the position of a beneficiary named in a life insurance policy as an object of the bounty of the insured is similar to that of a beneficiary of a will [citation] plaintiff no more relinquished the right to take as beneficiary of her husband's insurance policy than she relinquished the right to take as beneficiary of his will" seems to me to be a non sequitur. The exception clause expressly reserves to plaintiff the right to take as beneficiary *under a will or codicil thereto* but it does not reserve or create the right to *succeed otherwise* to avails of the insurance policy, which policy and the "avails thereof" plaintiff had *conveyed* to decedent for a valuable consideration.

The transfer in writing to decedent of all of plaintiff's interest in and to the policy and its "avails" immediately divested plaintiff of all her interest in and to such policy and its "avails" and vested all of such interest in decedent as his separate property. There was no necessity for him to change the policy-designated beneficiary; he owned and there was vested in him all of such beneficiary's interest. She could thereafter acquire no interest in or right to the policy proceeds except by affirmative and competent action of the decedent to that end. He could have made a will or codicil bequeathing such avails to plaintiff but he did not do so. He chose to keep such policy and its avails for himself and his estate. His estate is now entitled to have them free of any claim of plaintiff, for which she has long since received fair compensation and of which she divested herself by voluntary action.

The provision in the agreement by which plaintiff bound herself to execute upon Mr. Grimm's request any instrument necessary or convenient to change the beneficiary does not, in my view, make it apparent, as asserted in the opinion, "that there was no present renunciation of the wife as beneficiary" in any material sense. Since Mr. Grimm had bought, paid for, and received a conveyance of plaintiff's entire interest there is apparent no essential reason why he should have desired or thought that he needed to have the policy itself amended to show a change in the designated beneficiary until and unless he wanted to name some third person as beneficiary. To accomplish that end he might well have needed plaintiff's execution of a proper document and, therefore, an appropriate covenant to that end was included in the agreement, but insofar as Mr. Grimm's rights against the plaintiff were concerned, if he wanted the avails of the policy to go to his estate, he already, in the agreement, had everything which he could reasonably anticipate would be needed.

Lastly, I find no substantial ground for distinguishing this case from our opinion in Sullivan v. Union Oil Co., 1940, 16 Cal. 2d 229, 233, 105 P.2d 922, 925. The agreement in that case provided that "each [husband and wife] hereby waive any and all right to the estate of the other *left at his or her death* and forever quitclaim any and *all* right to share in the same of the other, * * * and hereby release and waive all right to inherit under any will of the other * * * and from the date of this agreement * * * they shall have all the rights of single persons and maintain the same relation of such toward the other." The agreement in the case now before us seems more certain and efficacious to the end in question than does that involved in the Sullivan case. In addition to the language of conveyance and relinquishment hereinabove quoted the agreement we are construing provides that "All funds and property of every nature described or referred to in said Exhibit A [with certain immaterial exceptions but specifically including the mooted policy] * * * together with all property of any nature hereafter possessed or acquired by first party [the decedent] shall be *and remain* the sole and separate property of said first party, and second party [plaintiff] hereby *transfers, conveys,* relinquishes and releases to first party all right, title, interest and *claim* which she has *or might have* therein or thereto." (Italics added.) Here the plaintiff not only released and relinquished all claims arising out of the marital status but she expressly *conveyed* to the decedent all of her interest in and claim to the precise property in controversy. Such conveyance, instead of indicating as asserted in the

opinion "that the parties contemplated no present renunciation by the husband of the wife as beneficiary," in any material sense, conclusively establishes that the wife thereupon completely divested herself of all interest under the policy, specifically including the "avails thereof" and any claim which she "might have therein or thereto." In other words, she expressly conveyed to Mr. Grimm all of her interest as beneficiary and agreed that it should "remain" his "sole and separate property." Certainly, he could have reconveyed it to her, but he never did so.

As previously shown, there was no occasion or reason for Mr. Grimm, the former husband, to change the name of the beneficiary shown in the policy unless and until he wanted to designate a third person to that status. Since he apparently wished only to have the proceeds go to his own estate he rested upon the conveyance from plaintiff which, at least so far as appears, was never questioned during his lifetime and the due execution and fairness of which are not now questioned. We should not now, after his death, enable plaintiff to gratuitously take from his estate that which was his.

The judgment should be reversed.

CARTER, J., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.




26 Cal.2d 160

**IRVINE CO. v. McCOLGAN, Franchise Tax Commissioner.**

**L. A. 18634.**

Supreme Court of California.

March 23, 1945.

Rehearing Denied April 19, 1945.

**1. Agriculture ⇐6**

Co-operative marketing agreements are of two kinds, sales and agency, and determination of whether particular agreement is to be classified as one or the other depends upon intention of parties thereto.

**2. Corporations ⇐665(1)**
**Taxation ⇐164**

Jurisdiction of foreign corporations for purposes of process and regulation, as well as taxation, is dependent upon their presence or exercise of their corporate franchises, and sale of products of such corporations by independent contractors does not involve corporate presence or exercise of corporate franchises.

**3. Agriculture ⇐6**
**Factors ⇐1**
**Taxation ⇐376(4), 397**

Co-operative marketing associations are "factors" or so closely akin thereto that law relating to factors governed question whether foreign corporation which sold its horticultural and agricultural products through associations was doing business outside of California by reason of their activities in other states within Corporation Franchise Tax Act providing that tax shall be measured by that portion of income derived from business done within the state. Gen.Laws 1937, Act 8488, § 10; Civ.Code, § 2026.

See Words and Phrases, Permanent Edition, for all other definitions of "Factor".

**4. Taxation ⇐376(4), 397**

A corporation transacting business in California is entitled to allocation of income for franchise tax purposes only when business is done outside of the state by the corporation acting through its officers or agents. Gen.Laws 1937, Act 8488, § 10; Civ.Code, § 2026.

**5. Taxation ⇐397**

A foreign corporation whose horticultural and agricultural products were sold in other states by co-operative marketing associations whose activities, with exception of avocado sales, were confined to California, and vast majority of whose sales were arranged by California Fruit Growers' Exchange and California Walnut Growers' Association under marketing agreements with local co-operatives, was not "doing business" outside the state so as to be entitled to have part of its income allocated under Corporation Franchise Tax Act. Gen.Laws 1937, Act 8488, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

**6. Factors ⇐1**

Brokers to whom produce was consigned for sale by foreign corporation engaged in horticultural and agricultural business were "factors," and their activities were governed by rules relating to factors. Civ.Code, § 2026.

**7. Taxation ⇐376(4), 397**

The presence outside the state of corporation's property alone does not constitute "doing business" outside the state, and maintenance of stock by corporation in selling state does not make the selling thereof the business of the corporation rather than that of broker, in determining whether foreign corporation was entitled to have part of its income under Corporation Franchise Tax Act allocated as being attributable to business done without the state. Gen.Laws 1937, Act 8488, § 10.

**8. Taxation ⇐397**

A foreign corporation transacting business in California is not "doing business" outside the state within Corporation Franchise Tax Act providing that tax shall be measured by that portion of income derived from business done within the state by virtue of fact that corporation's products are sold from warehouses in other states by independent brokers. Gen.Laws 1937, Act 8488, § 10.

**9. Taxation ⇐397**

A foreign corporation which shipped portion of its bean crop and other vegetables directly to purchasers in other states upon sales made therein by brokers was not entitled to allocation under Corporation Franchise Tax Act because the sales partook of nature of transactions in interstate commerce where corporation's entire business was done within the state. Gen. Laws 1937, Act 8488, § 10.

**10. Commerce ⇐69(1)**
**Constitutional law ⇐283**
**Taxation ⇐37**

A franchise tax on entire income of foreign corporation which sold its horticultural and agricultural products through co-operative marketing association in interstate commerce did not violate the commerce and due process clauses of the Federal Constitution. Gen.Laws 1937, Act 8488, § 10; U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

SHENK and SCHAUER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Consolidated actions by the Irvine Company against Charles J. McColgan, as Franchise Tax Commissioner of the State of California, to recover a portion of the franchise tax paid on plaintiff's statutory net income for the fiscal year ending April 30, 1935. From a judgment for plaintiff, defendant appeals.

Reversed.

Prior opinion, 145 P.2d 325.

Robert W. Kenny, Atty. Gen., and H. H. Linney and James E. Sabine, Deputy Attys. Gen., for appellant.

Scarborough & Petty and Jas. G. Scarborough, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

This is an appeal from a judgment for the plaintiff in two consolidated actions brought to recover a portion of the franchise tax paid to the State of California by plaintiff on its statutory net income for its fiscal year ending April 30, 1935.

Plaintiff is a corporation organized under the laws of West Virginia, and authorized to transact business in California. Its only office and place of business is in Orange County, California, where it owns a large tract of land and is engaged in the business of raising, harvesting, preparing for market and selling horticultural and agricultural products. During 1935, some of plaintiff's products were marketed in California, but the greater portion thereof was marketed outside of the state in the following manner:

(1) Citrus fruits, avocados and walnuts were sold by plaintiff under marketing agreements with various local nonprofit cooperative marketing associations of which plaintiff was a member or stockholder. Pursuant to those agreements, plaintiff delivered the fruit to local associations which cleaned, graded, packed and shipped the same to marketing centers or points outside the state. Citrus fruit was shipped from the associations' packing houses in California to other states or foreign countries where it was sold from railroad or steamship terminals through the facilities of the California Fruit Growers Exchange, a cooperative with which the local associations were affiliated and which

acted as the latters' sales agency. The fruit was shipped under negotiable bills of lading, consigned to the exchange or to independent produce brokers who were engaged by the exchange to sell fruit on a commission basis. Sales at public auction and private sales were conducted by such brokers or by employees of the exchange. Subject to a minimum asking price specified by the shipper and the right of withdrawal reserved by the exchange, the prices and quantities of fruit sold were determined at the time and place of sale by the brokers or employees without prior confirmation from plaintiff or the associations. Proceeds from such sales were collected by the brokers or employees, who, after deducting freight, storage, sales, insurance, taxes and other expenses, including brokerage fees or commissions, transmitted the balance to the exchange. Thereafter in the ordinary course of business plaintiff received from the local associations its pro rata share of the proceeds less its pro rata share of expenses. Walnuts were handled in a somewhat similar manner, being consigned to the California Walnut Growers Association, stored in warehouses in its name, and later withdrawn and sold exclusively at private sales by independent brokers engaged by it on a commission basis. Avocados were marketed in a slightly different manner in that after arrival at their destination they were stored in warehouses in the name of the local association and thereafter withdrawn and sold by it at private sales.

(2) The bulk of plaintiff's bean crop was prepared for market and shipped by plaintiff to out-of-state destinations where it was stored in warehouses or at railroad and steamship terminals and thereafter sold by brokers on a commission basis. Such produce was consigned to plaintiff on negotiable bills of lading or to independent produce brokers. Subject to a minimum asking price specified from time to time by the shipper, sales were made at prices and in quantities determined by the brokers without prior confirmation from plaintiff. The brokers collected the proceeds and, after deducting freight, storage, sales, insurance, taxes and other expenses, including their commissions, transmitted the balance to plaintiff in California.

(3) A portion of plaintiff's bean crop and other vegetables were prepared for market and shipped by plaintiff to points outside California consigned to purchasers on bills of lading with sight drafts attached. Proceeds from such sales were forwarded to plaintiff by collecting banks.

In July, 1935, plaintiff filed a franchise tax return and paid to the state a tax measured by its total statutory net income for the year. In 1937, it filed a claim for refund on the ground that it had done business outside as well as within California during 1935 and, accordingly, its tax should have been measured only by that portion of net income reasonably attributable to business done within the state. Plaintiff's claim was rejected, whereupon the present action was commenced. The parties having stipulated to the facts heretofore recited, the trial court held that under the taxing statute plaintiff was entitled to "allocation of some portion of its statutory net income * * *, thereby entitling plaintiff to refund of some portion of the franchise tax." The question of the extent of allocation and other issues relating thereto were then submitted to the court on a supplemental stipulation of facts. On the basis of a three-factor formula consisting of property, expenses and sales, it determined that only 56.08 per cent of plaintiff's net income, representing the proceeds from the sale of its products both within and without the state, was derived from or attributable to business done within the state. Judgment was entered for plaintiff in the sum of $7,884.93, the difference between the amount paid and the amount found due.

The California Bank and Corporation Franchise Tax Act, Stats.1929, p. 19, Deering's Gen. Laws 1937, Act 8488, imposes upon corporations doing business in this state a tax, measured by net income, for the privilege of exercising their corporate franchises within the state. The term "doing business" is defined therein as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." (§ 5.) Section 10 provides that "If the entire business of the * * * corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such * * * corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State."

The primary question on this appeal by defendant is whether within the meaning of section 10 of the act plaintiff was doing business outside of California as well as in

California so as to be entitled to have its franchise tax measured by only a portion of its net income. Defendant contends that since plaintiff had no place of business, property, or regular employees outside this state, raised its produce and prepared the same for market entirely within this state, and here received the proceeds from extrastate and interstate sales, it carried on its corporate activities and was "doing business" only in California. He argues that sales in other states were made by purchasers of plaintiff's produce or by independent contractors, and that interstate sales transactions are to be regarded as business done in this state. On the other hand, plaintiff contends that its products were marketed outside the state in such a manner as to constitute the transaction of business by it outside of California. It argues that extrastate sales transactions or activities were carried on by plaintiff through its authorized agents, that the consummation of interstate sales entitled it to allocation, and that a tax on its entire net income would be void under the commerce and due process clauses of the United States Constitution, art. 1, § 8, cl. 3, and amend. 14, to the extent that proceeds from interstate sales entered into the measure thereof.

[1] As previously noted, three types of transactions figured in the marketing of plaintiff's products outside of California—viz. sales through the medium of cooperative marketing associations, sales by independent produce brokers, and sales in the channels of interstate commerce. With respect to transactions of the first type by which plaintiff disposed of its fruit crops, the parties are in conflict as to whether marketing agreements between plaintiff and the cooperative association created the relationship of seller and buyer or principal and agent. It is generally recognized that there are two kinds of cooperative marketing agreements, sales and agency, and that the determination of whether a particular agreement is to be classified as one or the other depends upon the intention of the parties thereto. United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Yakima Fruit Growers' Ass'n v. Hall, 180 Wash. 365, 40 P.2d 123; Spencer Co-op. Live Stock Shipping Ass'n v. Schultz, 209 Wis. 344, 245 N.W. 99; 98 A.L.R. 1413; Treadwell, The Law of Cooperative Marketing, 15 Cal.L.Rev. 85. In California, however, cooperative marketing agreements have been classified or construed as contracts of agency even when, as in this case, they contained language of sale. Poultry Producers v. Barlow, 189 Cal. 278, 208 P. 93; Poultry Producers v. Murphy, 64 Cal.App. 450, 221 P. 962. But whether such agreements are to be so classified in all cases, and whether the agreements in the present case should be construed as contracts of agency or sale, need not be determined, for even if it be assumed that an agency relation existed, it does not follow that plaintiff was "doing business" outside of California within the meaning of section 10 by reason of the cooperative associations' activities in other states.

[2] Transactions engaged in for a foreign corporation in a state are not necessarily engaged in by the corporation in that state. As stated in Union Internationale De Placements v. Hoey, 2 Cir., 96 F.2d 591, 592, "business transactions within the taxing jurisdiction for the account of a foreign corporation do not necessarily involve the doing of business within the jurisdiction." Thus, although factors or commission merchants are agents, it has been held that their activities in a state do not constitute the doing of business therein by the foreign principals they represent within the purview of statutes imposing franchise or license taxes. People v. Roberts, 25 App.Div. 13, 48 N.Y.S. 1028; City of Atlanta v. York Mfg. Co., 155 Ga. 33, 116 S.E. 195; cf. People v. Gilchrist, 244 N.Y. 114, 155 N.E. 68; 61 C.J. 339. Support for this position is found in the analogy afforded by decisions to the effect that foreign corporations are not doing business so as to be subject to the qualification laws of, or amenable to process in, states to which their products have been consigned for sale and sold by factors or commission merchants. Bartling Tire Co. v. Coxe, 5 Cir., 288 F. 314; Mitchell Wagon Co. v. Poole, 6 Cir., 235 F. 817, 149 C.C.A. 129; Butler Bros. Shoe Co. v. United States Rubber Co., 8 Cir., 156 F. 1, 84 C.C.A. 167; Republic Steel Corp. v. Atlas Housewrecking & Lumber Corp., 232 Mo.App. 791, 113 S.W.2d 155; 17 Fletcher, Cyclopedia Corporations, 520; see Cannon Mfg. Co. v. Cudahy Pkg. Co., 267 U.S. 333, 336, 45 S.Ct. 250, 69 L.Ed. 634; cf. Bank of America v. Whitney Central Nat. Bank, 261 U.S. 171, 43 S.Ct. 311, 67 L.Ed. 594. The decisions reason that since factors or commission merchants are independent con-

tractors, the disposition of goods in their possession in accordance with the directions of their foreign principals constitutes a part of their business rather than the business of the individuals or corporations whose products they sell. People v. Roberts, supra, 25 App.Div. 13, 48 N.Y.S. at page 1029; 23 Am.Jur. 308. In other words, jurisdiction of foreign corporations for purposes of process and regulation, as well as taxation, is dependent upon their presence or the exercise of their corporate franchises, and the sale of products of such corporations by independent contractors does not involve corporate presence or the exercise of corporate franchises. Cf. Union Internationale De Placements v. Hoey, supra.

It would seem to follow that if a foreign corporation marketing its products in a state through factors is not thereby "doing business" in that state, it is not thereby "doing business" outside of the state in which it engages in production activities. Cf. Watson, Allocation of Business Income for State Income Tax Purposes, 25 Minn. L.Rev. 851, 894, n. 179.

[3] We are of the opinion that cooperative marketing associations are factors, or so closely akin thereto that the question whether plaintiff was doing business outside of California by reason of their sales transactions or activities in other states is governed by the foregoing authorities. Section 2026 of the Civil Code defines a factor as an "agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser." Clearly cooperatives which market the produce of their grower members in the manner disclosed by the facts of this case are embraced in that definition, and it has been so held in this state. Betts v. Southern Cal. Fruit Exchange, 144 Cal. 402, 77 P. 993; Cooper v. American Fruit Growers, Inc., 137 Cal.App. 494, 30 P.2d 558. Plaintiff argues, however, that the members of a nonprofit cooperative association in legal effect constitute the association, that the acts of the latter are the acts of the former, and that therefore the cooperatives in this case did not act as factors or independent contractors in selling plaintiff's produce. The argument is in reality a plea to disregard the corporate entity of the cooperatives for tax purposes. Similar pleas in comparable situations have been rejected, as where, for example, a foreign corporation employed a wholly owned and dominated subsidiary as an instrumentality to market its products in the taxing jurisdiction. People v. Gilchrist, 244 N.Y. 114, 155 N.E. 68; Cannon Mfg. Co. v. Cudahy Pkg. Co., 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634; Procter & Gamble Co. v. Newton, 2 Cir., 289 F. 1013. And the corporate entity of cooperative marketing associations has been strictly observed in a variety of situations, including the application in California of the franchise tax act under discussion. California Pear Growers Ass'n v. Johnson, 219 Cal. 98, 25 P.2d 414. There has been no showing in the present case of such interference by plaintiff in the conduct of the associations' business as would justify either the conclusion that the associations were mere bookkeeping devices or that they did not enjoy the status of independent contractors. On the contrary, it appears that plaintiff's activity in the marketing of its produce ceased when it delivered the same to the local cooperatives in California, and that plaintiff did not determine the manner, place, or time of sale, nor the prices and quantities of produce sold.

[4, 5] We conclude that a corporation transacting business in this state is entitled to an allocation of income for franchise tax purposes only when business is done outside of the state by the corporation acting through its officers or agents, that a cooperative marketing association is not such an agent of its grower members that the latter can be said to be doing business where sales by the former take place, and that, therefore, plaintiff was not entitled to allocation merely because its products were sold in other states by cooperative marketing associations. In addition, it might be noted that with the exception of avocado sales, the activities of the local cooperatives were confined to California; that the vast majority of sales were arranged and conducted by the California Fruit Growers Exchange and the California Walnut Growers Association under marketing agreements with the local cooperatives; and that at least some of the extrastate sales were made by independent produce brokers employed by the exchange and the association.

With respect to the marketing of plaintiff's bean crop by independent produce brokers, the parties are again in disagree-

ment as to the effect of extrastate sales. While plaintiff insists that the making of such sales constituted the doing of business by it outside of this state, defendant urges a contrary conclusion on the ground that the brokers were independent contractors.

[6, 7] It should be noted at the outset that some of those sales followed the consignment of produce to brokers, whereas others followed consignments to plaintiff itself. Properly speaking, the brokers to whom produce was consigned for sale were factors (Cal.Civ.Code, § 2026; 22 Am.Jur. 307), and their activities are governed by the rules heretofore discussed. The brokers selling produce consigned to plaintiff were authorized to receive payment therefor from the purchasers and hence possibly were also factors. In any event, they were independent contractors (1 Rest., Agency, §§ 1, comment d, 2, comment b), and the brokerage sales differed from the factorage sales only in that the produce involved in the former was consigned to plaintiff and stored in its name in warehouses in the selling states. But the presence outside the state of property alone has not been considered the doing of business outside the state, and the maintenance of stock by a foreign corporation in the selling state does not make the selling thereof the business of the corporation rather than that of the broker. Cf. United States Glue Co. v. Town of Oak Creek, 161 Wis. 211, 153 N.W. 241, Ann.Cas.1918A, 421; Trane Co. v. Tax Commission, 235 Wis. 516, 292 N.W. 897.

[8] We are of the opinion, therefore, that a corporation transacting business in this state is not doing business outside of the state within the meaning of section 10 of the Bank and Corporation Franchise Tax Act, by virtue of the fact that its products are sold from warehouses in other states by independent brokers. See Watson, Allocation of Business Income For State Income Tax Purposes, 25 Minn.L.Rev. 851, 877, 893. And we think it is worthy of note that since at least 1934, section 10 has been construed in conformity with this view by the administrative officials charged with its enforcement, and that it has been twice reenacted or amended since 1934. Appeal of Great Western Electro Chemical Co., Cal. C.C.H. Tax Service, par. 5-802.3.

[9] It would seem clear that if plaintiff was not doing business outside of this state by reason of the fact that its products were sold by independent brokers from warehouses in other states, it was not doing business outside the state when it shipped a portion of its bean crop and other vegetables directly to purchasers in other states upon orders obtained or sales made therein by independent produce brokers. The argument that plaintiff is entitled to an allocation because the latter sales partook of the nature of transactions in interstate commerce, is successfully countered by the argument that plaintiff's entire business was done within this state since all of its activities giving rise to income from interstate sales were carried on in California.

[10] Finally, we are of the opinion that plaintiff's contention that a tax on its entire net income would be violative of the commerce and due process clauses of the Federal Constitution is fully answered in cases such as Matson Navigation Co. v. State Board of Equalization, 297 U.S. 441, 56 S.Ct. 553, 80 L.Ed. 791; Western Cartridge Co. v. Emmerson, 281 U.S. 511, 50 S.Ct. 383, 74 L.Ed. 1004; Hump Hairpin Mfg. Co. v. Emmerson, 258 U.S. 290, 42 S. Ct. 305, 66 L.Ed. 622; and American Mfg. Co. v. St. Louis, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084.

The judgment is reversed.

EDMONDS and TRAYNOR, JJ., concurred.

CARTER, Justice.

I concur in the judgment of reversal, and agree generally with the views expressed in the opinion prepared by the Chief Justice, but I do not believe it is material whether the cooperative marketing association was the agent of plaintiff or was an independent contractor. Assuming the agency relationship existed between plaintiff and the cooperative, the facts remain that plaintiff's income was derived from products produced in California and sold by an agent operating in California. The agent-cooperative dealt with the brokers and factors outside the state. It did not do any business in other states. The sales in various places did not constitute doing business in those places by the agent or by plaintiff within the meaning of the taxing statute. In those instances in which the cooperative had agents in other states, as distinguished from independent brokers, who were engaged in selling the products delivered to the cooperative, it is vital to note that these agents had no places of

business in the other states and were in no different category than soliciting or selling agents operating outside of California. The activity of such agents, assuming they were also the agents of plaintiff, did not constitute doing business in those states within the meaning of the tax statute. In Montag Bros. v. State Revenue Commission of Georgia, 50 Ga.App. 660, 179 S.E. 563, a statute and situation similar to that involved in the instant case was considered, and in holding the income taxable, the Supreme Court of Georgia stated at page 566 of 179 S.E.: "The tax being thus imposed upon the 'net income from property owned' in the state as well as 'from business done' in the state, where, as under the stipulated facts of this case, a domesticated corporation maintained its only office and place of business in this state, owned and manufactured all its goods therein, and received therein all the proceeds from its sales made within and without the state, all from its state-owned plants and products manufactured in this state, and all from its state-owned property and state-managed business and office, from which it merely sent out samples *and operated a subordinate sale office with office equipment and salesmen out of the state under the control of its state office* and an executive living within the state, its *entire net income from these sales would be subject to the tax,* whether it be deemed a resident corporation, or a non-resident corporation with the right of invoking the inhibitions of the Fourteenth Amendment to the Federal Constitution, since neither the imposition by the statute nor the collection of such a tax would contravene that amendment. The fact that part of the sales were made in interstate commerce, or that the title to some of the goods may have passed to purchasers outside the state, or even that some of the sale contracts might be taken as made outside the state (construing in favor of the taxpayer the ambiguous stipulation in regard to the time and place of 'confirmation' and the closing of sales), would not relieve the seller from tax upon the net earnings from such sales, where the manufacturing plant was located, the products were manufactured and owned, the shipments and payments were made, and every important step connected with the manufacture, distribution, sales, collection, and earnings occurred, in Georgia." (Italics added.) Id., 182 Ga. 568, 186 S.E. 558. See, also, Commonwealth v. Bayuk Cigars, 345 Pa. 348, 28 A.2d 134, affirmed 318 U.S. 746, 63 S.Ct. 991, 87 L.Ed. 1123.

It seems clear to me that the income derived from the out of state sales in the instant case constituted income from business transacted in this state within the purview of the tax statute, and was therefore properly taken into consideration in computing the franchise tax payable by plaintiff.

SHENK, Justice.

I dissent. In order to arrive at their conclusion the majority have by-passed the authorities which distinctly hold that the cooperative is the agent of its members, notably such cases as California Bean Growers' Ass'n v. Rindge L. & N. Co., 199 Cal. 168, 181, 248 P. 658, 47 A.L.R. 904; Poultry Producers v. Barlow, 189 Cal. 278, 279, 281, 208 P. 93; Haarparinne v. Butter Hill Fruit Growers Ass'n, 122 Me. 138, 119 A. 116; Johnson v. Staple Cotton Cooperative Ass'n, 142 Miss. 312, 331, 107 So. 2; Brown v. Staple Cotton Co-operative Ass'n, 132 Miss. 859, 889, 96 So. 849; Cole-McIntyre-Norfleet Co. v. DuBard, 135 Miss. 20, 32, 99 So. 474; Spencer Co-op. Live Stock Shipping Ass'n v. Schultz, 209 Wis. 344, 346, 245 N.W. 99; Mountain States Beet Growers' Marketing Ass'n v. Monroe, 84 Colo. 300, 311, 269 P. 886; Industrial Commission v. United Fruit Growers Ass'n, 106 Colo. 223, 103 P.2d 15; Texas Certified Cottonseed Breeders' Ass'n v. Aldridge, 122 Tex. 464, 61 S.W.2d 79, 82; Kansas Wheat Growers' Ass'n v. Board of Com'rs of Sedgwick County, 119 Kan. 877, 241 P. 466; Oregon Growers' Cooperative Ass'n v. Lentz, 107 Or. 561, 212 P. 811. They have been at great pains to draw an analogy between a cooperative and an independent broker. Identity of the two does not exist either in economic function or in legal contemplation.

The broker is an independent contractor, who deals with all who consign products, and who after sale returns the proceeds to the consignor, making deduction for expenses and a profit for himself. The cooperative has no independence. Its services may be and are performed by its members, and for its members only. Its function is to receive, process, distribute and sell the products of its member growers, returning to its members the proceeds less expenses only. Since members are obligated to deliver their entire crop to the cooperative and operate on a mutual help

basis exclusively for themselves it is immaterial whether the reciprocal obligation is written in terms of sale or agency. The same result obtains as to a cooperative distributing agency having a membership exclusively of cooperative producer organizations. They are likewise mutually dependent and exist only for their cooperative members, who in turn exist only for their member producers. Both are strictly nonprofit. Both belong to the producer who has a voice in and directs the affairs of the cooperative marketing association and through it the cooperative distributing agency. The fallacy in the majority's conclusion that the plaintiff's activity ceases when it delivers produce to the cooperative marketing association lies in the statement that the plaintiff does not determine the manner, place, or time of sale, nor the prices and quantities of produce sold. On the contrary, as a member of the cooperative marketing association, the plaintiff has a voice in the cooperative management through a properly constituted board elected by the members.

The state has recognized the economic desirability of cooperative marketing associations by setting up the machinery for their organization and operation. The majority have not demonstrated why the members of such associations are not entitled to the full benefits flowing from the legislative recognition. The problem is not solved by talk of tax evasion or creating opportunity for tax evasion. The problem, if there is one, is for the Legislature and not for the courts. The courts would be quick to detect evasion by the discovery of a mere legal cloak of cooperation which does not in fact exist. Since the Legislature and the courts have recognized the cooperating members as the cooperative organization when they are organized in accordance with law for cooperative purposes, it is not for the court to say that they shall be recognized as such for one purpose but not for another.

The trial court found on sufficient evidence that the plaintiff was, in part, doing business in the State of New York, and the formula of allocation under the statute has not been successfully questioned by the defendant. In my opinion the judgment should be affirmed.

SCHAUER, J., concurred.

Rehearing denied; SHENK, and SCHAUER, JJ., dissenting.

69 Cal.App.2d 20

## MARSHALL v. MARSHALL.

Civ. 7106; Sac. 5681.

District Court of Appeal, Third District, California.

April 26, 1945.

**1. Divorce ⇐329**

Evidence, on motion to set aside levy of execution for arrears of alimony and support money awarded by interlocutory decree of divorce on ground that such interlocutory decree was void because defendant had theretofore secured a divorce in another state, sustained finding that defendant had gone to the other state for sole purpose of obtaining a divorce and with intent to leave state as soon as accomplishing purpose, and that the divorce was obtained fraudulently.

**2. Divorce ⇐327**

A decree of divorce is not entitled to full faith and credit when it has been granted on constructive service by the courts of a state in which neither spouse is domiciled. U.S.C.A.Const. art. 4, § 1.

**3. Courts ⇐97(5)**

The Supreme Court of the United States is the final arbiter as to meaning of and limitations upon the full faith and credit clause of the Federal Constitution. U.S.C.A.Const. art. 4, § 1.

**4. Divorce ⇐330**

Defendant, in divorce action appearing and asking for affirmative relief by filing a cross-complaint for divorce and testifying in proceeding without either pleading or referring to action in another state wherein he claimed to have secured a divorce, submitted himself to jurisdiction of court, and cannot claim that court had no jurisdiction on ground a divorce had been theretofore granted in another state.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action for divorce by Winona Marshall, also known as and called Gladys W. Marshall, against Carlos Marshall, also known as and called D. C. Marshall. Interlocutory decree of divorce awarding alimony and support money, and, from an order denying defendant's motion to set aside levy of writ

of execution for arrears in payments under the decree, defendant appeals.

Affirmed.

Johnson & Hogan, of Stockton, for appellant.

Lawrence Edwards and Chas. H. Epperson, both of Stockton, for respondent.

ADAMS, Presiding Justice.

On April 10, 1942, plaintiff and respondent, Winona Marshall, filed an action for divorce against defendant and appellant, Carlos Marshall, in the Superior Court of San Joaquin County, of which county she was then a resident. Summons was served upon defendant in Plumas County on June 4, 1942, and on September 26th of the same year defendant filed an answer and cross-complaint, praying that he be awarded a decree of divorce against cross-defendant on the ground of extreme cruelty, that he be awarded all of the community property of the parties and the custody of their minor child. Plaintiff filed an answer to defendant's cross-complaint October 1, 1942, and thereafter on the motion of defendant and cross-complainant said action was set for trial. After hearing of the cause and the waiver of findings, an interlocutory decree was rendered on January 9, 1943, in favor of plaintiff, and she was awarded alimony in the sum of $30 per month, the custody of the child and the sum of $40 per month for his support. The community property of the parties was divided between them.

In August, 1943, defendant was in arrears in his payments under the decree, and the trial court ordered that an execution issue, directed to the sheriff of Sacramento County.

On September 16, 1943, defendant, appearing by his present counsel, who had not represented him in the divorce proceedings, served and filed a notice of motion to set aside the levy of the writ of execution, on the ground that the interlocutory decree of divorce was void and without legal force or effect. The motion was accompanied by an affidavit of one of defendant's attorneys in which it was alleged, on information and belief, that defendant, under the name Don Carlos Marshall, had prior to November 2, 1942, filed a complaint for divorce from plaintiff in the state of Nevada, that on November 2, 1942, a decree of absolute divorce had been granted to him, that by reason of said Nevada decree the parties had been restored to the status of single persons, and that at the date of the granting of the interlocutory decree in California the parties to said action were not husband and wife. Hearing on defendant's said motion was had on April 20, 1944, testimony was adduced, and the motion of defendant was denied. From that order this appeal was taken.

The record before us contains a transcript of the testimony taken and documentary evidence introduced at the hearing of defendant's motion. Appellant, who was a locomotive engineer, himself testified that he was employed by the Western Pacific Railway Company for many years prior to April, 1942, and just prior to said date was employed on a run between Keddie, California, and Bieber, California; that he applied for a transfer to Nevada, and when same was granted left California on April 5, 1942, and went to Reno, Nevada; that the next day he went to Winnemucca, where he was employed on a run between Winnemucca and Sand Pass, Nevada; that on May 19th or 20th he "moved out of Nevada" and returned to Quincy, California, having bid for a run in California; that he worked in California until October when he was assigned to a run between Portola, California, and Winnemucca, Nevada; that he would be in the latter place only between runs; that before going to Nevada he had lived at Payne's Cabin, Quincy, until April 5, 1942, and that he resumed his residence there when he came back to California in May, 1942.

The record in the Nevada action was introduced in evidence and shows that the complaint was filed May 18, 1942, just before Marshall returned to California; that service of summons on Mrs. Marshall was made by publication and the service of a copy of the summons on Mrs. Marshall at Stockton on June 1, 1942; and that on November 2, 1942, the Nevada proceeding was heard and a decree of divorce entered. Marshall at that time appeared and testified that he resided at Winnemucca and had resided there since the 4th day of April; that he was in the state of Nevada continuously after April 6th until the 18th day of May when his company sent him out of the state for a little while, but that he was now back in Nevada, and that Winnemucca was his permanent home. No mention was made by him of the divorce

proceeding pending in California, though he had not only filed his answer and cross-complaint in that proceeding on September 26, 1942, but also had appeared personally there in June when the court heard a motion for support pendente lite, and later had appeared before the Children's Court of Conciliation.

[1] After the hearing in the proceeding now before us the trial court filed a memorandum opinion which is included in the record before us. It appears therefrom that the court concluded that Marshall never acquired a bona fide residence in Nevada, but that he went to that state for the sole and only purpose of obtaining a divorce and with the intent to leave that state as soon as he had accomplished his purpose; and that the divorce in Nevada was obtained fraudulently. The evidence amply sustains this conclusion. During his stay in Nevada in April and May, 1942, gas and electric service was maintained in Marshall's name at his place of residence in Quincy. On May 11, 1942, while he claims that he was a resident of Nevada, he wrote a letter to the American Trust Company at Oakland, and gave his address as "Box 972, Quincy, Calif." Also in a letter to a real estate firm in Stockton, dated "5-25-42," he gave the same address at Quincy. Other communications sent by him during May, June, July, August and September, 1942, gave this same return address. In a letter to his son written from Nevada, dated May 12, 1942, he said: "I don't think I will have to stay here much longer." And at the very time that he testified in the Nevada court that Winnemucca was his permanent home, he was actually residing in Quincy, California, and had been since about May 18th; and he continued to reside there after the decree was entered.

Appellant's counsel in his briefs before this court apparently concedes that the evidence introduced at the hearing of his motion is sufficient to show that Marshall gave perjured testimony in the Nevada court, and that he never acquired a bona fide residence in that state; but it is contended, nevertheless, that the Nevada decree is valid on its face, that the fact that it is based upon false testimony given by Marshall is not ground for setting it aside, and that even though Marshall was never a bona fide resident of that state the California courts are compelled to give full faith and credit to its decree; and that since, by that judgment, the parties to this proceeding ceased to be husband and wife on November 2, 1942, the California court had no jurisdiction at the time it made and entered its interlocutory decree, and that the execution issued in the action was of no force and effect. In short, he contends that where a judgment of a foreign state is valid upon its face, it must be given full faith and credit in every other state, regardless of the fact that it was obtained by fraud, and though the court of such foreign state was actually without jurisdiction to render such judgment. He asserts, though without citation of authority for it, that the Nevada decree could not be set aside in that state. The decisions of the Nevada courts are to the contrary. See Fleming v. Fleming, 36 Nev. 135, 134 P. 445; Presson v. Presson, 38 Nev. 203, 147 P. 1081; Walker v. Walker, 45 Nev. 105, 198 P. 433; Latterner v. Latterner, 51 Nev. 285, 274 P. 194; Lamb v. Lamb, 57 Nev. 421, 65 P.2d 872; Barber v. Barber, 47 Nev. 377, 222 P. 284, 39 A.L.R. 706.

In support of his contention that the judgment of the Nevada court is necessarily binding here, appellant cites In re Estate of Morris, 56 Cal.App.2d 715, 133 P.2d 452, from which he quotes extensively, especially pages 720 to 723 of 56 Cal.App.2d and pages 454 to 456 of 133 P.2d, wherein Williams and Hendrix v. State of North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273, is cited and quoted. In Re Estate of Morris, John F. Morris, aged 92 years, adopted his niece Winifred R. Morris, aged 61 years, in Rhode Island, in conformity with the laws of that state which authorized such an adoption. The parties came to California where both died and their respective estates were administered; and in the course of the probate proceedings it was contended that, since the laws of California did not sanction the adoption of adults, the decree of the Rhode Island court need not be given full faith and credit as the adoption laws of that state were contrary to the public policy of this state. It was conceded in that case that the adoption proceedings in Rhode Island were regularly and duly had in accordance with the laws of that state. No fraud or irregularity therein were alleged or relied upon. And all that our court held was that California was bound to give full faith and credit to the judgment notwithstanding a claimed conflict with the an-

nounced policy of this state. Therefore, there is nothing in that case which conflicts with the decision under review here.

Nor do we find anything in the decision of the United States Supreme Court in Williams v. North Carolina, supra, that supports appellant's contentions. There the court specifically stated in its opinion that a suit for divorce is one in which domicile of the plaintiff in the state of the forum is essential to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least where the defendant has neither been personally served nor entered an appearance. It said, 317 U.S. at page 302, 63 S.Ct. at page 215, 87 L.Ed. at page 288, 143 A.L.R. 1273, that it was assuming that petitioner had a bona fide domicile in Nevada, and not that the Nevada domicile was a sham; and that it was not reaching the question as to the power of North Carolina to refuse full faith and credit to Nevada decrees because, contrary to the findings of the Nevada court, North Carolina found that no bona fide domicile was acquired in Nevada.

[2] The exact question presented in the case before us has, however, been decided in Bell v. Bell, 181 U.S. 175, 21 S.Ct. 551, 45 L.Ed. 804, and Streitwolf v. Streitwolf, 181 U.S. 179, 21 S.Ct. 553, 45 L.Ed. 807, both of which hold that a decree of divorce is not entitled to full faith and credit when it has been granted on constructive service by the courts of a state in which neither spouse is domiciled. In the former case Mrs. Bell brought suit for divorce in New York. Defendant appeared in the case and pleaded a divorce decree obtained by him in Pennsylvania. Plaintiff, in reply, denied that the Pennsylvania court had any jurisdiction to grant the decree, alleging that she had not been served with process in the action and that neither she nor her husband ever was a resident or citizen of Pennsylvania. The New York court, on what was held to be sufficient evidence, found that the husband had never acquired a residence in Pennsylvania, and granted a divorce to the plaintiff wife. The Supreme Court of the state affirmed the judgment, 4 App.Div. 527, 40 N.Y.S. 443, and the matter went to the United States Supreme Court on writ of error. That court held that upon the record the Pennsylvania court had no jurisdiction of the husband's suit for divorce because neither party had a domicile in Pennsylvania, and that the decree of divorce was entitled to no faith and credit in New York or any other state. That case is cited in the Williams case, 317 U.S. at page 291, 63 S.Ct. at page 209, 87 L.Ed. 279, 143 A.L.R. 1273, and held not there applicable; but its validity is not challenged. It has been cited and followed in numerous decisions by the courts of the several states since the decision in the Williams case, and the latter case distinguished. See Davis v. Davis, Ohio App., 57 N.E.2d 703; Wilkes v. Wilkes, 245 Ala. 54, 16 So.2d 15, 16; Atkins v. Atkins, 38t. Ill. 345, 54 N.E.2d 488, 489; Shuart v. Shuart, 183 Misc. 270, 51 N.Y.S.2d 359; Reese v. Reese, 268 App.Div. 993, 51 N.Y. S.2d 685; Hultz v. Hultz, —— Misc. ——, 51 N.Y.S.2d 301; Kraunz v. Kraunz, 183 Misc. 724, 51 N.Y.S.2d 433; Wolff v. Wolff, 134 N.J.Eq. 8, 34 A.2d 150, 158; Melnick v. Melnick, 154 Pa.Super. 481, 36 A.2d 235, 240. Our courts in numerous cases have passed upon the validity of divorce decrees granted in other jurisdictions, and where they have found that same were secured upon simulated or pretended residence alone, have not hesitated to declare them invalid. See Brill v. Brill, 38 Cal.App.2d 741, 102 P.2d 534; Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069; In re Estate of McNutt, 36 Cal.App.2d 542, 98 P.2d 253; In re Estate of Bruneman, 32 Cal.App.2d 606, 90 P.2d 323; DuQuesnay v. Henderson, 24 Cal.App.2d 11, 74 P.2d 294; Bruguiere v. Brugiere, 172 Cal. 199, 155 P. 988, Ann.Cas.1917E, 122. Also see Crouch v. Crouch, —— Cal.App.2d ——, 149 P.2d 437, hearing in Supreme Court granted August 3, 1944.

In the Streitwolf case hereinabove cited, the plaintiff wife, on August 17, 1896, filed suit for a divorce in New Jersey where the parties had lived as husband and wife until August 3rd of that year, and the husband was served with summons personally in New Jersey. On August 9, 1897, the husband filed a suit for divorce in North Dakota and caused summons to be personally served on the wife in New Jersey. On August 19th the husband filed an answer to the wife's suit in New Jersey, but made no reference therein to the suit in North Dakota. On September 7, 1897, the wife filed an action in New Jersey seeking an injunction against the suit in North Dakota, alleging that the domicile of both parties was in New Jersey and that the husband's pretended residence in North Dakota was wholly fictitious and fraudu-

lent; that she had not appeared in that suit. Though a temporary injunction was issued in that suit, the husband obtained a decree in the North Dakota court on October 4, 1897, which recited that "plaintiff now is and for more than ninety days prior to the commencement of this action has been in good faith a resident of the state of North Dakota." The wife then filed in the New Jersey divorce court a supplemental bill alleging that the North Dakota decree was void for want of jurisdiction of the subject matter and of the wife as a party and was secured by fraud and in contempt of the court of chancery of New Jersey. On trial of the issues in the divorce action evidence was adduced which was held to be sufficient to sustain the contentions of the wife, and the court held that the husband had no bona fide domicile in North Dakota, that the judgment there was secured by fraud and imposition on the court, and that the court there had no jurisdiction. The United States Supreme Court in affirming that judgment said, (181 U.S. at page 183, 21 S.Ct. at page 555, 45 L.Ed. at page 810):

"The law of North Dakota requires a domicil in good faith of the libellant for ninety days as a prerequisite to jurisdiction of a case of divorce. Smith v. Smith, 7 N.D. 404, 413, 75 N.W. 783. The facts in evidence warranted, and indeed required, the finding that the husband had no bona fide domicil in the state of North Dakota, when he obtained a divorce there; and it is not pretended that the wife had an independent domicil in North Dakota, or was ever in that state. The court of that state therefore had no jurisdiction."

[3] The Supreme Court of the United States is the final arbiter as to the meaning of and the limitations upon the full faith and credit clause of the Constitution of the United States, Art. 4, § 1 (Milwaukee County v. M. E. White Co., 296 U.S. 268, 274, 56 S.Ct. 229, 80 L.Ed. 220, 226; Williams v. North Carolina, supra, 317 U. S. at page 302, 63 S.Ct. 207, 87 L.Ed. at page 288, 143 A.L.R. 1273), and whatever may be its determination, if any, on the point before us when it renders its second opinion in the Williams case—which case is again before it after retrial in North Carolina and affirmance by the North Carolina Supreme Court of a judgment of conviction (State v. Williams, 224 N.C. 183, 29 S.E.2d 744)—this court is constrained to follow the decisions in Bell v. Bell, and Streitwolf v. Streitwolf, which are still the law of the land and will be until reversed by the Supreme Court of the United States, the court of last resort.

[4] As for appellant's argument that a judgment or decree cannot be set aside merely upon a showing that same was procured by and based upon false testimony, it is not pertinent, for the Nevada decree was not declared invalid upon that ground, but because the testimony shows what is practically admitted, that Marshall was never a bona fide resident of Nevada whose courts had no jurisdiction, and that he perpetrated a fraud upon the Nevada court by testifying that Winnemucca was his permanent home at a time when he was actually making his home in Quincy, California. And it might be added that when Marshall appeared in the California court and asked for affirmative relief by filing a cross-complaint for divorce, and when he appeared and testified in that divorce proceeding without either pleading or referring to the action in Nevada, he submitted himself to the jurisdiction of that court and sought affirmative relief by way of a decree on his cross-complaint. Under these circumstances he ought not now be heard to say that that court had no jurisdiction. See Spitzer v. Superior Court, 74 Cal.App. 494, 498, 241 P. 270; Rideaux v. Torgrimson, 12 Cal.2d 633, 638, 86 P.2d 826.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

68 Cal.App.2d 792

**PEOPLE v. DORR et al.**

**Civ. 3300.**

District Court of Appeal, Fourth District, California.

April 19, 1945.

**Hearing Denied June 14, 1945.**

**1. Public lands ⇐51**

Title of state to lands granted to state for school purposes under federal law could not have vested in state until land was identified by acceptance of survey. Act Cong. March 3, 1853, 10 Stat. 244.

**2. Public lands ⇐114(2)**

A patent to lands cannot cut off previously existing vested rights in a patented property. 43 U.S.C.A. § 871a.

**3. Public lands ⇐106(1)**

Decision of the Land Department as to whether lands patented to state were mineral lands or agricultural lands is not conclusive, and the question as to character of the land is subject to review in the courts. Act Cong. March 3, 1853, 10 Stat. 244; 43 U.S.C.A. § 871a.

**4. Public lands ⇐52**

Where, at time of survey of lands claimed by state under federal statute granting certain lands to state for school purposes and the issuance of patent to state therefor, mining claims had been located and were being operated thereon and mineral character of land was known throughout the community and even to men employed in making survey for state, the state acquired no title to the land covered by mining claims. Act Cong. March 3, 1853, 10 Stat. 244; 43 U.S.C.A. § 871a.

**5. Public lands ⇐117**

Failure to record notice of location of mining claims was not material as against state claiming lands under federal law granting certain lands to state for school purposes, where state had no title to land involved either under act of Congress upon which it relied or under a patent which was belatedly issued to it. Act Cong. March 3, 1853, 10 Stat. 244; 43 U.S.C.A. § 871a.

**6. Public lands ⇐117**

The failure to appear and contest application for a patent is immaterial where it affirmatively appears that state to whom patent was issued was not entitled to the patent under the terms of the grant pursuant to which it claimed and the existing and known facts. Act Cong. March 3, 1853, 10 Stat. 244.

**7. Appeal and error ⇐1047(5)**

In action by state involving title to mining claims claimed by state under federal law granting certain lands to state for school purposes, the failure to introduce a quitclaim deed under which defendant claimed from original locator was without prejudice to state, where there was testimony that quitclaim deed had been given, and trial judge remarked that deed could be brought in and introduced in evidence, which apparently was not done, although deed itself appeared as exhibit. Act Cong. March 3, 1853, 10 Stat. 244.

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Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer Judge.

Action by the People of the State of California against J. O. Dorr and others to obtain possession of certain lands, and to eject defendants and enjoin them from entering such lands or claiming ownership therein, and to recover for ores and minerals alleged to have been removed therefrom. Judgment for defendants, and plaintiff appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and L. G. Campbell, Deputy Atty. Gen., for appellant.

Harry H. Parsons, of San Bernardino, for respondents.

BARNARD, Presiding Justice.

This is an action to obtain possession of Section 36, Twp. 14 N., Range 15 East, S. B. B. & M., to eject the defendants and enjoin them from entering said lands or claiming ownership therein, and to recover for ores and minerals of the value of $6000 alleged to have been removed therefrom.

The plaintiff claims title to this section under the act of Congress of March 3, 1853, 10 Stats. at Large 244, granting sections 16 and 36 in every township to the state for school purposes. The defendants claim to be the owners of four mining claims within this section, located before any survey of that section was made.

In January, 1920, J. M. Dorr located these four claims in his own name but for

the benefit of his son J. O. Dorr. They have been in possession every since and have performed the annual work required by the mining laws each and every year since that time. This section was first surveyed in May and June, 1924, the survey was approved on December 19, 1927, and accepted by the Department of the Interior on February 15, 1928. In 1939, Dorr leased these claims to certain other parties. After these lessees started to work the claims they discovered that they were on section 36, whereupon they obtained a lease from the state and brought suit to quiet title against Dorr. Judgment was entered quieting title in Dorr. The state then secured a patent for this section under the act of Congress of June 21, 1934. 43 U.S.C.A. § 871a. This patent was dated July 10, 1942, and recited that title had vested in the state of California under the act of March 3, 1853, upon the acceptance of the plat or survey on February 15, 1928, and stated that it was given as evidence of the title which had vested in the state on February 15, 1928.

This action was brought on July 14, 1942. The court found in all respects in favor of the defendants finding, among other things, that in January 1920 the land covered by these four claims was open, unsurveyed and vacant mineral land of the United States, subject to entry under the mineral laws; that Dorr was a qualified entryman; that the four claims are contiguous end to end; that the land covered by said claims was and is mineral in character and not agricultural at all; that it was known to be mineral in character; that this ground had long been mined prior to its location by Dorr; that said mining operations were known to the entire community for many years prior to that location; that two brothers located this identical property in 1917, mined it successfully and marketed tungsten ore therefrom during World War I; that they abandoned these claims and told Dorr to locate the same, which he did; that in January, 1920, he made a rediscovery of mineral-bearing rock, tungsten in place, on each of these claims, sank the old shafts deeper and ran new tunnels; that he marked the boundaries of each claim so that it could be readily traced, with rock monuments at each corner and in the middle of each claim; that a separate and distinct rediscovery was made on each claim and a location notice was posted in a conspicuous place thereon, and that each of said notices so posted contained the facts required by the mining laws; that copies of said location notices were not recorded; that the ledge or lode that traverses these four claims lengthwise is conspicuous and can be readily followed for at least two miles; that at places it rises above the surface of the ground for more than 20 feet; that ever since January, 1920, all four of these claims have been enclosed by fences and the only means of access during the entire period has been through locked gates; that the annual assessment work and improvements have been performed each year since 1920 regardless of moratoriums; that between January, 1920, and February 15, 1928, the date of the acceptance of the official survey, more than $3000 was expended in good faith on these claims by J. O. Dorr; that assays and shipments of ore made in 1917 and later show that there was ore in paying quantities; that the state applied for and received a patent in 1942 without notice to the defendants; that there is no evidence of any notice, hearing, contest or action whatever other than a certificate from the register of the local land office at Los Angeles to the effect that no claim appeared of record in that office; that no contest or adverse proceeding as against the defendants had ever been had until this action was filed; that J. O. Dorr assisted the surveyors in 1924 when they surveyed this section; that they all saw the mining that had been done and knew the mineral character of the land; and that each of said claims is mineral in character and was known as such and to be worth nothing for anything else on the date of the discovery or rediscovery on January 12, 1920. Judgment was entered in favor of the defendants and the plaintiff has appealed.

The appellant contends that the effect of the act of Congress of March 3, 1853, was a grant in praesenti and that the title passed to the state at that time unless the land was then known to be mineral in character; that the approval of the survey in 1928 was conclusive as to the non-mineral character of the land; and that the patent issued to the state in 1942 is final and conclusive since the respondents did not file an adverse within the time allowed therefor.

[1-3] The act of Congress of March 3, 1853, excepted mineral lands from the grant therein contained with a further exception where private claims had intervened before a survey was made, and provided that other land could then be selected in lieu thereof

by the state. It is clear, under the authorities, that title to this particular section could not have vested in the state until the land was identified by the acceptance of the survey in 1928, (St. Paul R. Co. v. Northern Pac.R. Co., 139 U.S. 1, 11 S.Ct. 389, 35 L. Ed. 77; Sherman v. Buick, 93 U.S. 209, 3 Otto 209, 23 L.Ed. 849) and the patent which was issued recognizes this fact and purports to confirm title as of that date. At that time, the defendants had valid mining claims on portions of this section and were in possession and performing the required work. A patent cannot cut off previously existing vested rights in a patented property. Ames v. Empire Star Mines Co., Ltd., 17 Cal.2d 213, 110 P.2d 13. In that case it was held that the certificate of the register of the United States Land Office that no claim or filing appeared in the record of his office, which is the sort of certificate relied on by the appellant here, could be effective only against subsequently located mining claims and was not effective as against existing vested rights. It is well settled that the decision of the land department is not conclusive in such a case as this and that the question as to the character of the land is subject to review in the courts. West v. Standard Oil Co., 278 U.S. 200, 49 S.Ct. 138, 73 L.Ed. 265.

[4] Moreover, the evidence sustains the court's findings to the effect that the land covered by these four claims was known to be mineral in character prior to the acceptance of the survey in 1928 when, if at all, title to this particular land would vest in the state. It clearly appears from the evidence that this was rough mountainous land which could have no value at all as agricultural land. See Hunt v. Steese, 75 Cal. 620, 17 P. 920. The notes of the survey made in 1924 describe it as rough, mountainous and rocky. At that time mining was being carried on on each side of these claims, on the same ledge, and mineral claims were then being worked by the defendants on these four claims. These particular claims had been proved to be valuable for mineral purposes by the ore which had been previously taken out. A great deal had then already been expended on these claims and in making roads to enable the operations to be more successfully carried on. In addition to the legal rights acquired by the defendants long before the survey, and then being maintained by them, the mineral character of the land was known throughout the community and even to the men employed in making this survey. Under the facts as found, and as supported by the evidence, the plaintiff acquired no title to the land covered by these four claims.

[5] The appellant argues that the failure of the defendants to record copies of their location notices destroyed their rights to these claims. Not only was there no such penalty affixed to the statute at that time (see Webb v. Carlon, 148 Cal. 555, 83 P. 998, 113 Am.St.Rep. 305; Last Chance Mining Co. v. Bunker Hill & S. Mining & Concentrating Co., 9 Cir., 131 F. 579; Id., 200 U.S. 617, 26 S.Ct. 754, 50 L.Ed. 622), but no question of notice to other claimants is here involved and the failure to record could not be material here where it appears that the appellant acquired no title to the land in controversy, either under the act of Congress upon which it must rely or under the patent which was belatedly issued.

[6] It is further argued that any possible rights of the respondents have been lost because they failed to file an "adverse" and set forth their claims in opposition to the issuance of a patent at the time one was applied for by the state. Not only is there no evidence that notice of the application for a patent was ever published, but the procedure in such cases seems designed to cover situations where the rights of various locators are involved rather that a controversy between the state as a grantee of land for school purposes and individuals who have filed mining claims and who are in possession. In any event, the failure to appear and contest the application for a patent is immaterial where it affirmatively appears that the state was not entitled to the patent under the terms of the grant and the existing and known facts.

The appellant also contends that while the original location was filed by the father, J. M. Dorr, and a subsequent location by the son, J. O. Dorr, no conveyance from the father to the son appears in the record. There is testimony that the father had given a quitclaim deed to the son and the trial judge remarked that this deed could be brought in and introduced in evidence. Apparently, this was not done although the deed itself appears with the exhibits. No prejudice to the plaintiff appears.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

## PEOPLE v. MITCHELL.*

Cr. 493.

District Court of Appeal, Fourth District, California.

April 23, 1945.

Rehearing Denied May 7, 1945.

Hearing Granted May 21, 1945.

1. Criminal law ⇐240

In a preliminary examination, it is not necessary that a defendant be proved guilty beyond reasonable doubt in order to support order holding him to answer in superior court, it being sufficient if it appears that a public offense has been committed and there is sufficient cause to believe the defendant guilty thereof. Pen. Code, § 872.

2. Criminal law ⇐238

Where evidence, if accepted as true, would support conclusion, if drawn, that manslaughter by automobile had been committed by defendant, dismissing of information because evidence produced at the preliminary hearing was not sufficient to justify holding the defendant for trial was error. Pen.Code, § 192, subd. 2; § 872.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Prosecution by the People against Bart Mitchell for involuntary manslaughter. From an order dismissing the information, the People appeal.

Reversed and cause remanded.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and Eugene R. Dukette, Deputy Dist. Atty., both of San Diego, for appellant.

Edgar B. Hervey, of San Diego, and Henry F. Walker, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from an order dismissing an information filed against defendant charging the commission of the crime of involuntary manslaughter, alleged to have been committed contrary to the provisions of subdivision 2 of section 192 of the Penal Code, on the ground that the evidence produced at the preliminary examination was not sufficient to justify holding the defendant for trial.

The evidence at the preliminary examination is not before us, appellant having substituted the statement of facts given by counsel for defendant at the time of making the motion to dismiss the information. It is agreed that this is a fair and complete summary of all the evidence taken before the committing magistrate.

The accident happened on Twelfth Avenue near the intersection of Park Boulevard and Russ Street in the city of San Diego. The trial judge, it was assumed, was familiar with that locality so the statement of counsel contains no accurate description of its physical aspects. The members of the court are also familiar with the locality and we will draw on our own knowledge for such description.

The portion of Park Boulevard with which we are concerned runs in a general northerly and southerly direction across Balboa Park. As it approaches the United States Naval Hospital main buildings from the north it makes a broad curve to the west which returns into a slight curve to the east and joins the north end of Twelfth Avenue at Russ Street. The grade of Park Boulevard descends to the south commencing near the hospital. A street car track runs along the east side of the Boulevard, crosses Russ Street and proceeds south on Twelfth Avenue. Both Park Boulevard and Twelfth Avenue are main thoroughfares and at times carry considerable vehicular traffic. There is a 25-mile an hour speed limit sign on the west side of Park Boulevard about 180 feet north of the north line of Russ Street.

Defendant was driving an automobile south on Park Boulevard with Harvey Anderson riding with him. Anderson died of injuries received in the accident.

Counsel for defendant described the accident as follows:

"There was a street car stopped to discharge or take on passengers here at some place north of (on) Twelfth Street (indicating), just north of A Street, I take it, and the defendant was coming at a high rate of speed down here (indicating) according to evidence, and feeling that he could not avoid striking the people who were getting on or off the car at the time, and that he could not stop in time, he attempted to swerve to the left of the street car and was not able to do it, and he caught the left rear corner of the street car which threw his automobile out of control and he

* Subsequent opinion 166 P.2d 10.

came to rest against a telephone pole which was broken off over here on this side of the street (indicating)."

Charles T. Brooks, a police officer, testified at the preliminary examination. Counsel thus summarized and quoted from his testimony:

"He found the street car. He says this: 'The rear of the street car at the point contact was made between the car and the street car, was approximately eighty-one feet south of the south line of Russ. Prior to this point running up to the end of the street car was approximately twenty-seven feet of centrifugal skid'—showing an application of the brakes about twenty-seven feet before the collision—'leading from the point of impact to where the car was setting was approximately fifty-one feet of centrifugal skid'. In other words, there was a skid mark fifty-one feet after the contact with the street car and twenty-seven feet before. At the point where the car was resting, a support pole which supports the trolley lines for the street car, was broken off at the base. Also an ornamental light standard which was alongside the support pole, was badly damaged."

Two Waves were walking west on Russ Street and observed the accident. One of them testified concerning the speed of the automobile: "We thought it was going very rapidly, and in my opinion about seventy." The other testified that it was traveling "very fast" and as it rounded the curve on Park Boulevard it was riding on its left wheels with its right wheels off the pavement.

The question presented is whether this evidence was sufficient to justify the committing magistrate in holding defendant to answer in the superior court.

Subdivision 2 of section 192 of the Penal Code defines involuntary manslaughter as the unlawful killing of a human being "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

[1] In a preliminary examination it is not necessary that a defendant be proved guilty beyond a reasonable doubt in order to support an order holding him to answer. It is sufficient if it appears that a public offense has been committed "and there is sufficient cause to believe the defendant guilty thereof." Sec. 872, Penal Code; People v. O'Brien, 37 Cal.App.2d 708, 100 P.2d 367. As was said in People v. Fisk, 32 Cal.App.2d 26, 89 P.2d 142, 144:

"There is a great difference between the legal requirements with regard to what evidence is necessary to justify the order of a magistrate in holding a defendant to answer in the superior court, and that which is necessary to support a judgment of 'Guilty'. The doctrine of reasonable doubt applies to the latter, whereas but slight evidence is sufficient to justify the former."

[2] Without further discussion it should be obvious that the evidence as summarized, if accepted as true, would support the conclusion, if drawn, that the crime charged had been committed by the defendant. It follows that the committing magistrate was fully justified in holding defendant to answer in the superior court.

The order dismissing the information is reversed and the cause is remanded to the superior court for trial.

BARNARD, P. J., and GRIFFIN, J., concur.




68 Cal.App.2d 706

**PETERSON v. SHERMAN.**
**Civ. 3176, 3177.**

District Court of Appeal, Fourth District, California.

April 11, 1945.

**1. Contracts ⇐276**

In absence of special agreement as to place where contract is to be performed, it is deemed performable at creditor's place of business or, in absence of contrary showing, at place where it was made.

**2. Replevin ⇐1**
**Trover and conversion ⇐13**

An action for possession of personal property lies for recovery of property itself, with damages for wrongful detention thereof, while action for conversion lies to recover damages for wrongful conversion of property.

**3. Action ⇐27(1)**

Generally, question whether action is in contract or tort must be determined by nature of plaintiff's grievance, rather than form of pleading, and, when class of action is not clear, it will ordinarily be construed as in contract rather than tort.

**4. Action ⇐27(1)**

An action for breach of promise set forth in contract is "ex contractu", but action arising from breach of duty growing out of contract is "ex delicto".

See Words and Phrases, Permanent Edition, for all other definitions of "Action Ex Contractu" and "Action Ex Delicto".

**5. Appeal and error ⇐912**

On appeals from orders denying defendant's motions for change of venue, court must accept as true material allegations of complaints.

**6. Venue ⇐72**

The merits of motion for change of venue are determined on pleadings as they stand at time of hearing motion.

**7. Venue ⇐7**

In action for money due as result of partnership accounting, complaint, not setting forth written accounting agreement referred to, but alleging its contents and that it was made and to be performed in county wherein action was brought, stated cause of action triable in such county rather than county of defendant's residence. Code Civ.Proc. § 395.

**8. Venue ⇐7**

A claim and delivery action for possession or value of farm machinery and damages by way of rental for use thereof during its wrongful detention by defendant after expiration of written lease agreement, copy of which was set forth, arose from breach of promise, and hence was "action ex contractu", triable in county wherein contract was made and to be performed, not an "action ex delicto". Code Civ.Proc. §§ 395, 667.

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Appeal from Superior Court, Kings County; Clark Clement, Judge.

Action by J. Y. Peterson against Bryce Sherman for money due as the result of a partnership accounting and possession or value of and damages for wrongful retention of farm machinery. From orders denying defendant's motions for change of venue, he appeals.

Affirmed.

Russell & Heid, of Tulare, for appellant.

Sidney J. W. Sharp, of Hanford, for respondent.

GRIFFIN, Justice.

These two companion cases were filed by plaintiff and respondent in the Superior Court of Kings County against defendant and appellant. Both appeals are from orders denying motions for change of venue. They involve the same question and are submitted on one set of briefs.

Case No. 3177 seeks the recovery of money due as a result of a partnership accounting. The complaint alleges generally that in January, 1938, plaintiff, defendant and one Robinson, at and in the County of Kings, State of California, by an agreement in writing, entered into and formed a joint adventure for the purpose of farming certain lands in Kings County; that pursuant to the agreement, a crop of sugar beets were planted but that prior to its maturity the lands were inundated by flood waters and the crop was lost; that following such loss in 1938, it was agreed between the parties that the term of the joint adventure should be indefinitely extended in order that they might recoup the losses suffered; that crops were raised and an accounting was had between them; that $868 was paid to defendant by plaintiff as a final settlement; that plaintiff, as well as defendant, believed that the accounting was accurate and was in full, but that it was subsequently discovered, due to erroneous bookkeeping, that certain expenses had not been included in the accounting; that by such mistake defendant had been paid $640.23 in excess of the correct amount; that plaintiff demanded the return of this amount and that defendant refused to pay it; that the obligation sued upon was contracted to be performed in and was made payable to plaintiff in Kings County. Plaintiff prayed judgment for the $640.23 erroneously paid.

Case No. 3176 is an action to recover the possession of certain farm machinery or its value and for damages by way of rental for its use during the period of its wrongful detention. In the complaint it is alleged that on December 13, 1938, plaintiff

rented to defendant the machinery pursuant to the terms of a written contract attached to the complaint. This contract reads in part as follows:

"Corcoran, California
"December 13, 1938.

"It is understood and agreed between J. Y. Peterson and Bryce Sherman that J. Y. Peterson is renting the following equipment to Bryce Sherman (certain farming equipment) for the sum of $400.00 to cover 1939 cropping year, due and payable on or before December 31, 1939.

"It is further understood and agreed that in the event J. Y. Peterson desires to sell Sherman the above equipment on or before December 31, 1939, the selling price shall be $1,530.00, one-half payable on or before December 31, 1939, the balance to be paid on or before December 31, 1940, with interest at 6% from this date.

"In event of purchase, any rental paid or to be paid by Sherman shall be credited by J. Y. Peterson on payment due on December 31, 1939, and shall be credited as a part of the $1,530.00.

"J. Y. Peterson
"Bryce Sherman"

Defendant paid the rental for the year ending December 31, 1939. It is alleged that by mutual consent the agreement was renewed and extended to cover the year 1940, and that on January 27, 1941, defendant paid the 1940 rental; that no further agreement or arrangements were made for the sale of the equipment; that plaintiff demanded possession of it and that defendant refused. It is then alleged that defendant refused to compensate plaintiff for its use since January 1, 1941. It is then specifically alleged that "said agreement was made and entered into and defendant contracted to perform his obligations thereunder, and such obligations were to be performed, in the County of Kings, State of California." The prayer alleges the value of the property to be $1,000 and seeks recovery of its possession or its value and claims $800 damages for its wrongful detention.

In each case defendant appeared and moved to transfer the cases to Tulare County on the ground that defendant was, at the time of and since the commencement of the action, on August 1, 1944, and now is, a resident of Tulare County. These motions were submitted with defendant's affidavit of residence and of merit. No counteraffidavit was filed. The motions were denied.

Defendant appealed from the orders and contends that they were erroneous for the reason that the right of a defendant to have an action brought against him tried in the county in which he has his residence, is an ancient and valuable right; that the right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional and, if the plaintiff would claim such right, he must bring himself within the terms of the exception; that the contracts or agreements referred to in the complaints are only incidental to the causes of action therein set forth and that therefore that portion of section 395 of the Code of Civil Procedure relied on by plaintiff has no application. Citing Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209; Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 274 P. 977; and McCarthy v. Mt. Tecarte Land & Water Co., 111 Cal. 328, 43 P. 956.

It is argued that action No. 3176 is for the conversion of farm machinery allegedly rented by written agreement but that there is nothing in the contract relating to the return of the equipment nor is there any obligation of any character either to pay the value thereof or otherwise; that in case No. 3177 it is alleged that the parties entered into a joint adventure and that the suit is one to have an accounting of the business transacted; that since no copy of the contract pertaining to the joint adventure is set out in the complaint, it is the right of the defendant to have the case tried in the county of his residence.

Section 395 of the Code of Civil Procedure provides that when a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary.

[1] It has been repeatedly held that in the absence of a special agreement as to

the place where a contract is to be performed, it is to be deemed performable at the creditor's place of business, or in the absence of a contrary showing, a contract is to be deemed performable where it is made. Roos v. Jansen, 30 Cal.App.2d Supp. 773, 78 P.2d 476. The complaint in the present action (No. 3176) is to recover the possession of personal property, sometimes designated claim and delivery, and sets forth the agreement under which the machinery was rented, alleges its renewal, and its breach by defendant.

[2] The question here presented is whether or not these two actions were "founded" on an "obligation" contracted to be performed in, or which in fact was entered into in Kings County. If so, either that county or the county in which the defendant resides is a proper place of trial. The instant action (No. 3176) was not predicated upon a claimed conversion, as contended by defendant. The distinction between an action for the possession of personal property and one to recover damages for its wrongful conversion is just as broad as that between the common-law actions of detinue and trover. One lies for the recovery of the property itself, with damages for the wrongful detention of it; the other for the recovery of damages for the wrongful conversion of it. Richards v. Morey, 133 Cal. 437, 65 P. 886; 5 Cal.Jur. 158, sec. 2.

[3-7] In seeking a determination whether an action is one in contract or in tort, the general rule is that the character of the action is to be determined by the nature of the grievance rather than by the form of pleading and when it is not clear to which class the action belongs, it will ordinarily be construed in contract rather than in tort. Nathan v. Locke, 108 Cal. App. 158, 287 P. 550, 291 P. 286; Kings Laboratories v. Yucaipa Val. F. Co., 18 Cal. App.2d 47, 62 P.2d 1054; Rushing v. Pickwick Stages, System, 113 Cal.App. 240, 298 P. 150. It has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises from a breach of duty growing out of the contract it is ex delicto. Jones v. Kelly, 208 Cal. 251, 280 P. 942; Berning v. Colodny & Colodny, 103 Cal.App. 188, 284 P. 496. The pleadings in both cases allege that the agreements were made and entered into and that the obligations thereunder were to be performed in Kings County. The court must accept as true the material allegations of the complaints. Coley v. Hecker, 206 Cal. 22, 272 P. 1045; Neet v. Holmes, 19 Cal.2d 605, 122 P.2d 557. The merits of a motion for a change of venue are determined upon the pleadings as they stand at the time of hearing the motion. Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209. The complaint in the accounting case (No. 3177) does not set forth the written agreement referred to but alleges its contents and that it was made and entered into and was to be performed in Kings County. Assuming the truth of the allegations of the complaint, plaintiff has brought himself strictly within the provisions of section 395 of the Code of Civil Procedure. Therefore, under the pleadings, Kings County is a proper county for the trial of that action.

[8] In the so-called claim and delivery action (No. 3176) a copy of the written agreement under which the machinery was let to defendant is set forth. The obligation to pay for the rental thereof, or its purchase price, arises from that agreement, as extended. Plaintiff's action is based upon a breach of the agreement, and seeks return of the machinery or its value and for compensation by way of damages for its use. Under the following cases cited, the action arises from the breach of a promise, and is an action ex contractu as distinguished from an action ex delicto. Donnelly v. Strueven, 63 Cal. 182; Taggart v. Shepherd, 122 Cal.App. 755, 10 P.2d 808; Kings Laboratories v. Yucaipa Val. F. Co., supra; Wray v. Sumerset Oil Co., 89 Okl. 71, 213 P. 836; 1 C.J.S. Actions, p. 1098, §§ 44 to 49 inclusive; Nathan v. Locke, supra; Redwood Fibre, etc., Co. v. Miller Mfg. Co., 61 Cal.App.2d 505, 143 P.2d 389; Sec. 667, C.C.P.; 5 Cal.Jur. p. 174, sec. 13; 5 Cal.Jur. p. 206, secs. 36 and 37; Steele v. Marlborough Hall Corp., 100 Cal. App. 491, 280 P. 380; Roos v. Jansen, supra; MacDonald v. Crawford, 106 Cal.App. 193, 288 P. 1088; Pacific Const. Fin. Co. Ltd. v. Kramer, 42 Cal.App.2d 190, 108 P.2d 723; Ivey v. Kern County Land Co., 115 Cal. 196, 46 P. 926; 25 Cal.Jur. p. 873, sec. 18; 11 Cal.Jur Ten Year Supp. p. 284, sec. 18; East-West Dairymen's Ass'n v. Dias, 59 Cal.App.2d 437, 138 P.2d 772; Di Giorgio Fruit Corp. v. Zachary, 60 Cal. App.2d 560, 141 P.2d 8; Taylor v. Lund-

blade, 43 Cal.App.2d 638, 111 P.2d 344. Each complaint states a cause of action triable in Kings County.

Orders affirmed.

BARNARD, P. J., and MARKS, J., concur.




68 Cal.App.2d 751

**MILLER v. MILLER.**

**Civ. 14755.**

District Court of Appeal, Second District, Division 2, California.

April 17, 1945.

**Hearing Denied June 14, 1945.**

**1. Husband and wife ⇐49½(8)**

Wife's testimony and husband's documentary admissions constituted substantial proof that husband, prior to divorce, intended to and did assign to wife his interest in certificate of ownership of automobile and in contract for purchase of home as joint tenants, and supported findings adverse to husband's claim of ownership.

**2. Appeal and error ⇐1010(1)**

The trial court's findings will not be disturbed if supported by any substantial evidence.

**3. Appeal and error ⇐1010(1)**

Appellate court has jurisdiction to consider facts other than as found only where there is no evidence, or where as matter of law evidence is insufficient, to sustain finding.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by John E. Miller against Ruth E. Miller for declaratory relief as to certain property following the obtaining by defendant of an interlocutory decree of divorce from plaintiff. From an adverse judgment, plaintiff appeals.

Affirmed.

Appellant, John E. Miller, in pro. per.

Sprague, Ivey & Sprague, of Los Angeles, Cal., for respondent.

MOORE, Presiding Justice.

The question for decision is whether the findings have substantial evidentiary support.

On September 7, 1943, respondent obtained an interlocutory decree of divorce from appellant with whom she had lived in conjugal amity for some years. Following the entry of that decree appellant instituted this action against her for declaratory relief, claiming that the home in Compton in which the parties had maintained their abode was owned by them as joint tenants and that he had voluntarily recorded an assignment of his interest therein solely for his wife's protection in the event of his death in the course of military training. Also, he alleged that he had endorsed in blank his certificate of ownership of a Studebaker automobile and left it among his papers and that without his consent respondent had appropriated it, had inserted her name as assignee and had caused title thereto to be transferred to herself. Wherefore he demanded to be restored to ownership.

Following a trial the court made findings as follows: On June 29, 1940, the parties contracted for the purchase of the Compton property as joint tenants for which they held a sales agreement from the Ed Krist Company without a notarial acknowledgment; prior to April 15, 1942, appellant informed respondent of his intention to assign to her his interest in the realty and subsequently advised her that he had made such assignment; plaintiff terminated his interest in the property by assigning the contract to respondent and pursuant to his request she accepted the assignment and recorded the instrument; November 27, 1941, the parties purchased with community funds a Studebaker car, the title to which was taken in the name of appellant but with the intention of both that it should remain community in character; on August 15, 1942, appellant indorsed the ownership certificate, delivered it to respondent and advised her that he was thereby assigning his interest in the vehicle to her; one week later, with respondent's knowledge, appellant moved to the state of Arizona. The court determined also that it was not true that appellant instructed his wife that in the event of his decease as a result of hazardous war training she could have the automobile, but that appellant made a voluntary gift of the vehicle to respondent. Upon such findings the court decreed that

both the Compton property and the automobile were community property from the date of purchase of same by appellant until the transfer of his interest therein to respondent, after which the property was her separate estate.

[1] The testimony of respondent and the documentary admissions of appellant constitute substantial proof that appellant intended to and did assign his interest in the contract of purchase and his certificate of ownership of the automobile to his wife. In a letter dated October 2, 1942, appellant wrote respondent: "You have a very favorable house contract, furniture, car, and cash, plus your excellent position. * * *" On May 23, 1943, about two weeks after the filing of the divorce action appellant wrote respondent: "It was largely your money that sent me through law school. * * *" On June 5, 1943, he wrote her: "When you do set up your new establishment take nothing with you, sell it off, give it away or anything that will take it completely out of your life. * * *" And again on December 23, 1942, he wrote his wife: "* * * You have everything but the plane and the money in mother's hands * * * so take it and go your merry way."

In addition to the documents above quoted the testimony of respondent was positive and unequivocal that the assignment of the contract for the purchase of the Compton home was voluntarily executed by appellant to her; that prior to his departure for Arizona, August 22, 1942, he told her of having executed the assignments of the contract and the certificate of automobile ownership to her and that he had placed them in his briefcase which was in their home in the back bedroom on the sewing machine; that she took the Krist contract from its repository in the latter part of December. As if to reassure her of his purpose to yield all community possession to her he reminded her that it was her earnings that had made it possible for them to have the home.

[2, 3] The findings of the trial court will not be disturbed so long as there is any substantial evidence in the record in support of them. Bellman v. San Francisco H. S. District, 11 Cal.2d 576, 581, 81 P.2d 894. Because appellant introduced evidence in certain respects contradictory to that of respondent, appellant contends that the judgment should for that reason be reversed. But the rule is that only where there is no evidence to sustain a finding or where as a matter of law the evidence is insufficient to sustain it, does the appellate court have jurisdiction to consider the facts other than as found. Olivero v. Rosano, 42 Cal.App.2d 740, 109 P.2d 976; Thom v. Stewart, 162 Cal. 413, 122 P. 1069.

The contention is made that it was obligatory upon respondent, because of the confidential relationship, to prove that the transactions were without fraud. Without indulging in an extended discussion of that doctrine it is sufficient to observe that the documentary and oral testimony introduced by respondent and the inferences reasonably drawn from all the facts were sufficient when believed by the trial judge to dispose of such contention.

Judgment affirmed.

McCOMB, J., concurs.

Hearing denied; SCHAUER, J., dissenting.




68 Cal.App.2d 758

**COOK et al. v. STEWART McKEE & CO.**

**Civ. 14873.**

District Court of Appeal, Second District, Division 2, California.

April 17, 1945.

Hearing Denied June 14, 1945.

**1. Appeal and error ⇐105**
**Dismissal and nonsuit ⇐42**

A voluntary dismissal of action terminates it for all time, and affords appellate court no jurisdiction to review rulings on demurrers or motions made prior to dismissal. Code Civ.Proc. § 581.

**2. Dismissal and nonsuit ⇐12**

Plaintiff's right of dismissal at any time before submission of case is absolute and arises only from statute authorizing such dismissal in absence of counterclaim or pleading by defendant seeking affirmative relief. Code Civ.Proc. § 581, subd. 1.

**3. Dismissal and nonsuit ⇐42**

Plaintiff's voluntary dismissal of action has effect of absolute withdrawal of claim and leaves defendant as though he had never been a party. Code Civ.Proc. § 581.

**4. Dismissal and nonsuit ⇐42**

When plaintiff willfully dismisses action against one or more of several defendants, effect is same as though action had been originally brought against remaining defendants. Code Civ.Proc. § 581.

**5. Dismissal and nonsuit ⇐42**

When plaintiff voluntarily dismisses action against a sole defendant, it is as though no action had ever been filed, and thereafter defendant is a stranger to the action. Code Civ.Proc. § 581.

**6. Appeal and error ⇐105**

The clerk's entry in registry of dismissal of action on plaintiff's request, in absence of counterclaim or other pleading seeking affirmative relief, is not exercise of any "judicial act" from which appeal may be prosecuted by defendant. Code Civ. Proc. § 581.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Act".

**7. Appeal and error ⇐151(5)**

Where plaintiffs voluntarily dismissed action, defendant, having filed no counterclaim or other pleading for affirmative relief, was not entitled to appeal and obtain review of alleged error in overruling demurrer to complaint. Code Civ.Proc. § 437; § 581, subd. 1.

**8. Appeal and error ⇐151(5)**

Even if clerk's dismissal of action on plaintiffs' request constituted a judicial act, defendant had no right of appeal therefrom, since dismissal left defendant where it desired to be. Code Civ.Proc. § 581.

**9. Appeal and error ⇐151(5)**

A party whose total demands are granted in a judicial proceeding has no right of appeal.

**10. Appeal and error ⇐151(5)**

Plaintiff's voluntary dismissal of action under statute leaves defendant the successful contender, and as such no errors committed against him prior to dismissal will be reviewed on appeal, inasmuch as no ruling has prejudiced defendant and hence none can be noticed on appeal. Code Civ. Proc. § 581, subd. 1.

**11. Appeal and error ⇐870(5)**

Even if clerk's entry of dismissal of action on plaintiffs' request were a judicial order from which defendant could appeal, court on such appeal could not review order overruling demurrer to complaint, in absence of appeal from such order. Code Civ.Proc. § 581.

**12. Appeal and error ⇐78(3), 870(5)**

A ruling on demurrer is reviewable only on appeal from final judgment on merits adverse to demurrant or from judgment entered against him on his declining to answer.

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Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Don Cook and another against Stewart McKee & Company for alleged breach of contract for sale of beer. A demurrer to an amended complaint was overruled, and, after the second amended complaint had been stricken on defendant's motion, the action was dismissed by the clerk on plaintiffs' request, and defendant appeals. Motion by plaintiffs and respondents to dismiss the appeal.

Motion granted and appeal dismissed.

Stanley M. Arndt, of Los Angeles, for plaintiffs and respondents.

Morris R. Cohn, of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

The question for decision is whether a defendant has the right of appeal from the clerk's entry in his registry of the dismissal of an action on the request of plaintiff, where no counter claim or other pleading demanding affirmative relief has been filed.

In the court below defendant filed its motion to strike and a demurrer to the amended complaint for damages alleged to have been suffered as a result of a breach of contract to sell specified quantities of beer to plaintiffs. The court allowed plaintiffs to strike certain passages and overruled the demurrer. Two weeks subsequent to the filing of a stipulation for a second amended complaint such pleading was filed. For reasons satisfactory to the court on the motion of defendant the last mentioned pleading was stricken. On the request of plaintiffs the action was dismissed by the clerk on October 9, 1944, and 28 days later defendant filed its notice of appeal from the "order of dismissal entered * * * on October 9, 1944, from the dismissal made pursuant to the direction of the plaintiffs on or about the 9th day of October, 1944, and from the im-

plied judgment of dismissal made pursuant to the said direction." Respondents have presented their motion to dismiss the appeal on the grounds that appellant is not aggrieved; that the dismissal was in its favor; that it had demanded no affirmative relief.

[1, 2] Appellant conceives that the voluntary dismissal of an action under section 581, Code Civil Procedure, following adverse rulings is analogous to a final judgment against a defendant after he has suffered prejudicial rulings. It argues: Although the judgment may be in correct form, the review sought on appeal is that of the rulings precedent to the entry of judgment. Such analogy would be persuasive if a voluntary dismissal held the same rank as a final judgment after a trial of controverted issues of law or of fact. But there is no kinship of a voluntary dismissal to a final judgment. A wilful dismissal terminates the action for all time and affords the appellate court no jurisdiction to review rulings on demurrers or motions made prior to the dismissal. Such rule is a necessary inference from the provisions of section 581. Subdivision 1 provides that his action may be dismissed by the plaintiff at any time before the submission of the case (MacDermot v. Grant, 181 Cal. 332, 184 P. 396) "provided that a counterclaim has not been set up, or affirmative relief sought" by a pleading of the defendant. A distinct privilege is thereby expressly conferred upon a plaintiff. The intent of the language could not be that, at his option and without having pleaded an affirmative defense, a defendant may require the court to retain jurisdiction of the action until his convenience be fully satisfied. The right of dismissal is absolute and arises only from the cited section. Since its original enactment in 1872, section 581 has been amended by additions on eight distinct occasions at none of which did the lawmakers intimate a purpose to enlarge the court's power to perpetuate the pendency of an action to suit its caprice or to gratify the wishes of the defendant. Subdivision 2 authorizes dismissals by the clerk at any time with the defendant's consent. The remaining subdivisions allow dismissal by the court for the reasons therein prescribed. A dismissal is "made by entry in the clerk's register" and it is then "effective for all purposes when so entered."

[3-6] A plaintiff's voluntary dismissal of his action has the effect of an absolute withdrawal of his claim and leaves the defendant as though he had never been a party. Holt Mfg. Co. v. Collins, 154 Cal. 265, 275, 97 P. 516; King v. Superior Court, 12 Cal.App.2d 501, 507, 56 P.2d 268. When an action is wilfully dismissed by the plaintiff against one or more of several defendants the effect is the same as if the action had been originally brought against the remaining defendants. Page v. W. W. Chase Co., 145 Cal. 578, 574, 79 P. 278. When dismissed against a sole defendant it is as though no action had ever been filed. After such dismissal the defendant is a stranger to the action. Rogers v. Transamerica Corp., 6 Cal.App.2d 340, 341, 44 P.2d 635. By the clerk's entry no judicial act has been exercised from which appeal may be prosecuted.

[7] Appellant contends that the court had erred in overruling its demurrer to the complaint and that upon this appeal from the dismissal it is entitled to this court's judgment upon the error alleged to have occured in the overruling of the demurrer. But such conclusion does not follow by virtue of any public or private statute or of any judicial decision. The legislature has provided a course by which to secure the defendant against a wilful dismissal of his action, namely, by filing a pleading for affirmative relief. Sec. 581. By such pleading a new issue is imported into the case pursuant to statute, Sec. 437, Code Civil Proc., which renders plaintiff powerless to effect a dismissal by his sole act.

[8-10] But even the clerk's dismissal be considered a judicial act, defendant has no right of appeal therefrom for the reason that the dismissal leaves it exactly where it desired to be at all times both before and after the filing of the action. The party whose total demands are granted in a judicial proceeding has no right of appeal. Widener v. Hartnett, 12 Cal.2d 287, 290, 83 P.2d 718; Maxwell Hardware Co. v. Foster, 207 Cal. 167, 170, 277 P. 327; Merron v. Title Guarantee & Trust Co., 27 Cal.App. 2d 119, 122, 80 P.2d 740. The dismissal of a cause pursuant to subdivision 1 of section 581 leaves the defendant the successful contender, and as such no errors committed against him prior to the dismissal will be reviewed on appeal. Pene v. Mauk, 5 Cal. App.2d 428, 435, 42 P.2d 697. Since no ruling of the court prejudiced appellant, none can be noticed on appeal. 2 Cal.Jur. pp. 839, 840, 845.

[11, 12] But further to extend the supposititious status of the clerk's entry by considering it a judicial order, we could not review the ruling upon defendant's demurrer. There is no appeal from such an order. Schwalen v. Retail Food Clerks Union, 46 Cal.App.2d 545, 546, 116 P.2d 179; Hughes v. Heffner, 29 Cal.App.2d 382, 383, 84 P.2d 540. The only opportunity for a review of a ruling on demurrer is that which arises out of the appeal from the final judgment on the merits adverse to demurrant, or by his declining to answer and allowing judgment to be entered against him. Byxbee v. Dewey, 128 Cal. 322, 60 P. 847.

In support of its contention that it has the right to appeal from the dismissal entered in the clerk's registry, appellant cites two authorities from other jurisdictions. Klinge v. Southern Pacific Co., 89 Utah 284, 57 P.2d 367, 105 A.L.R. 204; Wallen's Executors v. Moore, 248 Ky. 348, 58 S.W.2d 601. Neither announces any principle that will uphold the contention of appellant here. In the Klinge case, although the order of dismissal was made by the court its holding is positive support of respondents' position. A new trial had been granted plaintiff after verdict in his favor for $12,000. He then obtained a dismissal. Defendant's appeal was designed to obtain a review of the order granting the new trial, defendant insisting that such order was an injustice to the company. Under the Utah practice there is no provision for appeal from the order granting a new trial. Lukich v. Utah Construction Co., 46 Utah 317, 150 P. 298. But following an industrious review of the authorities the court held in accordance with the general rule (3 C.J. 621, 636; 4 C.J.S., Appeal and Error, §§ 169, 183) that plaintiff cannot prosecute an appeal from a judgment in his own favor nor from a voluntary dismissal; that he is not aggrieved thereby; that in order to review intermediate rulings there must be a final, definite and adverse judgment against the appellant; that the dismissal of an action without prejudice is not prejudicial to defendant merely because the plaintiff may commence a new action; that the granting of a new trial erases the verdict as though it had never been; and that plaintiff has the same right to dismiss the action after, as before, the trial. Pursuant to such holding that appeal was dismissed notwithstanding plaintiff had, following the dismissal, obtained a judgment on the same claim in the federal court. While two of the justices thought some way should be found to review the order for a new trial because of error in making the order and because there was no appeal in Utah from such an order, yet a dismissal of the appeal was the decision of the court. The Whallen case was a will contest. After verdict sustaining the will the contestants moved for a new trial which was granted. The contestees prepared a bill of exceptions to preserve their right to have the first verdict reinstated in event they should not prevail in a second trial. After the commencement of the new trial on the motion of contestants the contest was dismissed without prejudice. On appeal by the contestees it was established that while in Kentucky no appeal lies from an order granting a new trial and an action may be dismissed by plaintiff as a matter of right before its final submission to the jury, yet where defendant has obtained a verdict in his favor he had acquired a substantial right of which he cannot be deprived by the court in ordering a dismissal after having granted a new trial. Upon appeal from the order of dismissal after verdict the court held that the defendants might show that the court had abused its discretion in granting the new trial. To have denied the appeal would have deprived the defendants of the benefits of a favorable verdict returned after trial without error. It was pointed out that whereas under Kentucky practice an order granting a new trial is not final in that it is appealable, yet it is "final in the sense that the excepting party has been divested of a right which the court * * * cannot restore after the expiration of the term. The right of appeal is merely held in abeyance pending the subsequent trial and final disposition of the case." [248 Ky. 348, 58 S.W.2d 603.] It thus appears that the Kentucky decision of dismissal after the case had been tried is without force to support an appeal in California from a dismissal under subdivision 1, Section 581, for the reason that provision subsists for appeals from orders granting new trials.

Huntington Park Imp. Co. v. Superior Court, 17 Cal.App. 692, page 694, 121 P. 701, does not support appellant's contention but is in accord with the conclusions above announced. It is there held that after the court has been ousted of jurisdiction by the plaintiff's dismissal of his action prohibition will lie to prevent further proceedings.

It is therefore ordered that respondents' motion be and is hereby granted and that the appeal herein be and the same is hereby dismissed.

McCOMB, J., concurs.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.




68 Cal.App.2d 755

**In re ISAMAN'S ESTATE.**

**COLE et al. v. EVANS.**

**Civ. 14857.**

District Court of Appeal, Second District, Division 2, California.

April 17, 1945.

**1. Executors and administrators ⇐379**

The Probate Code provision authorizing court to vacate order confirming sale is merely directory, and vacation of an order of confirmation rests solely in the discretion of the court. Probate Code, § 788.

**2. Appeal and error ⇐983(3)**

An order vacating or refusing to vacate sale of real estate on motion of executor or administrator will not be disturbed except for abuse of discretion. Probate Code, § 788.

**3. Appeal and error ⇐931(1)**

On appeal by administrator from order refusing to vacate confirmation of sale, the evidence must be viewed most favorably to appellee. Probate Code, § 788.

**4. Appeal and error ⇐935(3)**

The presumption on appeal is that court properly denied administrator's order to vacate sale of real estate. Probate Code, § 788.

**5. Appeal and error ⇐901**

On appeal from order denying administrator's motion to vacate sale of real estate, appellant must show that there was no substantial evidence supporting such order. Probate Code, § 788.

**6. Appeal and error ⇐1024(6)**

An order denying administrator's motion to vacate confirmation of sale of real estate will not be disturbed where it was based on conflicting evidence. Probate Code, § 788.

**7. Executors and administrators ⇐379**

Finding that purchasers of real estate were not to blame for delay in closing purchase, and that delay was caused solely by party seeking to vacate confirmation of sale, was sustained by the evidence. Probate Code, § 788.

**8. Executors and administrators ⇐379**

Administrator's motion to vacate order confirming sale of real estate was properly denied and administrator was directed to execute additional deed, where proof showed that delay was due to administrator and his decedent. Probate Code, § 788.

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Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Sara C. Isaman, deceased. On motion by Clarence H. Evans to vacate confirmation of sale, and on motion of Clem Cole, Jr., and Ruth C. Cole to enforce the execution and delivery of the deed. From an order denying motion to vacate confirmation of sale and directing the deposit of deed in escrow conveying the property involved, Clarence H. Evans appeals.

Affirmed.

Jones & Wiener, of Los Angeles, for petitioners and respondents.

Marcus, Rabwin & Nash, of Los Angeles, for contestant and appellant.

MOORE, Presiding Justice.

The question for decision is whether the probate court abused its discretion in directing the administrator to convey property, the sale of which had already been confirmed, and in denying the motion of the administrator to vacate the order of confirmation, substantial evidence having shown that the delay was not due to the neglect or refusal of respondents.

On October 7, 1943, the court below made its order confirming the sale of a residential property belonging to decedent's estate for the sum of $5,550. At that time respondents held a lien in the sum of $2,474.05 upon the property, secured by a trust deed, and it was in default. An escrow was immediately opened in which respondents deposited $550 in cash and a statement

acknowledging receipt of $2,474.05. Also, they promptly arranged with a bank for a loan of $2,500. Subsequently they deposited in the escrow a valid, non-negotiable order drawn upon the bank for the borrowed amount. The aggregate of the foregoing sums constitutes the total purchase price. The executrix, acting through her husband, William Akin, deposited her deed conveying the property to respondents. At the same time he filed also a rental statement in the escrow by which it was disclosed that he was occupant of the premises under an oral, one-year lease recently granted to him by the executrix.

Following the disclosure of the lease and respondents' resentment thereat negotiations resulted in a tentative agreement for delivery of possession by Mr. Akin prior to April 1, 1944. Directly after that agreement the executrix deceased. The administrator with will annexed, appellant herein, qualified on February 18, 1944. Straightway following his qualification demands were made upon him for the filing of a new deed. He refused at all times to make such deposit. Moreover, his attorneys consistently reiterated to respondents that a deed to the property would be obtained only by order of court. Appellant's motion to vacate the confirmation of sale came on for hearing concomitantly with the citation issued to appellant for the purpose of enforcing the execution and delivery of a deed. The motion was denied but appellant was ordered to deposit his deed in escrow conveying the property pursuant to the order of October 7, 1943.

[1-6] Section 788, Probate Code, provides: "If, after the confirmation, the purchaser neglects or refuses to comply with the terms of the sale, the court, on motion of the executor or administrator, and after notice to the purchaser, may vacate the order of confirmation * * *." The quoted statute is merely directive and permissive. The vacation of an order of confirmation rests solely in the discretion of the court. The order made pursuant to the exercise of such discretion will not be disturbed unless it is made to appear that such discretion has been abused. Sharpe v. Sharpe, 55 Cal.App.2d 262, 130 P.2d 462, 2 Cal.Jur. 896; Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301; In re Estate of Cowell, 170 Cal. 362, 149 P. 808; In re Estate of Bazzuro, 161 Cal. 71, 118 P. 434. Appellant's argument proceeds upon the assumption that the evidence most favorable to him constitutes the record on appeal. This is false logic. The facts before this court are those determined by the court below, and they are attended by a presumption of their correctness. Successfully to attack the findings is possible only by showing that there was no substantial evidence received on behalf of the respondents. Bellman v. San Francisco H. S. District, 11 Cal.2d 576, 81 P.2d 894. Certainly, in the absence of error, findings based upon conflicting evidence will not be disturbed.

[7, 8] The court was apparently convinced that the conduct of the executrix was not marked by the good faith to which purchasers at a judicial sale are entitled. Prior to receiving respondents' bid she had given her husband the oral lease, but in consummating the transaction she made no reference to that incumbrance prior to or at the time of the hearing on the report of sale. Neither did respondents learn of it until after they had deposited in escrow the funds required for the purchase. But wholly apart from any question of such bad faith the proof clearly warranted the finding that, after the delays caused by the death of the executrix and appellant's tardiness in qualifying, subsequent delays in closing the deal were caused only by the refusal of appellant to deposit a new deed in the escrow. Such finding emphatically exculpated respondents from any bad faith or reprehensible conduct. On the contrary it was determined that appellant was wholly responsible for the retarded consummation of the transaction. No sound argument for a reversal can be advanced by appellant on account of respondents' repeated postponement of the foreclosure sale of the property by his trustee under the deed of trust. Such behavior could have been by the court regarded only as a cooperative gesture in view of appellant's steadfast refusal to deliver a new deed.

The judgment is supported by In re Estate of Backesto, 63 Cal.App. 265, 218 P. 597, in which after a fair sale and its confirmation a dispute arose with reference to the payment of certain taxes charged against the realty. Upon a hearing the purchaser's petition to require the administrator to accept the balance of the amount bid and to convey the property clear of incumbrances was denied by the probate

court. On the contrary it set aside the order of sale. On appeal the judgment was reversed on the principles that a sale by the court is not judicial unless it is made upon the express order of the court and that in executory contracts for the sale of land there is an implied covenant that vendor will transfer a valid, unencumbered title to the vendee. Barnes v. Morrison, 102 Cal.App. 152, 282 P. 986, cited by appellant, is not authority for his present contention. In that case the administrator had duly tendered to the purchase a good and sufficient deed conveying the land free from encumbrance, after which tender the purchaser was never able to procure the money with which to pay the purchase price.

The judgment is affirmed.

McCOMB, J., concurs.




## HOWARD v. HOWARD.*

Civ. 12781.

District Court of Appeal, First District, Division 2, California.

April 24, 1945.

As Modified on Denial of Rehearing May 24, 1945.

Hearing Granted June 21, 1945.

1. Divorce ⇐331

Where wife sued to establish as a foreign judgment a Nevada divorce decree and to recover the sums due thereunder which were ordered paid wife in accordance with a property settlement and the defendant set up that property settlement was obtained by fraud, attack upon the Nevada decree was a "direct" and not a "collateral attack".

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Direct Attack".

2. Judgment ⇐443(1), 464

In an equitable proceeding the courts may inquire whether a judgment valid on its face was obtained by fraud, and such judgment may be set aside, or where such relief cannot be had a court of equity may prevent an inequitable advantage from being taken of the judgment by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party.

3. Judgment ⇐518

An attack upon a judgment on the ground that it was procured by fraud is a "direct attack", since the establishment of the fraud shows that no judgment has been rendered.

4. Judgment ⇐518

A party may attack a judgment on the ground that it was obtained by extrinsic fraud, and such attack is not "collateral", whether made in the same proceeding or in a separate suit in equity.

5. Limitation of actions ⇐40(2)

Under the codal provision permitting a defendant who seeks affirmative relief against a party relating to or depending upon the contract upon which the action is brought to file a cross-complaint, a defendant may abide his time and when enforcement is sought against him excuse himself from performance by proof of fraud. Code Civ.Proc. § 442.

6. Divorce ⇐331

In action by wife to establish as a foreign judgment a Nevada divorce decree, and to recover thereunder sums which were ordered paid to plaintiff in accordance with a property settlement, the fraud set up by defendant that property settlement was procured by fraudulent representations was "extrinsic fraud" which was properly pleaded as a defense to the action. Code Civ.Proc. § 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Extrinsic Fraud".

7. Divorce ⇐331

In action to establish as a foreign judgment a Nevada decree of divorce and to recover sums due thereunder in accordance with property settlement, defendant was not estopped from attacking the decree of divorce because of his subsequent remarriage, and defendant could also attack that part of the decree adopting the property settlement agreement on ground that property settlement had been procured by fraud. Code Civ.Proc. § 442.

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Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

* Subsequent opinion 161 P.2d 681.

Action by Anita Z. Howard against Lindsay C. Howard to establish as a foreign judgment a Nevada decree of divorce and to recover sums due under the decree, which were ordered paid to plaintiff in accordance with a property settlement, wherein the defendant filed a cross-complaint charging fraud and subsequent remarriage of plaintiff with another. From a judgment for plaintiff on sustaining of demurrer to answer and cross-complaint without leave to amend, the defendant appeals.

Judgment reversed.

Walter McGovern, of San Francisco, and Neil S. McCarthy, of Los Angeles, for appellant.

Torregano & Stark and Francis W. Murphy, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to establish as a foreign judgment a Nevada decree of divorce and to recover sums due under the decree which were ordered paid plaintiff in accordance with a property settlement. The defendant filed an answer and cross-complaint in which he pleaded two separate defenses—that the money portions of the Nevada judgment lapsed through its specific terms because of the subsequent marriage of plaintiff with one Gerald Melone, and that the property settlement was procured by the fraud of plaintiff in that she represented to defendant that she was a woman of good moral character and a faithful wife and mother whereas during coverture and prior to the execution of the agreement she had repeatedly committed acts of adultery with numerous men, four of whom were named in the pleading. The trial court sustained a demurrer to the answer and cross-complaint without leave to amend, struck out all material portions of the pleading relating to the defense of fraud, and entered judgment for the plaintiff.

The charge of a subsequent marriage was based upon allegations of cohabitation in Mexico over a period of several months which was assumed to have consummated a common-law marriage, but appellant does not press for a ruling on that portion of the order. On the issue of fraud the defendant's appeal from the resulting judgment presents these three questions: (1) Is the attack upon the Nevada decree direct or collateral? (2) Is the alleged fraud extrinsic or intrinsic? (3) May a party to a suit for divorce attack the money portions of the decree and permit the rest of the decree to stand?

A brief statement of facts will suffice. The parties were married in 1925 and are the parents of three children. In August, 1938 the property settlement was executed and the plaintiff went to Reno, Nevada, where, on October 21, 1938, she was granted a divorce upon an uncontested hearing. The decree adopted the property settlement agreement through which the parties were given joint custody and control of the children and defendant agreed to pay to plaintiff the sum of $1250 each month for the maintenance of herself and the minor children until she should remarry, and to pay additional sums for the support of the children. (It is stated in the appellant's brief and not denied that the children were taken from the custody of respondent by a final judgment of another superior court and the custody awarded to their paternal grandparent. The defendant's obligation to support the children is not involved in this proceeding.)

[1-3] The attack upon the Nevada decree is direct and not collateral. Concededly there is some confusion in the decisions as to when an attack upon a judgment is direct and when it is indirect, but there is not the same uncertainty as to when it is collateral. Thus, "where an action is brought upon a judgment and the defendant sets up the invalidity of the judgment as a defense, this is a collateral attack upon the judgment." Rest.Judgments, § 11, p. 66. But, where proceedings are taken in the action in which the judgment is rendered to have the judgment vacated it is a direct attack upon the judgment. Id., § 11, p. 65. The character of the attack, whether direct or collateral, is thus determined on the basis whether the attack is made in the same proceeding or in an independent suit. Our system of pleading calls for some qualification of these general rules. We may start with the precept stated in Title Ins., etc., Co. v. California Dev. Co., 171 Cal. 173, 208, 152 P. 542, 557, that: "It is elementary that the courts of this state may, in an equitable proceeding, inquire whether a judgment valid on its face was obtained by fraud. Sometimes such judgments may be set aside, but even in cases where this relief cannot be had a court of equity may—'prevent an inequitable advan-

tage being taken of it (the judgment) by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party.'" And in Parsons v. Weis, 144 Cal. 410, 415, 77 P. 1007, 1010, it is said that "an attack upon a judgment on the ground that it was procured by fraud is a direct attack, since the establishment of the fraud shows that no judgment has been rendered." In the early case of Eichhoff v. Eichhoff, 107 Cal. 42, 48, 40 P. 24, 25, 48 Am.St.Rep. 110, it was said that "when an action is brought in a court of equity to set aside a judgment at law, the attack, although not collateral is always indirect." See to similar effect Bergin v. Haight, 99 Cal. 52, 56, 53 P. 760; Caldwell v. Taylor, 218 Cal. 471, 475, 23 P.2d 758, 8 A.L.R. 1194; Patterson v. Almond, etc., 40 Cal.App. 285, 289, 180 P. 823; Borg v. Borg, 25 Cal.App.2d 25, 30, 76 P.2d 218; Assets Corp. v. Perrin Properties, 48 Cal. App.2d 220, 226, 119 P.2d 375.

[4, 5] The cases all support the doctrine that in this state where there is no separation of the courts of law and the courts of equity a party may attack a judgment on the ground that it was obtained by extrinsic fraud and that such attack is not collateral whether made in the same proceeding or in a separate suit in equity. This is made clear by the provisions of section 442 of the Code of Civil Procedure which permit a defendant who seeks affirmative relief against a party "relating to or depending upon the contract * * * upon which the action is brought" to file a cross-complaint. In other words "he may abide his time, and when enforcement is sought against him excuse himself from performance by proof of the fraud." In re Estate of Cover, 188 Cal. 133, 141, 204 P. 583, 587.

The foregoing relates to those cases where the fraud alleged is extrinsic rather than intrinsic. The distinction is given with some qualifications in Rest., Judgments, § 118, p. 571, "The distinction between the types of situations in which equitable relief will be given and those in which it will not be given, has sometimes been expressed by saying that equity will not relieve for fraud which leads to an erroneous judgment after a trial which is otherwise fair, but only where a party has been prevented from having a reasonably fair trial. The first situation has been described as resulting from intrinsic fraud or error for which no relief will be given; the second situation has been described as resulting from extrinsic fraud, error, or misfortune, for which relief will be granted." A precise statement is found in the leading case of Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 971, 27 P. 537, 13 L.R.A. 336, 25 Am.St.Rep. 159, where it is said: "That a former judgment or decree may be set aside and annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or, where an attorney fraudulently pretends to represent a party, and connives at his defeat or, being regularly employed, corruptly sells out his client's interest."

[6] Here the alleged fraud consisted of the misrepresentations of the plaintiff in the divorce action before the action was commenced and before the property settlement was executed that she had been a faithful wife and mother and the concealment from the defendant that she had committed various acts of adultery in her own home and at other places during coverture. In support of these allegations the appellant herein contends that if he had known of those acts he would not have executed the agreement and particularly would have contested respondent's right to the joint custody of the minor children and the payment to her of a portion of the monthly sums for their maintenance and support.

The authorities cited all support the conclusion that the acts alleged were acts of extrinsic fraud which may be proved in defense of the present action. A case supporting appellant's argument that the alleged acts constitute fraud is Murdock v. Murdock, 49 Cal.App. 775, 194 P. 762, where a wife obtained a judgment setting aside her gift to the husband on the ground of fraud which consisted of his adultery in face of protestations of faithfulness. In affirming the judgment it was said (49 Cal.App. at page 786, 194 P. at page 767), "Indeed, from the authorities briefly reviewed herein, the proposition is clearly deducible (and upon principle the proposition as involving a sound legal rule would appear to be unimpeachable) that, even where there have been no false representations or promises by one of the spouses that the marital obligations have always been and would always be faithfully kept, property which has been given by one to the other will be restored to the donor upon discovery by the latter that the donee has been before or after the gift guilty of maintaining meretricious relations with a third party. In other words, the very act of unfaithfulness to the marriage vows in the particular characterizing this case itself furnishes a sufficient legal ground for vitiating the gift." The court cites with approval Thomas v. Thomas, 27 Okl. 784, 109 P. 825, 831, 113 P. 1058, 35 L.R.A.,N.S., 124, 133, Ann.Cas.1912C, 713, where a husband sued to cancel a gift to his wife upon the ground that, after the gift had been made, he discovered that she had committed acts of adultery while pretending that she was faithful to her husband. There the court said, as to the right of the husband to cancel the gift, "In the wife's adultery the entire foundation and consideration for the gift is swept away and leaves its support void—indeed in this case the consideration was gone, the right to care, affection, confidence, or even tolerance, every basic consideration, had been destroyed and had no existence when the gift was made. These things failing, the gift failed." A number of cases are cited in the opinion to the general effect that where a confidential relation exists, such as that between husband and wife, and one has obtained an unfair advantage over the other by means of the influence and confidence thus acquired and betrayed equity will interpose to relieve the injured party from the other's fraud.

Respondent relies upon Petry v. Petry, 47 Cal.App.2d 594, 118 P.2d 498, and Bullock v. Bullock, 131 Wash. 339, 230 P. 130. In the Petry case the husband attacked a property settlement on the ground that the marriage was void because the wife had not been legally divorced from her former husband. The reviewing court held that this was a collateral attack upon the judgment of divorce because the validity of the marriage was an issue in the divorce action and the finding of "marriage" presupposed a valid marriage. The Washington case stands alone and is out of harmony with the rule of the cases in this state.

[7] In support of the judgment the respondent contends that appellant is estopped from attacking the decree of divorce because of his subsequent remarriage, and that the law does not permit one to attack a portion of a final judgment and permit the remainder to stand. Neither point has any merit. The subsequent marriage of appellant has no possible relation to the question of respondent's fraud in procuring the property settlement agreement. And it should be emphasized here that the rights of the minor children are not involved in this proceeding in any manner, that appellant has not been charged with abandonment or a failure to provide for them at any time, and that their custody and control has been taken from respondent in another court. The old doctrines of status quo and restitution have no place in a proceeding of this kind where the offending party has herself chosen the "status" and where there is nothing to restore. Milekovich v. Quinn, 40 Cal. App. 537, 545, 181 P. 256; Title Ins., etc., Co. v. California Dev. Co., 171 Cal. 173, 209, 152 P. 542; Locke Paddon v. Locke Paddon, 194 Cal. 73, 83, 227 P. 715; In re Estate of Barrow, 27 Cal.App.2d 402, 406, 80 P.2d 1006.

That a party may under these circumstances have relief from a property settlement obtained by fraud without attacking the judgment granting a divorce has been heretofore adjudicated in Mason v. Mason, 219 Cal. 111, 25 P.2d 461, and Lorraine v. Lorraine, 8 Cal.App.2d 687, 695, 48 P.2d 48. In Milekovich v. Quinn, supra, this court had on appeal a similar case where a party to a divorce decree attacked in a separate action a property settlement. The plaintiff in the second action had married

after the divorce had been granted and we held that notwithstanding this new relation she was entitled to relief from the fraud practiced upon her in relation to the property rights alone. This case has been cited with approval and we have found no authority in this state to the contrary. For these reasons we are satisfied that the proposed answer and cross-complaint plead a triable cause of action for equitable relief from a contract affecting the property rights of the parties alone. There is no sound reason why this issue should not be tried without upsetting the decree of divorce. If the respondent is entitled to some award in the nature of alimony the court, in the exercise of its equity powers, may grant her such protection. But the fact that some support may be proper cannot be used to deny to appellant his day in court upon the other issues raised.

Judgment reversed.

GOODELL, J., and DOOLING, J. pro tem., concur.




68 Cal.App.2d 742

**DRURY v. HAGERSTROM et al.**

**Civ. 14654.**

District Court of Appeal, Second District, Division 2, California.

April 17, 1945.

Hearing Denied June 14, 1945.

**1. Appeal and error ⇐930(1)**

On appeal from judgment on jury's verdict for defendants, evidence must be viewed in light most favorable to defendants.

**2. Automobiles ⇐244(6, 50)**

In action for death of pedestrian walking into side of defendants' truck while crossing street outside marked crosswalk, truck driver's testimony was sufficient to support jury's verdict for defendants on grounds of their freedom from negligence and deceased's contributory negligence.

**3. Appeal and error ⇐989**

On appeal from judgment on jury's verdict supported by evidence, appellate court must disregard conflicting testimony and inferences which jury might have drawn from evidence.

**4. Automobiles ⇐243(17)**

In action for death of pedestrian walking into side of defendants' truck, evidence of deceased's intoxication about 12 hours before accident was not inadmissible as too remote from time of accident.

**5. Negligence ⇐132(1)**

Remoteness of evidence of intoxication from time of injury to intoxicated person does not render such evidence inadmissible on question of his contributory negligence, but is fact to be considered by trier of facts in determining weight of such evidence.

**6. Automobiles ⇐244(50, 58)**

In action for death of pedestrian walking into side of defendants' truck, evidence was sufficient to take to jury questions whether decedent was intoxicated at time of accident and whether such intoxication contributed to accident, so that verdict for defendants because of decedent's contributory negligence was not improper as reached through prejudice and passion.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Catherine Drury against Clarence H. Hagerstrom and another, copartners, doing business under the fictitious firm name and style of Express Freight Lines, for the death of plaintiff's husband as the result of walking into the side of defendants' truck. Judgment for defendants, and plaintiff appeals.

Affirmed.

Chas. G. Young, of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for the death of plaintiff's husband alleged to have been caused by the negligence of defendants, plaintiff appeals.

[1] The evidence being viewed in the light most favorable to defendants (respondents) and pursuant to the rules set forth in Estate of Isenberg, 63 Cal.App.2d

214, 216 et seq., 146 P.2d 424, the essential facts are:

Shortly after midnight of May 20, 1943, Harold C. Rhoades, an employee of defendants, was driving a large truck and trailer in a southerly direction on San Fernando Road where it intersects Chevy Chase Drive. At the same time plaintiff's husband, Mr. Drury, was crossing from the east to the west side of San Fernando Road at a point ten feet outside of a marked crosswalk. The forepart of the truck passed Mr. Drury, who continued to walk in a westerly direction walking into the side of the vehicle with resulting injuries from which he died.

[2, 3] Plaintiff urges reversal of the judgment on three propositions which will be stated and answered hereunder seriatim:

First: *The judgment is not supported by the evidence.*

This proposition is without merit. Mr. Rhoades, the driver of defendant's truck, gave evidence from which the jury was justified in finding the facts set forth above.* From the facts thus found, the jury impliedly found that defendants were free from negligence and that the deceased met his death as the result of his own contributory negligence in walking into the side of defendants' truck. Under well established rules in this state we must disregard conflicting testimony and inferences which the jury might have drawn from the evidence but did not. (See Estate of Isenberg, supra.)

[4, 5] Second: *The trial court committed prejudicial error in receiving evidence that decedent was inebriated at 3:00 p.m. on May 20, 1943, for the reason that such evidence of intoxication was too remote from the time of the accident.*

This proposition is untenable. It is the rule in California that remoteness of evi-

* Witness Rhoades testified in part as follows:

"Q. Having gotten into San Fernando Road some blocks north of Chevy Chase, as you turned into Chevy Chase, in what line of traffic were you traveling? A. The center lane. * * *

"Q. As you approached Chevy Chase what was your speed? A. Between 20 and 25 miles an hour. * * *

"Q. As a matter of fact when you passed Mr. Drury on the highway there, in place of Mr. Drury being standing up he was lying down on the street, was he not? A. No, sir; he was standing up when I passed him with the truck.

"Q. And 10 feet of your truck had passed him at that time? A. Yes, sir.

"Q. And he was four feet to your left away from the truck? A. Yes, sir.

"Q. Where was this woman when you first saw her? A. About a foot north of the crosswalk.

"Q. About what? A. About one or two feet north of the crosswalk.

"Q. Mr. Drury was in the crosswalk, was he? A. He was not. He was 10 feet from the crosswalk.

"Q. Which side? A. North of the crosswalk.

"Q. Where was Mr. Drury after the impact? A. At the north edge of the crosswalk.

"Q. Do you recognize the tree here? A. Yes sir.

"Q. You recognize this as San Fernando Road (indicating)? A. It is different.

"Q. Is it different? A. Yes, the street runs at an angle. That is in line with the west curb of the street.

"Q. Which way would you say Chevy Chase run? Is it an angle towards this direction or towards the northeast or northwest? (Indicating) A. Towards the northwest.

"Q. Just where was Mr. Drury's body lying after the impact? A. Right along in here. (Indicating)

"The Court: Right about there (indicating)? A. Yes.

"The Court: That will be marked 'Drury, Rhoades'.

"Q. By Mr. Young: Do you mean to say that he was lying on the north line of the crosswalk? A. Yes, sir.

"Q. Is that correct? Now how far west of the center line would you say Mr. Drury was? A. I couldn't say.

"Q. Approximately how far? A. I wouldn't say. I don't remember the exact distance. I would say approximately four feet.

"The Court: Now then, where was he at the time you first saw him when you say you passed him with the cab? A. About here.

"The Court: Right on the line? A. Yes, sir.

"The Court: That will be marked 'X–4'; that will also be marked 'Drury', and in the margin 'Rhoades'.

"Go ahead, counsel.

"Q. By Mr. Young: When you saw Mr. Drury, he was in the double line in the center of the street, is that correct? A. Approximately so.

"Q. And how far north of the crosswalk would you say that was? A. About 10 or 15 feet. * * *"

dence of intoxication does not make such evidence inadmissible but is a fact to be considered by the trier of fact in determining the weight to be given such evidence. (People v. Collins, 195 Cal. 325, 351, 233 P. 97. See also 2 Wigmore on Evidence, [1940] page 31, sec. 235; 3 Nichols Applied Evidence [1928] page 2680, sec. 9.)

[6] Third: *The jury reached its verdict through prejudice and passion.*

This proposition is also without merit. Defendants' attorney stated to the jury that he expected to prove that decedent was in a very drunken condition at 3:00 p.m. on May 20, 1943. Subsequently, evidence in support of such statement was properly admitted by the trial judge. There was also evidence that decedent was drinking beer about 11:30 p.m., May 20, 1943, which was approximately one-half hour before the fatal accident. It was for the jury to determine from such evidence whether or not in their opinion decedent was intoxicated at the time of the accident, and whether such intoxication was a factor contributing to the unfortunate occurrence. (Coakley v. Ajuria, 209 Cal. 745, 752, 290 P. 33; Trumbell v. Erickson, 8 Cir., 97 F. 891, 893.)

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.




68 Cal.App.2d 788

**ARISTOCRAT HIGHWAY DISPLAYS, Inc., v. STRICKLIN.**

Civ. 3171.

District Court of Appeal, Fourth District, California.

April 19, 1945.

**1. Contracts ⇐278(1)**

Where emergency ordinance of county board prohibiting any illumination without provision for its extinguishment within one minute after commencement of air raid alarm made performance of contract previously executed on October 14, 1941, for rental of two illuminated highway advertising signs more difficult and expensive and illumination was never provided, agreed rental could not be recovered.

**2. Contracts ⇐303(2)**

Laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse duty to perform a contractual obligation.

**3. Contracts ⇐309(1)**

Where contract for rental of two illuminated highway advertising signs was executed on October 14, 1941, the parties contracted with danger of war a foreseeable event, and failure to provide for it in contract created inference that risk of war was assumed.

**4. Work and labor ⇐28(4)**

Where contract provided for rental of two illuminated highway advertising signs, but illumination had not been provided because emergency ordinance of county board made furnishing of illumination more difficult and expensive, but plaintiff sought to recover reasonable rental value of the unilluminated signs, evidence supported determination that the unilluminated signs had no value.

**5. Contracts ⇐278(2)**

Where obligation of defendant to pay rental under contract for rental of two illuminated highway advertising signs did not accrue until advertising signs were completed but signs were never completed so as to provide illumination, provision of contract that any unavoidable loss of advertising should be satisfied by advertiser being accorded suitable and coextensive advertising in extended service, and acceleration clause, did not entitle plaintiff to recover agreed rental by agreeing to give defendant an extended period of service after expiration of the fixed term.

**6. Contracts ⇐214**

An acceleration clause in a contract advances the date of payment of future installments when there is default in a payment, but, if there is no default, there is no acceleration.

**7. Contracts ⇐303(2)**

Where contract executed October 14, 1941, provided for rental of two illuminated highway advertising signs, but plaintiff failed to put itself in a position to be able to furnish illumination because emergency ordinance of county board made perform-

ance more difficult and expensive, plaintiff could not recover agreed rental on ground that a lieutenant general's proclamation issued on August 5, 1942, prohibiting electrical illumination of highway advertising signs, prevented performance.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by the Aristocrat Highway Displays, Inc., against D. S. Strickland, doing business under the fictitious firm name and style of Southern Garage, to recover the rental of two highway advertising signs. Judgment for defendant, and plaintiff appeals.

Affirmed.

Mack, Werdel & Bianco, of Bakersfield, for appellant.

West & Vizzard, of Bakersfield, for respondent.

MARKS, Justice.

This is an appeal from a judgment for defendant in an action to recover the rental of two highway advertising signs which plaintiff erected for defendant on Highway 99, north and south of Bakersfield.

The written contract was dated October 14, 1941, and provided that defendant pay plaintiff $75 per month for 36 months for the use of the signs. It contained an acceleration clause in the event of failure to pay the monthly rental and also the following:

"Total number of displays 2. Illuminated? Yes. * * * Any loss of advertising, damages or delays caused by the Act of God, strikes, labor conditions, or other cause beyond the control of Aristocrat Highway Displays, Inc., shall be satisfied by Advertiser being accorded suitable and co-extensive advertising in extended service at the expiration hereof."

On December 16, 1941, the board of supervisors of Kern County passed an emergency ordinance which contained the following:

"Section 4. The maintenance or leaving of any illumination, except within a blackout structure, without provision for its extinguishment, within one minute after the commencement of a period of air raid alarm by a competent person over the age of eighteen years attendant at the place where such illumination is controlled, is hereby prohibited."

On August 5, 1942, Lieutenant General J. L. DeWitt issued a proclamation which, after that date, prohibited the electrical illumination of such highway advertising signs as are involved here.

While the contract did not so provide, the parties agree that the two signs were to be illuminated by electric lights.

The evidence is not clear on the question of when work on the two signs started but it is probable that the actual work of placing them along the highway was started after December 7, 1941. Plaintiff discontinued work on them on January 23, 1942. They were completed except that they were not wired and had no electric lights on them. They were never illuminated.

The parties negotiated in an endeavor to agree upon a rental to be paid by defendant for these unilluminated signs. The negotiations failed and defendant paid plaintiff nothing.

[1] On September 30, 1942, this action was brought to recover $2700, the total rental specified in the contract for the three year period. The action was brought on the contract. At the conclusion of the trial, judgment was rendered for defendant, and properly so, because plaintiff was not prevented from fully performing its obligations under the contract by the ordinance of Kern County which did not prohibit the illumination of the signs if the conditions under which illumination was permitted were met. These conditions simply made performance by plaintiff more difficult and expensive.

[2, 3] As was said in Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47, 51, "Thus laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation." Under the facts of that case and the conclusions there reached we must conclude that the parties before us contracted with the danger of war a foreseeable event and should have provided for it in their contract or be subject to the inference that the risk of war was assumed. See also, Mitchell v. Ceazan Tires, Ltd., 25 Cal.2d 45, 153 P.2d 53.

As plaintiff failed to perform its obligations under its contract, and as the illumination of the sign was not prevented at least until August 5, 1942, it needs no cita-

tion of authorities to support the conclusion that it could not recover in an action on the contract.

After judgment went against it plaintiff moved for a new trial. A new trial was granted on stipulation of the parties to the effect that plaintiff might file an amended complaint setting up a second cause of action; that the first cause of action with allegations identical to those of the original complaint be submitted on evidence already taken during the first trial; that evidence be taken on the second cause of action at a second trial.

An amended complaint was filed on March 1, 1943. The second cause of action alleged in effect that defendant was indebted to plaintiff in the sum of $2700 for labor, services and materials furnished at defendant's request and for which he promised to pay. It is admitted that ownership of the signs remained in plaintiff and that defendant had no interest in them. Defendant did not promise to pay for the labor and materials used in constructing the boards. His obligation was to pay a monthly rental for the advertising after the signs were completed. Thus the cost of the boards and their installation had no direct bearing on the case.

[4] Plaintiff introduced evidence over the strenuous objection of defendant that the reasonable rental value of the unilluminated sign boards was $60 per month. The answer contained an allegation that the unilluminated boards had no value whatsoever. This was supported by evidence produced by defendant and the trial judge found in accordance with this evidence. Under these circumstances the judgment must be affirmed.

Plaintiff maintains that it can recover under the provisions of the contract already quoted by agreeing to give defendant an extended period of service after the term specified in the contract.

[5-7] There are persuasive reasons why this argument cannot be sustained. In the first place the obligation of defendant to pay rental did not accrue until the advertising signs were completed. As they were never completed it is difficult to understand how any acceleration clause in a contract could become effective on an obligation to pay money before the obligation became due. An acceleration clause advances the date of payment of future instalments when there is default in a payment. If there is no default there is no acceleration. Further, the extended service clause became effective where failure to perform was caused by something beyond the control of plaintiff. The ordinance did not render performance by plaintiff impossible, only more difficult and expensive, which did not excuse plaintiff from performing. If plaintiff had illuminated the signs and had fully performed its obligations under the contract up to August 5, 1942, then it might be argued that further performance was prevented by the proclamation of Lieut. General DeWitt. It clearly appears that the failure to perform was caused more by the failure of plaintiff to put itself in a position to be able to perform than by the proclamation. As plaintiff could not perform because it did not wire its signs, its failure to perform could not be charged to the proclamation.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.




69 Cal.App.2d 11

**HORSMAN et al. v. MADEN.**

**Civ. 12780.**

District Court of Appeal, First District, Division 1, California.

April 26, 1945.

**Hearing Denied June 21, 1944.**

**1. Appeal and error ⇐1011(1)**

On appeal, court cannot interfere with result reached by trier of facts when there exists a substantial conflict in the evidence.

**2. Husband and wife ⇐273(12)**

In action by deceased husband's executors against surviving wife to quiet title to property, evidence sustained finding that transfers of property by husband to wife were gifts.

**3. Appeal and error ⇐1099(3)**

In action by deceased husband's executors against surviving wife to quiet title to property, determination, on prior appeal, that trial court committed error in excluding evidence of husband's declarations that he did not intend to make gifts

to wife, did not establish as the law of the case that the transfers were not made as gifts.

**4. Husband and wife ⇐273(12)**

In action by deceased husband's executors against surviving wife to quiet title to property, finding that husband gave property to wife contained implied finding of husband's intent in transferring property to his wife and was sufficient to support judgment for wife.

**5. Gifts ⇐4**

Actual transfer of property plus an intention to give are the constituent parts of a "gift".

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

**6. Appeal and error ⇐1071(6)**

Findings which fully support judgment will not be set aside on appeal for failure to make a finding on an issue if a finding thereon results by necessary implication from those made.

**7. Husband and wife ⇐266**

Even though property was held in joint tenancy and was community property, husband could give his share in property to his wife as her separate property.

**8. Husband and wife ⇐273(12)**

In action by deceased husband's executors against surviving wife to quiet title to property, finding that husband delivered deed of gift of real property to wife made finding regarding community character of property or ownership of property prior to delivery of deed unnecessary.

**9. Husband and wife ⇐273(12)**

In action by deceased husband's executors against surviving wife to quiet title to property, wife's uncontradicted evidence required finding that bonds were her sole and separate property. Code Civ. Proc. § 956a.

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Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action to quiet title to certain real and personal property by John W. Horsman and another, as executors of the last will and testament of Emile Maden, deceased, against Marcella Maden. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Peter tum Suden and Richard tum Suden, both of San Francisco, for appellants.

Williamson & Wallace, of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a judgment for defendant in an action to quiet title to certain real and personal property. The plaintiffs are the executors of the estate of Emile Maden, deceased, and the defendant is his widow. The executors are seeking to recover for the estate property which defendant claims as her separate property. Almost all of the property in question was acquired with the community funds of defendant and her husband, held by them in joint tenancy, and then during 1934 and 1935 transferred to defendant. The basic issue in this case is whether Maden made a gift to his wife of his share in the property or whether he did not intend to affect the status of the property but made the transfers "as a matter of convenience and for the protection" of the parties' respective interests.

The present appeal is the second one taken in this case. Plaintiffs previously appealed from a judgment after nonsuit. The trial court had refused to allow plaintiffs to introduce evidence of Maden's declarations both before and after the transfers that he did not intend thereby to make a gift to defendant. It was held that the declarations were admissible. Horsman v. Maden, 48 Cal.App.2d 635, 120 P.2d 92. The case was retried in accordance with this decision and the present appeal taken from judgment rendered therein.

Emile and Marcella Maden were married on December 25, 1914. From the time of their marriage until 1933 the earnings of both spouses were deposited in joint bank accounts. From time to time money was withdrawn from these accounts for investments in various stocks, bonds, and in real property. Certificates representing the shares of stock purchased were, with a few exceptions, taken in the names of the parties as joint tenants. One of the exceptions was a one-eighth interest in the Cyclops Iron Works of which Maden was vice-president and manager. The stock certificate representing this interest was held

in his name alone. The spouses also held several bonds separately. Their home, purchased in the summer of 1933, was held in joint tenancy. A cash payment of $3,000 had been made at the time of purchase and a mortgage of $3,000 given to cover the balance of the purchase price.

Later in 1933 Maden told his wife that he had formed an attachment for another woman and asked her to secure a divorce which she refused to do. After talking with Maden's uncle and later the uncle's attorney, defendant withdrew all funds in the joint bank accounts amounting to approximately $8,500 and the securities in the joint safe deposit box. She left a note in the safe deposit box which read as follows: "Dearest Emile: I am taking charge of our possessions as I want to save you from yourself. Remember I love you dearly and know that I will always be your best friend. Marcella."

Thereafter the parties attempted a reconciliation and took a three months trip to the Orient. Defendant turned over the money she had withdrawn from the bank accounts to finance the trip. She retained possession of the securities. The reconciliation was a failure. Disputes arose over the matter of defendant's support. To work out his difficulties with his wife Maden took the steps over which there is much conflicting evidence. According to defendant's testimony she met her husband in October, 1934, in the safe deposit vault where she had her individual box. Her husband told her at that time that he had decided to give her the securities and $100 a month from his salary. He also agreed to make a deed to her of the family home. Defendant states that her husband then endorsed the stock certificates for transfer and delivered them to her with the statement that they were to be her personal and separate property. Among the securities were two $1,000 bonds of the Texas Corporation. Mr. Maden took one of the bonds with him and gave the other to defendant. She testified that there was no agreement or understanding that her husband should retain any interest in the securities transferred.

Defendant's testimony is corroborated by that of her father, who stated that he called at defendant's house shortly before Christmas and there met and talked with Maden who was packing his trunk preparatory to leaving. At that time Maden made the following remarks: "Dad, I suppose you know about Marcella and I." The father said he know nothing and Maden replied: "Well, we just cannot agree, and I am leaving but, Dad, don't worry, I gave Marcella everything."

After their separation Maden transferred additional property to defendant. In the spring of 1935 while she was in the hospital recuperating from an operation, he gave her the bond he had taken with him from the safe deposit box. Later in the year he delivered to her a deed of gift to their home in San Francisco and in October, 1937, he signed a document confirming the transfer to her of a Crown Zellerbach Voting Trust Certificate which had theretofore stood in his own name. Maden died in 1939.

In contradiction of defendant's proof that the transfers of the properties were gifts to her, is testimony that Maden stated that he never intended to part with his interest in the properties; that he only agreed to give his wife the income therefrom. In his will he declared that all of his estate was community property and that there was no agreement to make it defendant's separate property, but that it had been placed in her name as a matter of convenience. He then bequeathed his half of the community property to the other woman.

[1, 2] Plaintiffs attack the sufficiency of the evidence, as a matter of law, to sustain the findings in defendant's favor. They base their contention on proof of Maden's intent to retain his interest in the property, on defendant's interest in the outcome of the suit, and on inconsistencies in some of her testimony. Plaintiffs' argument on this point while persuasive is the type of argument which should have been, and probably was, addressed to the trial court. On appeal we cannot interfere with the result reached by the trier of fact when there exists a substantial conflict in the evidence. Plaintiffs' effort to escape this limitation on our powers by citation of Herbert v. Lankershim, 9 Cal.2d 409, 71 P.2d 220, is of no avail. That case is cited as authority for the proposition that in a proper case the appellate court may review the evidence. We believe that the evidence in the present case is sufficient to support the findings of the trial judge. The trial court had an opportunity of hearing the testimony and passing on the credibility of the witnesses, including defendant. When as a reviewing court we read the tran-

script we cannot say from anything we find therein that the conclusions reached by the trial court are incorrect.

[3] There is no merit in plaintiffs' contention that the previous appeal establishes as the law of this case that the transfers were not made as a gift to defendant. It is true that the decision contains the following statement, 48 Cal.App. 2d at page 639, 120 P.2d at page 94: "Despite the rulings refusing admission of certain evidence, some of the evidence given by defendant herself together with evidence given by other witnesses was sufficient to show that there was no intention on the part of the deceased to make a gift to defendant or to change the status of the property; that the transfers were requested by defendant for the protection of both parties; and that the deceased made the transfers after expressing his trust in the defendant and his faith that defendant would respect his interest in the property." However, this statement cannot be used to attack the sufficiency of the evidence. In the first place the court was discussing a nonsuit and was presenting the strongest statement possible of plaintiffs' case. In the second place the court said, 48 Cal.App. 2d at page 642, 120 P.2d at page 96: "It is probably unnecessary but we deem it appropriate to state that this court should not be understood as indicating any view with respect to the ultimate determination of the issues of fact which may be presented in this controversy."

[4-6] Plaintiffs complain with justification that the findings are not carefully prepared. However, they are sufficient to support the judgment. Objection is raised to the court's failure to find on the issue of Maden's intent in making the transfers. It is true that there is no specific finding on this point but the court found that Maden gave the securities to defendant and made a deed of gift of the real property. Implicit in the finding of a gift is a finding of Maden's intent in transferring the property to his wife. The actual transfer of the property plus an intention to give are the constituent parts of a gift. There is ample authority for holding that findings which fully support the judgment will not be set aside on appeal for failure to make a finding on an issue if a finding thereon results by necessary implication from those made. 24 Cal.Jur., sec. 207, p. 974; 10 Cal.Jur.Supp., sec. 207, p. 753.

[7] The finding that Maden gave his wife his interest in their jointly owned property makes unnecessary any extended consideration of plaintiffs' argument that they were unfairly prevented by the tactics of defendant's counsel from presenting proof that the securities and real property while held in joint tenancy remained community property. Whatever the manner of holding the property, Maden could give it to his wife as her separate property which is what the evidence shows that he did. In view of this conclusion a discussion of Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905, and related cases is not required.

[8] For the same reason the contention that the court failed to find on the ownership or community character of the real property is without merit. The finding that Maden delivered a deed of gift of the real property to defendant makes unnecessary a finding as to the ownership of the property prior to the delivery of the deed, and it is obvious from reading all of the findings that had the court made a specific finding on the ownership of the real property after the transfer it would have favored defendant.

Plaintiffs alleged in their complaint that subsequent to the marriage of defendant and Emile Maden they acquired certain bonds, namely, four $1,000 U. S. Government bonds of the issue of 1935; one $1,000 Southern California Edison bond; two $1,000 Texas Corporation bonds and one $1,000 American Mercantile Realty Company bond. They alleged that the bonds were at all times since their acquisition community property and were of the reasonable value of $8,000. Defendant admitted in her answer that the bonds were acquired after her marriage with Maden and with community funds. She alleged and at the trial offered evidence to prove that the Texas bonds were given her by her husband as her sole and separate property. The first one he gave to her on October 16, 1934, at the same time he transferred the securities to her. The other Texas bond was given in April, 1935, while she was in the hospital recovering from a serious operation. She alleged that prior to the year 1933 Maden gave her as her sole and separate property the $1,000 Southern California Edison bond and the $1,000 American Mercantile Realty Company bond. The government bonds she alleged were purchased out of her sepa-

rate funds. All of the bonds had been sold by defendant as her separate property.

[9] Plaintiffs offered no testimony to overcome the allegations and evidence that the bonds were given defendant as her separate property, yet they complain that the trial court failed to find on the ownership of the bonds. It is obvious from the pleadings, the evidence, and the other findings that if a finding is necessary we must and do find that the bonds were defendant's sole and separate property. Code Civ.Proc. sec. 956a.

The decision reached by us on the merits of this case makes unnecessary any consideration of plaintiffs' contention that the trial court made no finding of fact to support his conclusion of law that the action was barred by the statute of limitations.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.




68 Cal.App.2d 681

## SINGLETON v. SINGLETON.

Civ. 14490.

District Court of Appeal, Second District, Division 1, California.

April 9, 1945.

**1. Appeal and error ⇐930(1)**

Reviewing court is required to view the evidence in the light most favorable to plaintiff following a judgment in her favor.

**2. Malicious prosecution ⇐15**

The primary question to be considered in an action for malicious prosecution is the want of probable cause for the prosecution complained of.

**3. Malicious prosecution ⇐23, 32**

Malice may be inferred from want of probable cause, but want of probable cause may not be implied from the most express malice.

**4. Malicious prosecution ⇐18(1)**

The term "probable cause" insofar as applying to law of malicious prosecution is a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

**5. Malicious prosecution ⇐24(2)**

The existence of probable cause is not negatived by showing merely that accused was successful at trial of criminal proceedings in obtaining an acquittal, nor is even a conflict on issue of probable cause created by such favorable termination of the criminal prosecution.

**6. Malicious prosecution ⇐71(2)**

Where there is no dispute as to existence of facts relied upon to show probable cause, it is for trial court to determine as a matter of law whether an inference of existence of probable cause is warranted; but where the evidence bearing upon the issue is in conflict, it is a question for jury or judge as the trier of facts.

**7. Appeal and error ⇐1010(1)**

On appeal in malicious prosecution action, findings of trier of facts as to existence or nonexistence of facts and circumstances sought to be proved by evidence introduced before him and relied upon by respective parties to show probable cause or absence thereof will not be disturbed unless it can be held that they are supported by no substantial evidence in the record.

**8. Malicious prosecution ⇐56**

Burden of proving that there was no probable cause for defendant's prosecution of plaintiff upon which an action for malicious prosecution was based, rests upon the plaintiff.

**9. Malicious prosecution ⇐64(2)**

In action for malicious prosecution based on a charge of grand theft by brother against sister who had removed from house jointly occupied by them furniture which she claimed as her own, evidence showing that, although furniture was removed during nighttime, it was otherwise openly removed, justified finding that property was not surreptitiously taken so as to constitute probable cause for instituting prosecution.

**10. Malicious prosecution ⇐19, 20**

While it is not necessary to show on question of probable cause in action for malicious prosecution that the crime has in fact been committed, it is necessary to show not only that defendant had reasonable ground to believe, but that he did in fact believe that the crime had been committed, and that the plaintiff had committed the crime.

**11. Embezzlement ⇐5**
**Larceny ⇐3(3)**

When a person takes goods which he honestly believes are his own under a claim of title, he is not guilty of larceny, nor is such person guilty of embezzlement of property if it is openly and avowedly taken under a claim of title preferred in good faith. Pen.Code, § 511.

**12. Malicious prosecution ⇐20**

Where there was evidence in action for malicious prosecution which supported findings of trial court that defendant did not himself believe plaintiff guilty of felony for which she was prosecuted upon his complaint, all other facts and circumstances relied upon by him would be insufficient to constitute probable cause.

**13. Malicious prosecution ⇐20**

Even though facts brought out in action for malicious prosecution might in themselves be such as ordinarily to create a belief in mind of a reasonable person that crime with which plaintiff has been charged had been committed by plaintiff, yet, if defendant had knowledge of other facts and circumstances which would destroy such belief, the defense of probable cause is not available to defendant.

**14. Malicious prosecution ⇐21(2)**

If defendant in action for malicious prosecution can satisfactorily show that, prior to commencement of criminal prosecution alleged to have been malicious, he was advised by counsel after a full and fair disclosure of all facts within his knowledge that the crime charged had been committed, and further showed that he acted upon that advice in good faith, he established a complete defense.

**15. Malicious prosecution ⇐21(1)**

Where defendant, charged with malicious prosecution based on charge of grand theft against sister, failed to disclose to attorneys fact that sister was claiming title to property involved, although in possession of such knowledge, and attorneys were not shown to have received information from some other source, the defendant was precluded from relying upon defense of advice of counsel.

**16. Malicious prosecution ⇐21(1)**

Defense that criminal prosecution was commenced upon advice of counsel is unavailing in an action for malicious prosecution if it appears that defendant did not believe that accused was guilty of the crime charged.

**17. Malicious prosecution ⇐27**

In a malicious prosecution case, the plaintiff is not required, in order to recover compensatory damages, to show that prosecution was inspired by personal hostility, a grudge or ill will, but what is required is evidence which establishes bad faith or the absence of an honest belief that prosecution was justified.

**18. Malicious prosecution ⇐64(2)**

In action for malicious prosecution based on charge of grand theft by defendant against sister on ground she had removed furniture from house jointly occupied by them, evidence to effect that prior to institution of criminal action parties maintained an unfriendly feeling toward each other and that defendant had locked plaintiff out of the dwelling house was sufficient to show malice.

**19. Malicious prosecution ⇐32**

Trier of facts in action for malicious prosecution is justified in drawing an inference of malice from want of probable cause.

**20. Trial ⇐29(1)**

Denial of motion for mistrial, in action for malicious prosecution based on a charge of grand theft by defendant against his sister, because of remark of trial court in ruling on admissibility of evidence to effect that this was a suit for wrongful arrest and malice was alleged and that great latitude should be extended because the events causing woman to be arrested were important, which it was alleged showed that trial court had prejudged case against defendant, was not erroneous.

**21. Appeal and error ⇐1046(5)**
**Trial ⇐29(2)**

Statements of trial court during argument and discussion of defendant's motion

for nonsuit and for mistrial in action for malicious prosecution, indicating belief of court that plaintiff had a case and that there was malice, and referring to evidence showing that defendant had not disclosed all knowledge possessed by him to district attorney when asking his advice, were not prejudicial error.

**22. Trial ⇐384**

Trial court for purpose of ruling on motion for nonsuit is required to accept as true all evidence favorable to plaintiff's case and to interpret all evidence most strongly against defendant and to disregard contradictory evidence.

**23. Trial ⇐367**

The trial court in trying case without a jury has right to announce mental processes by which he determined the credibility of witnesses and by which he arrived at his conclusions.

**24. Appeal and error ⇐1046(5)**

Fact that trial judge, in exercise of his right to determine the facts from the evidence and in passing upon credibility of witnesses in case tried without a jury, may have exceeded the bounds of propriety, does not entitle an appellant to a new trial.

**25. Malicious prosecution ⇐38**

Although suits for malicious prosecution are not favored by the courts, nevertheless a plaintiff suing for malicious prosecution, having met the difficult burden of proof, is allowed a recovery.

**26. Malicious prosecution ⇐64(1)**

Allowance of attorneys' fees in action for malicious prosecution was erroneous, where there was no evidence that plaintiff paid any attorneys' fees in connection with the criminal prosecution instituted against her by defendant or that she incurred any liability whatever for such fees.

**27. Malicious prosecution ⇐68**

A criminal prosecution begun maliciously and without probable cause justifies the imposition of exemplary and punitive damages. Civ.Code, § 3294.

**28. Malicious prosecution ⇐68**

Exemplary damages were allowable in action for malicious prosecution where there was sufficient evidence of malice, oppression and design to injure the plaintiff. Civ.Code, § 3294.

**29. Appeal and error ⇐1004(1)**

Relief from allegedly excessive damages is available only when it appears that damages awarded had been given under the influence of passion or prejudice. Code Civ.Proc. § 657, subd. 5.

**30. Malicious prosecution ⇐69**

$2,500 as damages for malicious prosecution resulting in the arrest of plaintiff, a woman, on a charge of grand theft and confining her in two separate jails for periods of some three or four hours, and wherein she was booked, fingerprinted, and photographed, was not excessive.

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Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Jean Singleton against John Singleton to recover damages for malicious prosecution. Judgment for plaintiff, and defendant appeals.

Modified and as modified affirmed.

George Penney and Jean Wunderlich, both of Los Angeles, for appellant.

George Stahlman, of Los Angeles, for respondent.

WHITE, Justice.

The plaintiff, Jean Singleton, sued the defendant, John Singleton, who is her brother, for malicious prosecution and, upon trial before the court sitting without a jury, was given judgment for "$2500 as actual damages, $200 for attorney's fees in criminal proceeding, and $2500 as exemplary and punitive damages", from which judgment defendant prosecutes this appeal.

The action arose out of plaintiff's arrest on a grand theft charge filed against her on September 22, 1942, by defendant, after consultation with his own attorney, a police officer and a deputy district attorney, the latter of whom prepared the criminal complaint, which was signed by the defendant, and upon which the warrant for the arrest of plaintiff was issued. Pursuant to the warrant of arrest, plaintiff was taken into custody at the home of her sister in San Fernando Valley, was transported to University Division Police Station in the city of Los Angeles, where she was "booked" on a charge of grand theft, fingerprinted and photographed. After remaining in custody at University Station for some three or four hours, plaintiff was trans-

ferred to the Los Angeles County Jail, where she was again "booked," fingerprinted, photographed, and where she remained for some three hours, when she was released on bail. At the conclusion of the preliminary examination subsequently held in the Municipal Court of the City of Los Angeles, the magistrate, upon plaintiff's motion, dismissed the case.

As grounds for reversal, defendant contends that the evidence is legally insufficient to support the findings or judgment; that the evidence shows conclusively, as a matter of law, that defendant had probable cause for signing the criminal complaint, and that in so doing he acted without malice; that the court erred in denying defendant's motion for a nonsuit; that the court erred in denying defendant's motion for a mistrial; and that, as a matter of law, the actual and exemplary damages assessed against defendant are excessive and not supported by any evidence in the record.

[1] Viewing the evidence in the light most favorable to the plaintiff, as we are required to do following a judgment in her favor, we thus epitomize the factual background which gave rise to this litigation as revealed by the record.

The parties are sister and brother, defendant being the older by eight years. In 1924, with their parents and an older sister, they moved from Ireland to 851 West 48th Street in Los Angeles, which premises were then purchased by their father and mother as joint tenants. Their father died in 1931, and in 1932, their mother, in order to "save inheritance tax," transferred title of the real estate to defendant and herself as joint tenants. Upon her death in 1940, defendant became the record owner of the place. From 1924 until 1942 (a few days before plaintiff's arrest) both plaintiff and defendant lived there.

Besides the family home, there were on said premises several apartments and rooms which were rented. The income from said apartments and rooms was used by the parents to pay the family's living expense and also to make payments on the purchase money mortgage and trust deed. According to plaintiff's testimony, from 1937 on, in lieu of paying board at home, defendant made the payments due on the purchase money mortgage and trust deed.

Said home was furnished originally by their father and mother, in the main with things bought at auctions. Then, after defendant went to work at Barker Bros.' furniture store about 1926, in order to obtain the benefit of his discount, plaintiff and her mother from time to time bought items of furniture there on defendant's charge account, sometimes trading in their old pieces, and reimbursed defendant therefor when he paid the bills and brought home the receipts. From time to time, some furniture was purchased by plaintiff and her mother from other stores, also, and placed in the home or in the rented apartments.

Plaintiff left her employment and stayed home to keep house and care for her mother from 1932 to 1935, about a year in 1937 and '38, and again from 1939 until her mother's death in April 1940. Their mother was ill during these periods and in 1939 and '40 she required almost constant nursing care. While plaintiff was staying at home, she also kept house for her brother, cooked his meals, washed his clothes, made beds, watered the yard, rented the apartments, and collected the rents, out of which, together with her own savings, she paid for groceries for her brother, her mother and herself, medicines for her mother, utilities for the entire premises, and made minor replacements in the rented apartments.

There is positive testimony that, prior to her death, the mother of plaintiff and defendant made a gift to the former of the furniture then in the premises. Equally positive is the testimony that defendant was apprized of such gift and knew that it was their mother's "wish and understanding" that, upon the death of the mother, the furniture would belong to plaintiff. The defendant, testifying in his own behalf, flatly contradicted much of the foregoing testimony. The evidence given by him was that his sister, the plaintiff, never made any claim of ownership of the property allegedly stolen, that each and every item of the personal property in question was bought and paid for by him, and that neither his mother nor plaintiff ever "reimbursed him" or gave him any money on account of the charges they made against his account at Barker Bros. He also testified that, in filing the criminal complaint against his sister, he relied upon his personal attorney's advice and that of the deputy district

attorney, after a full disclosure of all the facts as they were known to him.

It was also testified that defendant (about a year before the death of their mother) agreed that, after their mother's death, plaintiff should continue to keep house for him, take care of the rental property, collect the rents, pay for groceries and utilities, and that during their mother's last illness, defendant told plaintiff "the balance, whatever it should be she could spend as she wished." Plaintiff and defendant continued to live there under that arrangement until July, 1942; and on September 12, 1942, plaintiff moved away, taking her clothes and some of her furniture.

From July until September, 1942, there was disagreement and discord between plaintiff and defendant, during which time defendant told plaintiff he would no longer live up to their agreement made before their mother's death; and plaintiff asked defendant to settle her interest in the real property. Defendant told plaintiff she had no interest in the real property; that it belonged solely to him, and advised her to consult an attorney about it, which she did. Plaintiff's lawyer wrote to defendant asking for a settlement of her said claim. Defendant in plaintiff's absence "plugged" the locks so that she could not enter when she returned home; and plaintiff asked defendant if she could take the things that belonged to her out of the place, and he said no, "just her personal clothing." In order to gain entry to her home and possession of her furniture plaintiff agreed she "would see about" the new terms demanded by defendant; and plaintiff testified that she found that she "couldn't possibly pay $75.00 per month plus the utilities and go to work and keep up that property, physically I wasn't fit for it, so I just simply said I was moving" and "moved out of the apartment before the agreement was final."

On defendant's return home after plaintiff's removal therefrom, he missed certain items of furniture, made a list of them, estimated their value at about $800, telephoned his lawyer and asked what to do. His lawyer told him he would have to report it to the police, but if he would be unwilling to prosecute his sister in case she had taken it he should not report the theft, as the police department could not be used as a collection agency. He phoned the police station and reported the theft. Officer Flannery called at the 48th Street place to investigate; and concerning said call he testified as follows:

"He (defendant) said he had made a burglary report on it, not knowing who took the property. * * * Later on during the conversation he stated that he thought possibly that his sister had taken the property * * * at that time I stated, 'Well, if your sister took the property'—he said at that time it was his property, and I asked him, 'If she had taken the property, would you be willing to prosecute her on grand theft merchandise,' and he said he would. I said 'If you are not going to prosecute her, we have no interest in the case,' and he said, 'Yes, I will prosecute her to the utmost of the law.' "

According to the testimony of this witness, he visited defendant again about two days later and "he (defendant) still insisted on prosecuting his sister." A few days later Officer Flannery phoned defendant, told him his sister had taken the furniture, and arranged to meet him at the District Attorney's office. Defendant telephoned his lawyer, who then asked defendant if he owned the furniture, was told that it belonged to defendant, and thereupon advised him to go ahead with the prosecution. The list of missing articles made by defendant was turned over to Officer Flannery, then to a Deputy District Attorney, both of whom, according to the testimony of Officer Flannery, were told by defendant that "* * * all the furniture in the house belonged to him (defendant), that the property belonged to him, that he has acquired some of it from his mother after her death, and the balance of it he purchased at Barker Brothers. He said every bit of it was his." Said list was used on the trial of this action by attorneys for both parties in examining various witnesses.

From the record it appears that said list included a two-piece divan set, round mahogany occasional table, a large stand lamp, a davenport bed, floor heater and electric toaster, all of which, according to plaintiff's testimony, were bought by her with her own money saved from wages made by her when working, and all of which items she admitted moving. There is considerable conflicting testimony respecting cookstoves, from which the trial judge could have found that the three listed by defendant as stolen and, according to plaintiff's testimony, taken by her were purchased by plaintiff on instalment contracts with money saved by her out of

the rents collected by her under her agreement with defendant that they should be considered as her salary, trading in as down payments one stove bought by her mother and given to her and one previously bought by plaintiff with her own money saved from her wages. Included in said list were a table and ten pictures brought by their father and mother from Ireland, and rugs, sheets, pillow cases and mattress pads bought by their parents soon after their arrival in Los Angeles. According to plaintiff's testimony, other items listed, to wit: candlesticks, curtains, sofa pillows, desk, embroidered tablecloth and napkins, mantel clock, lamp, mirrors, vacuum cleaner, and bath rug, were bought with money collected as rents by her mother and given to plaintiff. Plaintiff testified that the washing machine and small kitchen radio were bought by defendant and given to plaintiff as presents before their mother's death. From the testimony of the witness Jean Fox, it could have been found by the trial judge that the pillows and blankets listed were removed from said premises by defendant and his wife in the absence of plaintiff. From the entire record, the trial court could have found that certain listed articles, to wit: two davenport beds, two bath rugs, one peach bath towel set, two salt and pepper jars belonging to the electric stove, pots and pans, studio couch and chair, suit case last seen in the basement, garment bag, pillows, hanging mirror, and rug, had not been removed from the premises by anyone, but remained there and could have been found by defendant if he had looked for them. There was testimony that an overstuffed set listed had been at all times in defendant's own apartment and, some months before, had been covered with slip covers, that defendant had never noticed the covers, had first missed the set after plaintiff moved and listed it as stolen; and that other pieces which had been in use in the rented apartments for a long time and which were first missed by defendant after plaintiff moved were also listed as stolen without defendant's looking in the rented apartments for such items.

The trial court could have inferred from plaintiff's testimony that, even though she was the housekeeper, she had never seen on said premises the lace table cloth, damask dinner sets, four dozen men's pure linen handkerchiefs, linen lace scarfs, camel's hair blanket, which she was accused of stealing, that such articles had never been on said premises. The testimony of Mrs. Garner, oldest sister of the parties, was that one of the rugs listed had never been on said premises, that it was bought by her on her brother's account, paid for by her, delivered to her house, and had been there ever since, while the testimony of Mrs. Muir, another sister, was that one of the stoves listed had been bought and paid for by her in the same manner and had never been in the 48th Street place.

[2-8] That the primary question to be considered in an action for malicious prosecution is the want of probable cause for the prosecution complained of was the holding in Grant v. Moore, 29 Cal. 644, 648, and Bealmear v. Southern California Edison Co., 22 Cal.2d 337, 340, 139 P.2d 20. Malice may be inferred from the want of probable cause, but want of probable cause may not be implied from the most express malice. The term "probable cause," in so far as it is applicable to the law of malicious prosecution, has been defined to be a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. Haydel v. Morton, 8 Cal.App.2d 730, 48 P.2d 709; Richter v. Neilson, 11 Cal.App. 2d 503, 54 P.2d 54; Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611; Lee v. Levison, 173 Cal. 166, 159 P. 438; Selvester v. Kennedy, 137 Cal.App. 250, 30 P.2d 63, and cases therein cited. It is also the law that the existence of probable cause is not negatived by showing merely that the accused was successful at the trial of the criminal proceeding in obtaining an acquittal. Not even a conflict on the issue of probable cause is created by such favorable termination of the criminal prosecution. Haydel v. Morton, supra; Dunlap v. New Zealand F. & M. Ins. Co., 109 Cal. 365, 42 P. 29; Moore v. Durrer, 127 Cal.App.759, 16 P.2d 676; McKenna v. Heinlen, 128 Cal. 97, 60 P. 668. Where there is no dispute as to the existence of the facts relied upon to show probable cause, it is for the trial court to determine as a matter of law whether an inference of the existence of probable cause is warranted by such undisputed facts, but where, as in the instant case, the evidence bearing upon the issue of probable cause is in conflict in essential particulars, it is the province of the jury, or the judge as the trier of facts, to determine whether or not such

facts are shown as will warrant or overcome an inference of probable cause. Franzen v. Shenk, 192 Cal. 572, 578, 221 P. 932. On appeal the findings of the trier of facts as to the existence or nonexistence of the facts and circumstances sought to be proved by evidence introduced before him and relied upon by the respective parties to show probable cause, or the absence thereof, will not be disturbed unless it can be held that they are supported by no substantial evidence in the record. Ball v. Rawles, 93 Cal. 222, 234, 235, 28 P. 937, 27 Am.St.Rep. 174; Franzen v. Shenk, supra, 192 Cal. at page 577, 221 P. 932. The burden of proving that there was no probable cause for defendant's prosecution of plaintiff upon which an action for malicious prosecution is based rests upon the plaintiff. Starkweather v. Eddy, 210 Cal. 483, 487, 292 P. 467; Jaffe v. Stone, 18 Cal. 2d 146, 159, 114 P.2d 335, 135 A.L.R. 775.

Appellant asserts that the following facts were proved by uncontroverted testimony and, as a matter of law, constitute probable cause for instituting the prosecution complained of: That all the property listed as stolen was in the house in July; that it had disappeared when defendant returned after his sister's (plaintiff's) moving therefrom in September; that appellant did not consent to its removal; that respondent removed it in the night time—part of it with a truck; that the property was removed surreptitiously; that defendant did not know who had taken the property until the officer told him; that when first questioned respondent did not admit taking the property; that respondent never made any claim of ownership of said furniture to or before appellant; that the lawyer who asked for settlement of respondent's claim to an interest in the real property did not mention the personal property; and finally that respondent is bound and must be judged by the appearances she has created.

[9] As hereinbefore narrated, all of these claims of defendant were controverted, except the following: That appellant did not consent to plaintiff's removal of the furniture; that the lawyer who requested settlement of plaintiff's interest in the real property did not mention the furniture; and that plaintiff removed the personal property at night. Of these, the only one which could possibly militate against plaintiff is the fact that she moved the property at night, and the testimony in that regard is that a sister and niece of plaintiff and defendant accompanied plaintiff on two or three trips with loads of her things in an automobile between seven and eleven o'clock on the same evening; that one load was taken in a truck; that plaintiff had old stoves connected in the rented apartments in place of the three stoves removed by her; and that a neighbor told Officer Flannery she heard plaintiff's voice during the moving and knew it was she who took the furniture. From these circumstances, we are of the opinion that the trial court was justified in finding that the property was not "surreptitiously" taken as claimed by defendant, but that the plaintiff chose to move it at night because it was a more convenient time for her, or for her niece, who was employed during the day, to help her. In the recent case of Graham v. Griffin, 66 Cal.App.2d 116, 151 P.2d 879, 881, the court held against a similar claim made by an appellant in a malicious prosecution action in regard to plaintiffs who, at 2:30 in the morning, rounded up, drove two and a half miles to a neighbor's ranch, and there loaded on a truck a cow and three heifers, which were on a ranch occupied by both plaintiffs and defendants, and which each claimed to own. In that case the court affirmed a judgment for plaintiffs.

[10] There is manifestly a conflict in the evidence relating to the facts from which the existence or want of probable cause for the prosecution of plaintiff upon the charge of grand theft must be determined. The law concerning the determination of the question of probable cause in an action for malicious prosecution has been stated as follows:

"While it is not necessary to show that the crime has in fact been committed, it is necessary to show, not only that the defendant had reasonable ground to believe, but that he did in fact believe, that the crime had been committed, and that the plaintiff had committed the crime. Although the question of probable cause, as we have seen above, is a question of law, yet the belief of the defendant in a state of facts is itself a fact which it is proper to submit to the jury for its consideration; and whenever the good faith of the defendant, or his knowledge or belief in an existing state of facts, is an element in determining whether there was probable cause, the court should submit that question to the jury as well as the other facts which

in its opinion bear upon that issue." Ball v. Rawles, supra, 93 Cal. at page 234, 28 P. at page 940, 27 Am.St.Rep. 174.

[11-13] In view of the evidence in the case at bar, it cannot be said that the implied finding of the trial court that the facts and circumstances surrounding respondent's taking of the personal property here in question were not such as would constitute probable cause for appellant's prosecution was not justified. When a person takes goods which he honestly believes are his own, under a claim of title, he is not guilty of larceny (People v. Devine, 95 Cal. 227, 30 P. 378) nor is such person guilty of embezzlement of the property if it is openly and avowedly taken under a claim of title preferred in good faith. Pen.Code, Sec. 511. As hereinbefore shown, there is evidence that appellant knew respondent was claiming the property in question as her own. In fact it was testified that appellant was present when respondent was invested with title to some of the property. If the trial judge believed, as evidently he did, that appellant was in possession of such knowledge, it cannot be successfully maintained that appellant, as a reasonable man, would have been warranted in believing that respondent acted criminally in the taking of said property, and consequently appellant would not have probable cause for instituting the criminal prosecution. Burke v. Watts, 188 Cal. 118, 204 P. 578; Runo v. Williams, 162 Cal. 444, 122 P. 1082; Franzen v. Shenk, supra; Richter v. Neilson, supra. Since there is evidence in the record which supports the findings of the trial court that appellant did not himself believe respondent guilty of the felony for which she was prosecuted upon his complaint, all of the other facts and circumstances relied upon by him are insufficient to constitute probable cause. Even though the facts in themselves might be such as ordinarily to create a belief in the mind of a reasonable person that the crime had been committed by plaintiff, yet if, for the reason that the defendant had knowledge of other facts and circumstances which would destroy such belief, and from which it could reasonably be inferred that defendant did not in fact believe that the crime had been committed and that plaintiff had committed the crime, then the defense of probable cause is not available to defendant, because such knowledge negatives the fact that defendant himself actually did believe that a crime was committed by plaintiff. To effectually urge the defense of probable cause it is not only necessary to show that the defendant had reasonable grounds to believe, but that he did in fact believe, that the crime charged had been committed and that plaintiff had committed such crime. Ball v. Rawles, supra, 93 Cal. at page 228, 28 P. 937, 27 Am.St.Rep. 174.

[14] In further support of his claim that there was ample probable cause, defendant argues that he acted on the advice of his counsel and that of the deputy district attorney who issued the complaint. Without doubt, if it can be said that the defendant satisfactorily showed that, prior to the commencement of the criminal prosecution alleged to have been malicious, he was advised by counsel, after a full and fair disclosure of all the facts within his knowledge, that the crime charged had been committed and if it was further shown that he had acted upon that advice in good faith, he would have established a complete defense. 16 Cal.Jur. 741. However, in the case at bar, there is evidence which justified the trial court in its finding that defendant knew, or should have known, the ownership of the property alleged to have been stolen was claimed by his sister, plaintiff herein. The evidence was such that the trial court was justified in finding, also, that the defendant knew the ownership of the property was an essential fact in the case; and that he did not tell his own lawyer, the police officer, or the deputy district attorney that his sister made any claim of ownership of the property, and he even assured each of them that the property was his own. True, in appellant's brief it is claimed that the uncontroverted testimony of appellant's attorney, "He told me the manner in which the purchases of the ranges had been made. I told him that as long as the property was his * * *," conclusively negatives such finding; but, from the testimony of said attorney as a whole, it appears that appellant in effect told him the stoves were bought by respondent as appellant's agent and with his money and that the stoves and all other items of furniture listed as stolen were his own; and the trial court impliedly found such statement of appellant to be untrue. Anyone relying upon the defense of advice of counsel must show that he fully and fairly stated all the facts within his knowledge bearing upon the transaction and this can only be done by testimony

showing what facts were stated by the defendant to the counsel consulted by him. Gordon v. Mount, 125 Cal.App. 701, 706, 13 P.2d 932.

[15] Furthermore, the deputy district attorney unequivocally testified that at no time did defendant tell him that his sister purchased any of the household goods, received any as a gift, or claimed title to such property. Because of the issue of disputed ownership of the personal property, the question of good faith in the disclosure of conflicting claims was a proper matter for the trial judge to determine. Manifestly, had the court believed and found that the defendant owned the property, no question of good faith could have arisen in regard to the statements made to his personal attorney and the deputy district attorney, but, if defendant was in possession of knowledge that plaintiff was claiming title to the property and, as the court found, failed to disclose that fact, then there could not have been a full and fair disclosure. In the absence of evidence that such information was received by his personal attorney and the deputy district attorney from some other source, defendant was precluded from relying upon the defense of advice of counsel. Foster v. Banks, 112 Cal.App. 622, 627, 297 P. 106.

[16] And in any event, the defense that a criminal prosecution was commenced upon the advice of counsel is unavailing in an action for malicious prosecution if it appears, as the court found in the instant action, that the defendant did not believe that the accused was guilty of the crime charged. Vann v. McCreary, 77 Cal. 434, 19 P. 826; Murphy v. Davids, 181 Cal. 706, 186 P. 143; Hudson v. Zumwalt, 64 Cal.App.2d 866, 149 P.2d 457.

[17, 18] The next point urged is that no element of malice was proven. There is substantial evidence showing that, prior to the institution of the criminal action, the parties maintained an unfriendly feeling toward each other; that defendant locked plaintiff out of their dwelling house; and that in speaking to his niece of and concerning the plaintiff the defendant said "If she does not have the property back by Monday I will have the sheriff after her." In a malicious prosecution case the plaintiff is not required in order to recover compensatory damages to show that the prosecution was inspired by personal hostility, a grudge or ill will. What is required is evidence which establishes bad faith, or the absence of an honest and sincere belief that the prosecution was justified by the existent facts and circumstances. Richter v. Neilson, supra, 11 Cal. App.2d at page 507, 54 P.2d 54. In the case of Burke v. Watts, supra, 188 Cal. at page 126, 204 P. at page 581, so often cited, the applicable rule is quoted from Runo v. Williams, supra, 162 Cal. at page 450, 122 P. at page 1085, as follows:

"Malice in fact is really the foundation of the action and is usually the pivotal point upon which the action turns. It is always a fact directly in issue. Its existence may be inferred by the jury from want of probable cause for the prosecution or from acts or declarations of the defendant expressing or indicating prejudice, ill will or malicious motive in the matter of the prosecution. The want of probable cause does not raise a legal presumption of malice; the law presumes nothing on that issue any more than it does on any other issue of fact in a civil action. The jury may, however, if they find that there was no probable cause for the prosecution infer malice therefrom, although malice is not a necessary inference to be deduced therefrom."

[19] Aside from facts testified to bearing upon the existence of malice, the trier of facts was, as we have pointed out, justified in drawing an inference of malice from want of probable cause. Burke v. Watts, supra; McAfee v. Los Angeles Gas, etc., Corp., 215 Cal. 219, 9 P.2d 212; White v. Brinkman, 23 Cal.App.2d 307, 73 P.2d 254; Portman v. Keegan, 31 Cal.App. 2d 30, 87 P.2d 400; Garfield v. Peoples Finance & Thrift Co., 24 Cal.App.2d 144, 74 P.2d 1061.

Defendant contends that his own testimony was uncontroverted to the effect that he did not know any of the items listed as stolen from him had been paid for by plaintiff or the other sisters, or that some of the items had been given to plaintiff by her mother, or that some of the items had not in fact disappeared from his own premises prior to the time his sister moved away; and that he was not required to investigate the commission of the crime itself any further than he did before making the complaint. He cites as authority on that point the case of Richter v. Neilson, supra, 11 Cal.App.2d at page 514, 54 P.2d 54. The facts of the cited case are not analogous,

and the language therein relied upon by defendant is not applicable to the instant case. In the cited case, defendant did go to considerable trouble to ascertain the facts, but, because of misleading statements made to her by plaintiff, who had left the city suddenly, closing his place of business and leaving no forwarding address, and who received and ignored her letter requesting an explanation, plaintiff's investigation, while it did not disclose the true facts, was held to be sufficient. Here, as to the items paid for by others, there is testimony that defendant, himself, accepted the money for them. As to items given plaintiff by her mother, there is testimony showing his knowledge thereof. As to the items not taken by plaintiff, which defendant contends in his brief disappeared at the time she moved her furniture and were of sufficient value to constitute probable cause for his complaint against her for grand theft, it appears that defendant did not investigate at all, and that, in fact, he refrained from looking in the rented apartments, the basement, and even at the slip covered overstuffed furniture and other items in his own living quarters. From the testimony before the court, it could have found that no property belonging to defendant was actually missing from his premises at the time he accused plaintiff of grand theft; and there is no evidence in the record which could excuse appellant for telling Officer Flannery and the deputy district attorney that there was, and signing a complaint against his sister charging theft of property still on his premises.

Appellant further contends the trial court erred in denying appellant's motion for a mistrial because "the record shows conclusively that the trial court prejudged the case and was biased and prejudiced against defendant and his cause". As evidence of the asserted prejudice of the trial judge, appellant calls attention to the following remark:

"I might say, this is a suit for wrongful arrest and malice is alleged and I think great latitude should be extended because the events of causing this woman to be arrested are important, if there wasn't any reason for it, *it may be severe.*"

The record discloses that this incident occurred when a sister of plaintiff and defendant was asked to state "* * * any conversation where your sister and you and your brother were present, and your mother was present before her death, in which there was a discussion about the distribution of the personal property, the furniture and furnishings of the house," and appellant objected, giving as his reason "because you are not trying a will contest". Counsel was heard at length, after which the trial judge made the above quoted statement and concluded the same by saying:

"If she wants to show that Mr. Singleton knew about her claims, apparently counsel takes the position that some light may be shed upon the matter as to whether there was knowledge or not. * * * And I don't think the court has the power to foreclose it. Objection overruled."

[20] Appellant's contention that this incident indicates the trial judge's prejudice is without merit.

Other remarks of the trial judge relied upon by appellant as showing prejudice are:

"I don't think we can take the time of the court to hear argument for non-suit *when a case is as plain as this one is, a brother has the sister arrested and thrown into jail when she has said it was her property.*"

"If there ever was malice—well, *I will say there is malice shown conclusively, a brother has his sister put in jail because she went out to the house they both occupied and she took property which she testified belonged to her.*"

"In this case, probable cause is alleged in the form of allegations that the defendant told the District Attorney certain things, I have heard that evidence, he has been on the stand. He didn't tell the District Attorney, he doesn't claim to have told the District Attorney that his sister claimed ownership of the property, he had her arrested upon his saying to the District Attorney, 'These are all my things, she took them'. If she took property that did not belong to her, she should be held accountable, but if he had told the District Attorney the truth about it, the District Attorney might have acted differently."

"He has testified under 2055 the property is his, and she has testified in her direct examination the property is hers, and for the purposes of a motion for nonsuit every intent must be indulged in favor of the plaintiff who has presented her case and it is up to the defendant to answer that case. Have you finished with your argument?"

[21] These statements were made by the court during the argument and discussion of defendant's motions for nonsuit and for mistrial, which were thereafter denied. We fail to see any prejudicial error in these or other remarks of the trial judge to which appellant refers. The language of the court in the case of Rosenfield v. Vosper, 45 Cal.App.2d 365, 114 P.2d 29, 31, cited by appellant as authority for reversal of the judgment herein on the ground of the trial judge's prejudice do not aid appellant upon this appeal because the facts of that case are in no wise analogous with the facts found to exist in the instant action.

In Rosenfield v. Vosper, supra, the trial court had continually urged upon counsel for both parties more speed in presenting the evidence and the advisability of settling the controversy out of court, and, during a discussion in chambers in the presence of defense counsel, said to counsel for plaintiffs who were suing for $18,000, "Tell your clients that in my opinion it would be to their best interests to settle on that basis" (for $7,500).

[22] In the case at bar, the remarks above referred to were as heretofore indicated, made in open court during the argument of defendant's motion for nonsuit and preceding its denial. The trial court, for the purpose of ruling on the motion for nonsuit was required to accept as true all evidence favorable to plaintiff's case (Mastro v. Kennedy, 57 Cal.App.2d 499, 500, 134 P.2d 865), to interpret all evidence most strongly against defendant, and to disregard contradictory evidence. Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, 197, 64 P.2d 946; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 722, 38 P.2d 825.

Appellant also assigns as prejudicial error the refusal of the court to declare a mistrial when, on the morning following the denial of his motion for a nonsuit, his counsel renewed the motion for a mistrial and in connection with which the record reveals the following:

"Mr. Penney: Your Honor, in view of what happened yesterday, I now find myself in a position where I have to be a witness in this case, and I feel the court is prejudiced against me and I desire to renew my motion for a mistrial and I want to be sworn and make certain statements for the record.

"The Court: Your offer is rejected and your motion is denied. Everything was said in the record.

"Mr. Penney: The tone of the court's voice isn't in the record and I desire at this time to make an offer of proof and I would like to be sworn at this time.

"The Court: Your motion has been ruled upon.

"Mr. Penney: Then I want to make an offer of proof.

"The Court: Do you want to make an offer of proof addition to the motion which is denied?

"Mr. Penney: Yes, in view of the motion being denied, I want to make an offer of proof at this time.

"The Court: Your offer is denied.

"Mr. Penney: In other words, this court rejects my offer of proof?

"The Court: After a ruling on a motion for mistrial has been denied, you want to further present the case for a mistrial and it has been denied.

"Mr. Barnes: If Your Honor please, isn't it the right of counsel, when Your Honor has ruled upon a motion without hearing any argument on the same—

"The Court: I did hear argument—you are misinformed.

"Mr. Barnes: I am merely speaking about what happened today. Your Honor has ruled upon a motion without hearing argument, without any presentation as the basis for a motion for mistrial, and now I believe counsel is right, and not for Your Honor to pass upon that motion again, but for the purpose of the record of counsel to submit an offer of proof, to put into the record, not for Your Honor to rule upon it again, because obviously that would be a useless gesture, because that would be an idle gesture—

"Mr. Stahlman: Your Honor—

"Mr. Penney: I desire to make an offer of proof as to the court's attitude toward me yesterday and I am standing on my rights to make that offer of proof in the record.

"The Court: Very well, you may.

"Mr. Penney: I offer to prove that during my cross-examination of Jean Singleton on the afternoon of October 13th, 1942, the court addressed me upon several occasions in a definite hostile manner and appearing quite irritable on several occasions, the

tone of his voice and his hostile attitude was such that I was embarrassed, that my cross-examination was conducted under mental strain, at the conclusion of the plaintiff's case, I moved for a non-suit on behalf of the defendant which was immediately denied. I respectfully request permission to cite my authorities. Then followed an argument between myself and the court—

"The Court: You are going to cover the point, aren't you—

"Mr. Penney: I am coming to that. During the course of which the court several times raised his voice in anger, his face reddened and his attitude toward me became more and more hostile. Following certain remarks made by the court, which to my mind clearly indicated prejudice, I requested a mistrial which was immediately denied by the court. Following this motion the court appears to be quite calm and while permitting me to cite my authorities, he did so in sarcastic manner. The court merely—I want to show that the court is laughing at this statement.

"The Court: I am smiling at your statement that the court said something in a sarcastic manner, the court wasn't aware of it.

"Mr. Penney: The court merely glanced at the citations and the manner in which he disposed of both the motions was most humiliating to me as an officer of this court. I further state throughout the trial, particularly in addressing the court, I conducted myself with dignity and gave the court no cause for his unjudicial conduct. I feel that my testimony is vital to the defense in this case, and under the authorities of this State it is a complete defense to the plaintiff's action, but I feel that this court is now so prejudiced against me that he cannot weigh my testimony thoroughly, or impartially.

"The Court: Do you want to testify as to that?

"Mr. Penney: Yes, I want to testify as to that.

"The Court: Take the stand. Although the court is willing to accept as your testimony, your statement."

Appellant's counsel was thereupon sworn and gave testimony relevant to the issues before the court, which included appellant's statement to him and his advice to appellant that the latter was entitled to institute criminal proceedings against the plaintiff.

Following further testimony in behalf of the defendant, as well as evidence given in rebuttal and surrebuttal, both counsel rested their case and announced themselves ready for argument, whereupon the court suggested a waiver of the rule "that a lawyer testifying in a case may not argue." The suggested waiver was agreed to by plaintiff's counsel. During the ensuing argument, defendant's counsel, so far as we can ascertain from the record interrupted and stated "You can't comment on something that isn't in the record. That was an offer of proof and it wasn't evidence. I want the record to show that." The court replied, "The record will show that you took the stand after making the offer of proof, I said 'Take the stand' and you did. You didn't say a word about it after you got up there under oath." Thereupon defendant's counsel said "Let the record show that the court is looking at me with a very belligerent attitude," to which plaintiff's counsel retorted, "Yes, and I want the record to show that the court is smiling too."

At the conclusion of argument by both counsel, the trial judge began a summary of the evidence, during which he referred to various witnesses by name, commented upon their testimony, and, in commenting upon the credibility to which he believed certain witnesses were entitled, he indicated a lack of belief in the verity of defendant's testimony relative to the issues of probable cause and malice.

[23, 24] The case with which we are here concerned was tried before the court without a jury, and the judge, as was said in Smith v. Coleman, 46 Cal.App.2d 507, 514, 116 P.2d 133, 136, "had the right to announce the mental processes by which he determined the credibility of the witnesses and by which he arrived at his conclusions." We are not prepared to negative appellant's claim that the attitude of the judge toward his counsel was brusque and, we may say, manifested a feeling of considerable displeasure toward appellant's counsel, which does not appear to have been warranted, and of which we do not approve. But the fact that the judge, in the exercise of his rights to determine the facts from the evidence and in passing upon the credibility of witnesses, may have exceeded the bounds of propriety does not entitle appellant to a

new trial. North v. Vinton, 17 Cal.App. 2d 214, 220, 61 P.2d 950; Smith v. Coleman, supra, 46 Cal.App.2d at page 514, 116 P.2d 133.

[25] In urging a reversal, appellant resorts to the oft-repeated argument that "suits for malicious prosecution are not favored by the courts". In the comparatively recent case of Jaffe v. Stone, supra, 18 Cal.2d at page 159, 114 P.2d at page 342, 135 A.L.R. 775, the Supreme Court disposes of that contention in the following language:

"The frequency with which this statement is made in these cases calls attention to the need of some explanation. Properly applied, it means that public policy is in favor of the apprehension and punishment of criminals, and limits the person complaining of criminal charges by placing upon him the burden of proving the basic elements of the tort. These elements, viewed on the other side, furnish full defenses to the public spirited accuser or prosecutor. But where the difficult burden of proof is met by the plaintiff, recovery is allowed. This being true, we should not be led so astray by the notion of a 'disfavored' action as to defeat the established rights of the plaintiff by indirection * * *. In brief, the public policy involved has properly served, over many years, to crystallize the limitations on the tort, and the defenses available to the defendant. Having served that purpose, *it should not be pressed further to the extreme of practical nullification of the tort and consequent defeat of the other important policy which underlies it of protecting the individual from the damage caused by unjustifiable criminal prosecution.* * * *" (Emphasis added.)

[26] In his claim that the award of $200 for attorney's fees as special damages is without support in the evidence, appellant must be sustained. The record is entirely barren of evidence that respondent paid any attorney's fees in connection with the criminal prosecution instituted against her by appellant, or that she incurred any liability whatever for such fees in any amount by reason of such prosecution. The allowance of attorney's fees was therefore erroneous. Torney v. Petersen, 109 Cal.App. 560, 565, 293 P. 653.

Appellant next urges what he terms "the impropriety" of an award of punitive damages in an action for malicious prosecution. He cites no authority to support his claim in this regard, saying only that his ability to find but one "reported California malicious prosecution case * * * in which punitive damages were awarded * * * is eloquent proof" of such impropriety. Section 3294 of the Civil Code provides:

"In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

[27, 28] A criminal prosecution begun maliciously and without probable cause justifies the imposition of exemplary or punitive damages. 8 Cal.Jur. 874, 875; Russell v. Dennison, 45 Cal. 337. There was sufficient evidence of malice, oppression and design to injure the plaintiff, and exemplary damages were therefore allowable. Maher v. Wilson, 139 Cal. 514, 520, 73 P. 418.

[29, 30] Finally, appellant contends that the judgment is excessive. Relief from allegedly excessive damages is available only when it appears that the damages awarded have been given under the influence of passion or prejudice. Code Civ. Proc. sec. 657, subd. 5. As hereinbefore narrated, the evidence shows that respondent was taken into custody at ten o'clock in the morning in San Fernando Valley, transported to University Police Station in Los Angeles, where she was "booked," fingerprinted and photographed for the police records. After some three or four hours confinement at University Jail she was transferred to the Los Angeles County Jail where she was again "booked," fingerprinted and photographed, and where she was confined for an additional three hours before securing her release on bail. Under such circumstances, the judgment cannot be said to be excessive, or that it was not the result of the fair, unbiased judgment of the trial court. Shaffer v. Arnaelsteen, 54 Cal.App. 719, 202 P. 946; Phelps v. Cogswell, 70 Cal. 201, 11 P. 628; Kinsey v. Wallace, 36 Cal. 462; Weaver v. Page, 6 Cal. 681; Torney v. Petersen, supra. In Green v. Stewart, 106 Cal.App. 518, 531, 532, 289 P. 940, the court said:

"It is the province of the jury and then of the trial court upon motion for new

trial, to determine and fix the amount of damages awarded a litigant. They have the witnesses before them and can weigh and consider all the circumstances of the case. All presumptions are in favor of the correctness of the judgment, and under the circumstances of this case we cannot hold it excessive."

Also in Wilson v. Fitch, 41 Cal. 363, 386, we find the following:

"The Court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must, necessarily, be left to the exercise of a wide discretion; to be restricted by the Court only when the sum awarded is so large that the verdict shocks the moral sense, and raises a presumption that it must have proceeded from passion or prejudice."

For the foregoing reasons the judgment is modified by deducting therefrom the sum of $200 awarded for attorney's fees, and as so modified is affirmed, respondent to recover costs of appeal.

YORK, P. J., and DORAN, J., concur.




68 Cal.App.2d 811

**AMPUERO v. LUCE et al.**

**Civ. 12734.**

District Court of Appeal, First District, Division 2, California.

April 24, 1945.

Rehearing Denied May 24, 1945.

Hearing Denied June 21, 1945.

**1. Deeds ⇐109**

In action by one joint tenant against second joint tenant to quiet first joint tenant's title to entire premises based upon an alleged failure of consideration, evidence was not sufficient to establish that joint tenancy deed executed by first joint tenant's wife was made upon express condition that second joint tenant would supply first joint tenant with the necessities of life in certain circumstances, particularly where no condition was expressed within four corners of deed.

**2. Trusts ⇐94½**

Where defendant promised plaintiff's wife that defendant would provide for plaintiff under certain circumstances and upon receiving such oral promise plaintiff's wife executed a joint tenancy deed to plaintiff and defendant, defendant's breach of oral promise after death of plaintiff's wife did not create a constructive fraud relating to transaction so as to make defendant a contructive trustee of premises for plaintiff's benefit.

**3. Vendor and purchaser ⇐92**

Where plaintiff's wife conveyed her property to plaintiff and defendant on defendant's oral promise to provide for plaintiff under certain circumstances, on defendant's breach of such promise after death of plaintiff's wife, plaintiff's remedy was an action at law for damages and not a suit in equity to cancel deed.

**4. Trusts ⇐103(1)**

The law of constructive trusts applies equally to land conveyed under a promise to furnish support as well as to land conveyed under an agreement for reconveyance although in each case a fiduciary or confidential relationship must have existed between grantor and grantee, and such relationship must appear as an ingredient of the constructive fraud practiced.

**5. Trusts ⇐103(1)**

That plaintiff's wife and defendant had been close friends since girlhood, had corresponded, visited back and forth, and plaintiff's wife considered defendant the most reliable friend she had and had confidence in defendant did not establish a "confidential" or "fiduciary relationship" so as to warrant a conclusion that defendant was constructive trustee of her interest in a joint tenancy deed executed by plaintiff's wife to plaintiff and defendant after defendant promised to provide for plaintiff under certain circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relation" and "Fiduciary Relationship".

**6. Trusts ⇐371(2)**

In action to set aside a deed conveying property to plaintiff and defendant as joint tenants in so far as it affected defendant's interest, plaintiff could not rely upon any relationship of trust and confidence existing between his wife, who executed the deed, and defendant without having first pleaded such relationship.

**7. Deeds ⇐212**

In action to quiet title to defendant's interest under a joint tenancy deed executed by plaintiff's wife in favor of plaintiff and defendant after defendant had orally promised plaintiff's wife that defendant would provide for plaintiff under certain circumstances, record disclosing that plaintiff requested $400 from defendant in order to have an operation performed, that request was not complied with, that operation was not in fact performed, but failing to disclose that operation was not performed because money was not forthcoming, supported finding that defendant did not breach her oral agreement.

**8. Judgment ⇐527**

Where plaintiff sought to quiet his title to defendant's interest under joint tenancy deed, to enforce a constructive trust, to cancel such deed and to have rights of parties declared under an oral agreement between plaintiff's wife and defendant entered into at time of execution of joint tenancy deed by plaintff's wife, and declaration of rights appeared in findings, but judgment merely decreed that plaintiff and defendant each owned an undivided half interest in joint tenancy, judgment was not deficient for failure to disclose such declaration of rights on its face, since findings may be read in connection with judgment.

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Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by John B. Ampuero against Beatrice S. Luce to quiet title, to enforce a constructive trust, and to cancel joint tenancy deed to the property as to defendant's interest on the grounds of fraud and failure of consideration. Judgment for defendant, and plaintiff appeals.

Affirmed.

Deadrich & Spencer, of Oakland, for appellant.

Henry S. Lyon, of Placerville, and Elwood Murphey, of Oakland, for respondent.

GOODELL, Justice.

The plaintiff and defendant Beatrice S. Luce are owners in joint tenancy of a parcel of real property. This suit was brought to quiet title, to enforce a constructive trust and to cancel the deed to the property as to defendant's interest, on the grounds of fraud and failure of consideration. The appeal is from a judgment in defendant's favor.

The appellant and Addie E. Ampuero, his wife, had their home on Fruitvale Avenue near East 14th Street in Oakland. It had cost about $12,000, was unencumbered and stood in the wife's name. The couple were getting along in years and the wife, who was suffering from heart trouble, did not expect to live long. They had negotiated with the Altenheim (an old people's home) with a view to conveying this property to that institution in exchange for its undertaking to care for the appellant for the remainder of his life, but such arrangement was not acceptable to the institution. Similar negotiations with the Ethel Moore Memorial had similar results.

In October, 1934, Mrs. Ampuero sent for an Oakland lawyer for the purpose of settling her affairs. She wanted to provide for her husband but she expressed the fear that he might through improvidence part with the property and eventually find himself in want. She also told the attorney that the respondent, then a visitor in the home, was an intimate lifelong friend who had helped her throughout the years, and that she wanted to provide for her as well as for appellant. He advised her to make a will, but this advice she rejected; he then suggested the making of a deed with a life estate reserved to the appellant, but this too she rejected. She arrived at her own decision to make a deed conveying this property to appellant and respondent in joint tenancy, and such deed was executed, acknowledged and recorded. On November 24, 1934, she died. At the time the deed was made Mrs. Ampuero said to the respondent in the presence of the appellant and the attorney (according to the latter's testimony): "Mrs. Luce, I am making a joint tenancy deed between you and John. You know how John handles affairs. I want you to be sure to see John never

wants for anything" to which Mrs. Luce replied "Don't worry, Addie, things will be taken care of and John will be taken care of." The court found that the appellant, the respondent and the grantor, Addie E. Ampuero, "entered into an oral understanding and agreement to the effect that reasonable provision should and would be made for the care and living" of the appellant by the respondent "in the event the income from said property and/or other sources should prove inadequate to provide the same", and that this oral understanding was a consideration for the deed.

The Ampueros also owned 106 shares of Transamerica stock which likewise was put into the names of appellant and respondent as joint tenants, and Mrs. Ampuero also opened a bank account in their joint names with a deposit of $100.50. The appellant had, and retained in his own name, 16 shares of Transamerica stock.

In the eight years from his wife's death to October, 1942, the appellant occupied the home and rented rooms therein (as his wife had intended) which rentals yielded a monthly income of about $115, out of which he paid taxes and insurance and made repairs. The net income gave him his living but did not create any surplus. The respondent never received, nor asked for, any of the income.

In the fall of 1942 the appellant was told by a doctor that he needed an operation, the cost of which would be at least $400. There remained but $75 in the joint account and he had no other ready money. At appellant's request a niece of respondent on October 18, 1942, wrote respondent as follows:

"Dear Aunt Beatrice:

I am writing this for John Ampuero as he is quite ill, he has to have his prostate gland removed as he has had several hemorrages.

He has been to two Dr's here in Oakland and they wanted $750 so he came out to see me and wanted me to take him to Dr. Dillion Dad's Dr. in San Francisco so I took him last Friday and he will do it for $400 at Stanford Lane Hospital. He will have to stay there three weeks. He does not have the money for the operation so he wants to know if you can help him or if you can come down. If you cannot come down will you please write him at once. We all have our troubles. How is every one up there? Hope all o.k. This war is sure terrible we notice things getting worse every day. Kindness regards to every one. Your niece Edith."

To this the respondent replied on the 20th directly to appellant as follows:

"Dear John:

Received a letter from Edith this a.m. saying you had to be operated upon and if I could let you have the money $400. Sorry John I cannot let you have some, my income is so small takes it all for my expenses.

I had a fall and all I can do to get around hardly can bend over and it pains. Going over to the Dr. makes me sick. Why don't you see Baker John he might let you have some money.

Your rooms must be all taken. Couldn't you pay so much down then each month pay as you can. Why don't you phone to Irene see can come up her family must be grown up. She will be near.

Hope you get along all right. Takes time.

Thought you were going to sell your place?

I will close have to lye down in such pain.

Best regards,

Beatrice Luce."

The appellant treated these letters as a demand and refusal of performance, and commenced this suit, notwithstanding no operation had been performed.

The first count of the complaint states that the deed was made upon the express condition that respondent would supply appellant with the necessaries of life in the event the income from the property proved inadequate to do so; it alleges appellant's need of an operation and his inability to furnish funds for it; the demand and refusal; that because of respondent's breach the entire consideration for the conveyance of respondent's interest had failed, and that the property had "reverted to plaintiff".

The second count was to quiet plaintiff's title to the whole interest in the property.

The third count is based upon claimed fraud. It alleges that the respondent made her promise to the grantor *if* Addie E. Ampuero would convey the property in joint tenancy; that the representations were false, known to be false, and that she never intended to perform; that Mrs. Ampuero and appellant believed the representations, that the deed was made in

reliance on them, and that the respondent is a constructive trustee for the benefit of appellant.

The complaint contained an alternative prayer that the court make a binding declaration of the rights and duties of plaintiff and defendant. The court did so, holding that each party is the owner of an undivided one-half interest in the property, in joint tenancy; that "plaintiff is entitled to reasonable provision for his care and living and that defendant is obligated to provide the same in the event plaintiff's income from other sources shall prove inadequate for such purposes", and that "plaintiff has received and had reasonable care and living and no breach or default on the part of Beatrice S. Luce exists."

The appellant contends that the judgment is without support in the evidence and is contrary to law.

[1] The first count, based on failure of consideration, states that the deed was made upon the *express condition* that respondent would supply appellant with the necessaries of life in certain circumstances. The third count alleges that the respondent promised to supply such necessaries *if* Addie E. Ampuero would convey the property in joint tenancy. There was nothing said in the conversation in question which can be construed as creating a condition. The attorney's version appears earlier. According to John Ampuero's own version his wife said to Mrs. Luce "I am deeding this property to you * * * and John with the understanding you are supposed to take care of him when he needs any money or care, you are supposed to help him out" and she replied "Yes, I will do that." There is no evidence of any solicitation or pressure, or the proposal of anything, by the respondent. The evidence shows that she knew nothing of the proposed deed until after Mrs. Ampuero had decided to make it. The testimony of the attorney that Mrs. Ampuero "was a very headstrong lady and quite determined in her desires" was borne out by the testimony of other witnesses. The legal advice had been sought by her, and if there had been anything conditional about the language used the attorney, who was there to look after the grantor's interests, would have so testified. The deed is an ordinary joint tenancy deed. No condition is expressed within its four corners. See James v. James, 80 Cal.App. 185, 197, 198, 251 P. 666, quoted in Lavely v. Nonemaker, 212 Cal. 380, 384, 385, 298 P. 976; see also White v. Hendley, 35 Cal.App. 267, 272, 273, 169 P. 710. The allegations, then, that the deed was made upon condition simply were not proved.

[2-4] In the third count the allegations that the representations were knowingly false and were made without any intention of performance pleaded *actual fraud* (Lawrence v. Gayetty, 78 Cal. 126, 131, 132, 20 P. 382, 12 Am.St.Rep. 29), but no actual fraud was proved and the court so found. Indeed appellant's counsel do not now claim that there was actual fraud. They claim it is a case of *constructive fraud.* They state their position thus: "The uncontradicted evidence shows that Mrs. Luce failed and refused to perform her oral promise. In so doing, she perpetrated the fraud complained of." This is repeated in appellant's closing brief as follows: "it is our contention that the mere breach of this oral promise to furnish necessaries of life by the defendant does create fraud, and make the defendant a constructive trustee * * *." The answer to this contention is found in Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am.St.Rep. 29, supra, and in the long line of cases which follow it. In that case, as in this, the plaintiff sued for fraud and failure of consideration. The plaintiff had conveyed to the defendant an interest in some mining property, the consideration being the defendant's promise to immediately interest men of capital in the property looking to its development and improvement. The defendant was inactive after the conveyances were made and the plaintiff sued for their cancellation. The trial court found that the defendant's promise had not been kept, but it also found that it was not fraudulent. It found a failure of consideration, and nothing more. On the authority of Hartman v. Reed, 50 Cal. 485, the court held that the plaintiff's remedy was an action at law for damages for breach of contract and not a suit in equity to cancel the deeds. In holding that no condition had been attached to the deeds the court said (78 Cal. at page 132, 20 P. at page 385, 12 Am.St.Rep. 29): "The plaintiff saw proper to accept the verbal promise of the defendants to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance." With respect to the claim that

the *mere breach of the oral promise creates a fraud* the court there said (78 Cal. at page 131, 20 P. at page 384, 12 Am.St. Rep. 29): "The mere failure to perform the covenant does not relate back to and render the same fraudulent." In Feeney v. Howard, 79 Cal. 525, 529, 21 P. 984, 986, 4 L.R.A. 826, 12 Am.St.Rep. 162, the court expressed the same thought as follows: "The mere failure to perform a parol agreement, which was made in good faith, is not fraud." In Rheingans v. Smith, 161 Cal. 362, 366, 119 P. 494, 496, Ann.Cas. 1913B, 1140, it is said: "In the absence of confidential relations between the parties, it is only when such promise is made without any intention of performing it, that it becomes fraudulent in law or equity", citing the Lawrence case. See also Ayers v. Southern Pacific R. Co., 173 Cal. 74, 79, 159 P. 144, L.R.A.1917F, 949; Locomobile Co. v. Belasco, 32 Cal.App. 329, 332, 162 P. 920, and Meehan v. Huntington, 39 Cal.App.2d 349, 354, 103 P.2d 196. In support of their position that mere failure to perform gave rise to a constructive trust counsel for appellant quote from Cooney v. Glynn, 157 Cal. 583, 587, 108 P. 506, 508, as follows: "It is the violation of the parole promise which constitutes the fraud upon which the trust arises * * *." But this was said with respect to an express promise made by a son to his mother, to whom he stood in a fiduciary relation. He promised her that if she would convey the property to him he would hold it in trust for his sister and convey it to her on demand. He so held it from 1891 until 1904, when he repudiated his trust by claiming it as his own. Cooney v. Glynn follows the Brison case, infra, and no more concise statement of the rule now under discussion will be found than that contained in Feeney v. Howard, 79 Cal. 525, 529, 21 P. 984, 986, 4 L.R.A. 826, 12 Am.St.Rep. 162, as follows: "It * * * was held in Brison v. Brison, 75 Cal. 525, 17 P. 689 [7 Am.St.Rep. 189], that if by means of a parol promise to reconvey a party obtains an absolute deed, without consideration from one to whom he stands in a fiduciary relation, the violation of the promise is constructive fraud, although at the time of the promise there was no intention not to perform." Steinberger v. Steinberger, 60 Cal.App.2d 116, 140 P.2d 31, cited by appellant is likewise distinguishable, for there, as in Cooney v. Glynn, a fiduciary relation was established and the conveyance was made upon an oral promise to reconvey. In Becker v. Schwerdtle, 141 Cal. 386, 74 P. 1029, which was before the court on demurrer, the complaint alleged a mother-and-son confidential relation, but, it also alleged the making of the promise by the son to the mother (of $20 a month for her support) without any intention of performance, which pleaded a case of *actual* fraud. In Neilsen v. Neilsen, 216 Cal. 150, 13 P.2d 715, the court found not only a confidential relation between mother and son but that the agreement entered into when she deeded the property was made by him without any intention of performing it. There was presented, then, a case of constructive fraud plus actual fraud, just as in Becker v. Schwerdtle. Granting, as appellant claims, that "the law of constructive trusts applies equally to furnishing support, as well as to a reconveyance" (25 Cal.Jur. p. 173, sec. 42), the same text (Id. sec. 33, p. 162) points out that "a fiduciary or confidential relationship must have existed between the grantor and grantee" and such "relationship is made to appear as an ingredient of 'constructive' fraud." Id. sec. 34 p. 165. In Johnson v. Clark, 7 Cal.2d 529, 61 P.2d 767, cited by appellant the trial court had sustained a demurrer to the complaint without leave to amend. In reversing the judgment the court pointed out that the complaint showed that confidential relations existed between the two sisters. At page 535 of 7 Cal.2d, at page 770 of 61 P.2d, this is said: "The transaction set forth in the complaint is governed by the rules pertaining to persons occupying confidential relations, and is presumed to be fraudulent without other allegations of fraud in the complaint. * * * The burden is cast on the defendant to allege and prove the fairness of the transaction." Teich v. San José, etc., Bank, 8 Cal.App. 397, 97 P. 167, differs in its facts from appellant's other cases, but it merely holds that a constructive trust arises where a stipulation to redeem from a tax sale was violated by the promisor bidding in the property for its own benefit.

[5, 6] This brings us to the appellant's claim that the evidence discloses without contradiction that "a relationship of trust and confidence existed between Mrs. Luce and Mrs. Ampuero". No evidence whatever is pointed out to show such relation beyond the fact that they had been close friends since girlhood, had corresponded, visited back and forth, and Mrs. Ampuero considered the respondent the most reliable

friend she had. It is conceded by respondent's counsel that Mrs. Ampuero had confidence in Mrs. Luce. But that is not to say that a confidential or fiduciary relation, as those terms are used in the authorities (see 9 Cal.Jur. p. 228, sec. 106 et seq.) existed between them. The circumstances under which the deed was made have been set forth earlier. As said in the Brison case, supra [75 Cal. 525, 17 P. 691], "It is not every case where parties trust each other that the law recognizes as confidential." Several witnesses beside the attorney testified that Mrs. Ampuero was headstrong and "knew what she wanted". And, after all, the lawyer was sitting at *her* elbow, not at the respondent's. But wholly apart from these considerations, no facts showing a relation of trust and confidence were pleaded. No such issue was tendered and therefore there is no finding on the subject. If such relation is to be relied on is must be pleaded. 12 Cal.Jur. p. 802, sec. 62; 11 McKinney's Digest p. 292, sec. 61; Feeney v. Howard, 79 Cal. 525, 529, 21 P. 984, 4 L.R.A. 826, 12 Am.St.Rep. 162, supra. In Schott v. Schott, 168 Cal. 342, 345, 143 P. 595, 596, admittedly a mother-and-son transaction, the court pointed out that "There was no allegation whatever in the pleadings showing any relationship of any kind between the parties."

[7] The interesting feature of this case is that the operation—the apparent need of which motivated the letter asking for the $400—was never performed. Toward the end of the trial the court asked the appellant "Did you have an operation?" and he answered "No sir * * *." "Q. How do you feel now? A. Oh, I feel a good deal better but it still bothers me. Q. How long were you sick? A. Oh, I think about three or four months." The record does *not* disclose that the operation was not performed because the money was not forthcoming from the respondent. Indeed no reason was suggested. For aught that appears the appellant might have had later or other medical advice that an operation was not necessary or that it would be unsafe or unwise. The findings "That no breach or default exists under the contemporaneous oral agreement as above set forth as of the date of the filing of this action" and "That it is not true that the defendant Beatrice S. Luce violated, breached, or defaulted in any of the terms or agreements as a consideration for which the aforesaid deed was made, executed, and delivered" are amply supported by the record. To again quote from Lawrence v. Gayetty, 78 Cal. at page 134, 20 P. at page 386, 12 Am.St.Rep. 29: "If the mere promise, and the failure to perform, is not sufficient to set aside a deed on the ground of fraud, as we have shown, the fact that the same acts are characterized in the pleading as a failure of consideration cannot give them additional force, and thereby bring about the same result." If in the instant case the court had found a breach, then on the present record (with no proof of an operation) it could not have awarded anything beyond nominal damages for, as we have seen from the cases already discussed, the equitable remedies which the appellant invoked are not available in a case such as this. Schott v. Schott, 168 Cal. 342, 143 P. 595, supra; Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976, supra. See also Conley v. Sharpe, 58 Cal.App.2d 145, 136 P.2d 376, and Dalbkermeyer v. Rader, 96 Cal.App. 23, 273 P. 600.

[8] The judgment entered in this case describes the property, decrees that the plaintiff and defendant each owns an undivided one-half interest in joint tenancy, and awards the respondent her costs of suit. The appellant complains that it does not also include the conclusions of law. We assume that the basis for this objection is that a declaration of the rights and duties of the parties was prayed, and it is felt that such declaration should appear on the face of the judgment itself. We are satisfied that this is unnecessary. That the findings may be read in connection with the judgment is settled. 14 Cal.Jur. p. 959, sec. 54; Watson v. Lawson, 166 Cal. 235, 135 P. 961; Pacific Paving Co. v. Vizelich, 1 Cal.App. 281, 284, 82 P. 82; Hoover v. Lester, 16 Cal.App. 151, 153, 116 P. 382; Brown v. Superior Court, 110 Cal.App. 464, 466, 294 P. 428; Minehan v. Silveria, 131 Cal.App. 317, 21 P.2d 617; De la Cuesta v. Bazzi, 47 Cal.App.2d 661, 672, 118 P.2d 909. The declaration of the rights and duties of the parties is set forth in the findings of fact and conclusions of law and if, in the future, a breach of the contract in question is claimed, there can be no doubt that that declaration, which was part of the decision of the case, will be read in connection with the judgment and will be considered part of it.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, J., pro tem, concur.

# CALIFORNIA REPORTER

## 158 PACIFIC REPORTER

SECOND SERIES

26 Cal.2d 273

### GRIFFITH v. STATE BAR OF CALIFORNIA.

L. A. 19285.

Supreme Court of California.

April 20, 1945.

**1. Attorney and client ⇐58**

Evidence justified suspension of attorney for three years for commingling funds of a client with his own in purchasing a bail bond for client and returning the same only under pressure. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103.

**2. Attorney and client ⇐58**

A plea of full repayment to client of funds commingled by attorney with his own in purchase of a cash bail bond could not be considered as mitigating circumstance in disciplinary proceeding, where repayment was made only under pressure of an attorney's demand and pendency of a disciplinary proceeding.

**3. Attorney and client ⇐52**

In disciplinary proceedings against attorney for commingling funds of a client paid to him for purchase of a cash bail bond for client, notice to show cause served on attorney charging facts concerning purchase of the bail bond, attorney's refusal to return the money and expenditure of it for his own personal use, and violation of his duties as an attorney, was sufficient. St.1939, pp. 354, 355, 357, §§ 6067, 6068, 6103.

**4. Attorney and client ⇐57**

In disciplinary proceeding, attorney could not complain of admission of former disciplinary record on ground that he was not charged with an act of prior misconduct, where such record was received by committee prior to adoption of rule limiting introduction of a prior disciplinary record, and Supreme Court did not consider such prior record in its consideration in holding that attorney should be suspended.

In Bank.

Proceedings by Floyd Cornelius Griffith against the State Bar of California to review recommendation of suspension of petitioner as an attorney.

Petitioner suspended for three years.

Thomas L. Griffith, Jr., Loren Miller, and Ivan J. Johnson, III, all of Los Angeles, for petitioner.

Nixon A. Lange, of Huntington Park, and Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review an order of the Board of Governors of the State Bar recommending that the petitioner be suspended from the practice of the law in this state for a period of three years. The board adopted, with minor amendments, the findings of the local administrative committee, but rejected the committee's recommendation of disbarment. Petitioner challenges the sufficiency of the evidence to support the findings or to show acts warranting discipline, complains of the admission in evidence of his former disciplinary record, and contends that the violations of which he has been found guilty exceed those charged.

Petitioner was charged, in connection with his representation in the federal court of one Leon Russell, with the commission of acts involving moral turpitude and dishonesty, with violation of his oath and duties as an attorney, and with commingling with his own funds and expending for his personal uses the sum of $500 paid to him for the purpose of purchasing a cash bail bond for his client.

Petitioner was admitted to practice in this state in November, 1932. Although prior complaints have been lodged against him he has not heretofore been subjected to discipline.

In August, 1943, Leon Russell was arrested for illegal possession of gas cou-

pons. On recommendation of his pastor he consulted petitioner. Petitioner represented him on the preliminary hearing. The charges were dismissed for lack of supporting evidence and he paid petitioner a fee of $150. A few days later one James Carter was arrested and Leon Russell paid to the petitioner a fee of $250 for representing Carter. In November, 1943, Russell was again arrested on a similar charge, and his wife arranged through the pastor to have the petitioner visit him in jail. A fee of $500 for defense was agreed upon and the cause came on for trial on November 30th. Prior to that date Russell paid to the petitioner $450 of the agreed $500. The trial was commenced and completed in the afternoon of November 30th. Russell was convicted and sent to the county jail.

On December 23, 1943, the petitioner telephoned Mrs. Russell and told her that her husband's bail had been set, and that the bond would cost $500. Anticipating this requirement Mrs. Russell had borrowed $500 from a Mrs. Tate. She immediately took the sum in cash to petitioner's office. She told him that "it was strictly bail bond money, that it had no connection with fees." Petitioner agreed, assuring her that he would have Russell out of jail that night, and he gave her a written receipt for $500 bearing the notation "Bail Bond." No bond was ever purchased and Russell was not released. In January, 1944, while he was still in the county jail he told the petitioner in the presence of Mrs. Russell that he had changed his mind about an appeal bond and he instructed the petitioner to return the $500. Petitioner promised to do so, but failed to perform.

Another attorney was later employed by Mrs. Russell to recover the money. He testified that he checked the records of the criminal case against Russell and they disclosed that bail had never been fixed. Russell was sent to a prison camp in Arizona on January 26, 1944. He made application for parole through the parole office at the camp and claims to have received no services from the petitioner in this connection. Except for receiving one letter, he never saw or heard from the petitioner until August, 1944, after he had been paroled. Petitioner, however, claims to have written certain letters and held certain interviews in his behalf concerning the parole.

Mrs. Russell made numerous requests of the petitioner for the return of the $500. On one occasion, she stated, he told her that he had deposited the money in a bank in the name of Mrs. Tate, and once or twice he mentioned transcribing fees. He told Mrs. Tate, when she also demanded a return, that he was holding the money because of the $50 which Russell still owed him on his fee. In May, 1944, Mrs. Russell retained the other attorney, to whom the petitioner paid $250 on July 2nd, and agreed in writing to pay the balance on July 7th. At no time did the petitioner deny to the attorney that he owed the money or that he had received it solely for bail bond purposes.

In September, 1944, the present disciplinary proceeding was commenced on the complaint of Mrs. Russell. Petitioner did not appear at the first hearing in September, nor at a subsequent hearing set in October to give him a further opportunity to attend. On October 25th the local committee filed its findings and recommendation of disbarment. On November 15th petitioner gave Mrs. Russell $273, in payment of the balance of the $500 with interest. On November 17th he appeared before the Board of Governors. He testified that he did not consider the matter of sufficient importance to make an effort to attend the hearings before the local committee. In the course of his explanations, by which he attempted to justify his action, he stated that no demand was made upon him for the return of the $500 prior to the demand made by Mrs. Russell's attorney. He admitted that both Mrs. Russell and Mrs. Tate had been to his office, but claimed that they were consulting him about the situation of Mr. Russell. He denied the charge of commingling, stating that he kept the $500 around his house, that he had no bank account, and that he didn't return the full amount to the attorney on demand because he wanted an adjustment of his fee for services rendered Russell after conviction.

The Board of Governors amended the findings of the local committee to show the fact of payment of the balance of the $500, and upon consideration of petitioner's statement, together with the record made before the local committee, recommended a three-year period of suspension.

[1, 2] Petitioner's attack upon the sufficiency of the evidence falls before the substantial proof contained in the record in support of the findings. The plea of full repayment as a mitigating circumstance is

met by the fact that the repayment was made only under the pressure of an attorney's demand and the pendency of the present proceeding.

[3] The notice to show cause was sufficient. It charged the facts concerning the $500 transaction, with specific allegations as to petitioner's refusal to return the money, and his expenditure of it for his own personal use. It charged petitioner not only with commingling but also with violation of his oath and duties as an attorney within the meaning of section 6103 of the State Bar Act, St.1939, p. 357, as prescribed by sections 6067 and 6068, with violation of rule 9 of the Rules of Professional Conduct, and with the commission of acts involving moral turpitude and dishonesty within the meaning of section 6106. The allegations were not limited, as petitioner argues, to accusations of commingling, and the evidence supports not only the finding on that accusation but also the conclusion that petitioner committed the other violations mentioned.

[4] Petitioner complains that although he was not charged with any act of prior misconduct, nevertheless the local committee received in evidence his entire disciplinary record, including twelve complaints which were disposed of after preliminary investigation and which did not result in the issuance of a notice to show cause, and one formal proceeding which was dismissed by the Board of Governors. A new rule of procedure subsequently adopted by the board and now in effect limits the introduction of a prior record. At the time this matter was heard by the committee and reviewed by the board, however, there was no prohibition against the admission of such evidence. The findings of the committee show that it considered the prior record in making its decision to recommend disbarment rather than suspension, but there is no indication that the board also considered that record in recommending a period of suspension. This court has not included the prior record in its consideration in holding that petitioner has failed to sustain the burden of showing that the findings are not supported, and in imposing the degree of discipline recommended by the Board of Governors. Herron v. State Bar, 24 Cal.2d 53, 147 P.2d 543; In re Copren, 25 Cal.2d 129, 139, 152 P.2d 729.

It is ordered that the petitioner Lloyd Cornelius Griffith be and he is hereby suspended from the practice of the law in this state for the period of three years, commencing thirty days after the date of the filing of this order.

SCHAUER, J., did not participate therein.




26 Cal.2d 261

## VINER et al. v. UNTRECHT.

L. A. 18907.

Supreme Court of California.

April 17, 1945.

**1. Appeal and error ⇐989**

Where judgment is attacked as unsupported by evidence, appellate court's power ends when it determines that there is substantial evidence supporting trial court's conclusions.

**2. Appeal and error ⇐1009(2)**

Whether evidence to prove existence of resulting trust is clear, satisfactory, and convincing is primarily for trial court, and if there is substantial evidence to support its conclusion, it is not open to review.

**3. Appeal and error ⇐994(3), 1009(4)**

Credibility and weight of evidence are exclusively for trial court in actions to enforce resulting trust.

**4. Trusts ⇐72**

Ordinarily resulting trust arises in favor of one paying purchase price of property where title is taken in another's name. Civ.Code, § 853.

**5. Trusts ⇐83**

Purchase price need not be paid by claimant of beneficial interest in alleged resulting trust, but may be paid by transferee of property by way of loan to claimant.

**6. Trusts ⇐83**

A resulting trust is not prevented by assumption by transferee of property of obligation to transferor to pay purchase price, where claimant of beneficial interest is obligated to reimburse transferee; there being in such case a loan of credit by transferee to claimant.

**7. Trusts ⇐83**

Where resulting trust is claimed on basis of payment by transferee of property or assumption of obligation to make payment of purchase price by way of loan to claimant of beneficial interest, claimant's agreement to repay loan need not be express but may be implied.

**8. Trusts ⇐83**

Where resulting trust is claimed on basis of payment by transferee of property or assumption of obligation to make payment of purchase price by way of loan to claimant of beneficial interest, transferee holds legal title as security for loan.

**9. Trusts ⇐83**

That transferee and payor of purchase price of property and claimant of beneficial interest therein made oral agreement that transferee was to hold property in trust for claimant, which is unenforceable under statute of frauds or otherwise, does not prevent resulting trust, but rather supports inference that transferee was not intended to have beneficial interest.

**10. Trusts ⇐361**

Where evidence showed that nonprofit corporation's president on its behalf borrowed money to purchase house and lender took title as security and later repudiated loan contract and denied existence of corporation's indebtedness, its failure to tender repayment did not defeat a resulting trust.

**11. Trusts ⇐89(1)**

Evidence supported findings that nonprofit corporation's president on its behalf borrowed money to purchase house and furnishings and that lender took title as security and received free use of room, etc., and warranted conclusion that lender was trustee of resulting trust.

**12. Innkeepers ⇐13**

Evidence supported findings that nonprofit corporation's president, having borrowed money on its behalf to purchase house and furnishings, leased several rooms from corporation, which gave lender free use of another room, and that president was not lender's guest and that lender was not a boardinghouse keeper and did not have lodging house lien on furnishings. Civ. Code, § 1861.

**13. Costs ⇐172**
**Damages ⇐71**

Generally, attorneys' fees are not recoverable from opposing party as costs, damages, or otherwise, in absence of statutory or contractual authority. Code Civ. Proc. § 1021.

**14. Trover and conversion ⇐54**

The statutory presumption that detriment caused by wrongful conversion of personalty is a fair compensation for time and money properly expended in pursuit of property does not authorize recovery of attorney's fees. Civ.Code, § 3336.

**15. Appeal and error ⇐1013**

Where plaintiffs alleged that defendant wrongfully removed and withheld personalty and sought punitive damages as well as attorneys' fees, allegations in complaint and statements in findings concerning attorneys' fees could not be ignored or interpreted as referring to punitive damages, where court unequivocally awarded attorneys' fees but not punitive damages.

**16. Damages ⇐94**

Attorney's fees cannot properly be included as part of exemplary damages. Code Civ.Proc. § 1021.

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In Bank.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Betty Ruth Viner and others against Mary Untrecht to enforce a resulting trust and for other relief, wherein defendant filed a cross-complaint. Judgment for plaintiffs, and defendant appeals.

Modified and affirmed.

Prior opinion, 150 P.2d 497.

Arthur E. Briggs and J. B. Mandel, both of Los Angeles, for appellant.

S. L. Kurland and W. L. Pollard, both of Los Angeles, for respondents.

CARTER, Justice.

We have examined the record in this case and adopt the decision of the District Court of Appeal of the Second Appellate District, Division Two, prepared by Mr. Presiding Justice Moore, with the omissions, alterations and additions hereinafter appearing:

"This action was brought to enforce a resulting trust. All of the material allega-

tions of the complaint were found to be true and those of the cross-complaint substantially contrary to the complaint were found to be untrue. Also, the court found that defendant's maintenance of her claims of ownership of the realty and of her claims of lien upon certain movables of plaintiffs was in bad faith by reason of which plaintiffs were awarded * * * attorney's fees in the sum of $1,000. From the ensuing judgment defendant has brought this appeal upon seven grounds [most of] which may be summed up in one phrase: Insufficiency of the evidence to support the findings and the judgment.

"Prior to November 15, 1940, plaintiff, Betty Ruth L. Viner, herein at times referred to as Ruth, was president of the Business Women's Association, a nonprofit California corporation. She and her corporation were associated with the Western States University, also a nonprofit California corporation. The two corporations having interests in the several properties involved in this action joined with Mrs. Viner as plaintiffs to establish their respective claims against a common adversary. Inasmuch as the right of each of the plaintiffs as against one another is immaterial to a decision, no effort will be made to keep distinct their respective interests insofar as they relate to defendant.

"Prior to November 1, 1940, Ruth had become associated with defendant Mary Untrecht. About that date, having investigated and negotiated for the acquisition of a house on behalf of the association, Ruth decided to undertake the purchase of a fourteen-room residence, herein referred to as 'La Brea house,' for the sum of $6,300, on terms, 10 per cent payable in cash, the balance in deferred payments. In order to effect such purchase, Ruth, on behalf of the association, agreed with Mary that if the latter would lend the association as much as $1,500 in order to consummate the transaction, to make certain improvements, to buy certain furnishings and to pay the accrued taxes and assessments, she should be repaid her advances with interest at 7 per cent per annum compounded; receive instructions in comptometry and bookkeeping; and have the use of a residential room free of charge. As security for the repayment of her loan, it was agreed that the title to the property should be vested in defendant. Arrangements for the purchase were concluded on January 3, 1941, when Mary deposited in the escrow the sum of $715, and she was named grantee in the conveyance of La Brea house. The association installed its furniture and furnishings, leased to Mrs. Viner certain residential rooms, which lease was ratified by [defendant], and, pursuant to the loan agreement had Mary occupy the room she had selected for herself. Ruth moved her furniture into the house, and both women continued to reside there until the repudiation of the loan contract by Mary. In the following month [defendant] advanced an additional $200 to the association and thereafter made other payments on account of the property.

"Simultaneously with the foregoing events the association leased certain space in the building to the University for the storage of its 165 law books, comptometer and other equipment, and this tenant agreed to carry out the association's contract with [defendant] by giving her the promised technical training. For fifteen months Mary continued to reside in the house and to receive instructions from the University which tuition was of the reasonable value of $300. After the occupancy of the house by the two women Ruth made practically all of the installment payments on the purchase price, paid the taxes and assessments, the utilities and expense of operation. This continued until January 3, 1942, when the association extended Ruth's lease for another year in consideration of her continuing the same payments. This she did until July 15, 1942.

"On July 4, 1942, [defendant] informed the association that she was the owner, demanded possession of the property; declared the association had no interest therein, and repudiated all agreements theretofore made with Ruth. The association requested a statement of its indebtedness on account of moneys advanced by Mary but that lady denied the existence of any such indebtedness. Following her oral and written demands for possession of the realty, Mary asserted a lodging-house lien upon the furniture and furnishings of Ruth and of the association and on September 10th she posted notice of sale of such effects pursuant to section 1861, Civil Code, for the purpose of satisfying her demand for moneys advanced in the sum of $3,142. The total of all moneys advanced by Mary in connection with the purchase and improvement of the property was $1,679.62. Besides her own occupancy, after her repudiation, Mary received net rentals as in-

come from the house $623.55. The University owns the movables it had placed in the house under its lease from the association. Although Mary had no interest in them she took them away and held them without any claim of right. Their value is $3,000. That corporation and Ruth were both required to employ counsel to effect a recovery and the reasonable value of such service to each of them is the sum of $500.

"The foregoing facts having been found to be true the [trial court concluded as follows]:

"(1) At all times the association was the equitable owner of La Brea house. (2) Defendant held title for the association, subject to her lien for advances; but (3) she had no right to the possession of the property to the exclusion of [plaintiffs]. (4) By virtue of their leases, Ruth and the University were entitled to occupy certain rooms which they entered as tenants of the association and occupied February 1, 1941; (5) neither was Mary a boarding-house keeper, nor was Ruth her guest, but on the contrary, (6) she was herself a mere lodger in the house. (7) She had no lien upon, claim to, or legal interest in, the law books and bookkeeping machines taken by her from the University or to any of the chattels claimed by Ruth, therefore Mary should pay to Ruth and the University the $1,000 counsel fees and. * * * (9) The association is entitled to all moneys heretofore collected as rentals on the La Brea house and to an accounting of all moneys paid her as rentals therefor after July 4, 1942, besides the $623.55 she accounted for prior to judgment.

[1-3] "It is fundamental that where a judgment is attacked on the ground that it is not supported, the power of the appellate court ends when it shall once have determined that there is substantial evidence which will support the conclusions of the trial court." Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732; Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478. And that rule is applicable where the action is one to enforce a resulting trust. Whether the evidence to prove the existence of the trust is clear, satisfactory and convincing "is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." Stromerson v. Averill, supra, 22 Cal.2d 815, 141 P.2d 736. See, also, Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583. Likewise, in such cases the credibility and weight of the evidence are exclusively for the trial court. Watson v. Poore, supra; Stromerson v. Averill, supra.

"The proof found to support the findings and judgment consists of two classes, to wit: (1) the declarations and affidavits of [defendant] and (2) the testimony of [plaintiffs] and their witnesses. Defendant testified that she purchased the La Brea home for herself and that the association was never mentioned in reference to the property. However, on October 29, 1940, she executed an affidavit to be filed in her divorce action in the superior court in which she averred that her sole possession was a $200 interest in a life insurance policy. On June 19, 1941, six months after taking title to the La Brea property she filed her verified amended complaint in the same action alleging that she was indigent. * * * In the verified divorce pleading she alleged that she was so ill from October, 1940, to June, 1941, that she was unable to do any work. In the present action she alleged under oath (1) that during the same period she acted as secretary, office attendant, and instructor for the association in its downtown office and that such services were worth $1,540; and (2) that during the same period she was acting as housekeeper for [plaintiffs] and did all of the work for the roomers and for [plaintiffs] in the upkeep of the fourteen-room house with its six bedrooms, and that such services were reasonably worth $1,690.

"The testimony of Mrs. Viner established that she located the La Brea house as a desirable property and that Mary accompanied her to visit the premises. They had many meetings at which the house was shown to certain members of the association and Mary finally agreed to lend to the association funds not to exceed $1,500 in order to complete the purchase and repairs. Ruth conducted all negotiations; dictated all letters for Mary's signature and told the agent of the grantor that the title would be taken in the name of [defendant] in order to comply with the requirements of the bank which declined to convey to an eleemosynary corporation. Mary was present at all of the conferences had with the seller or its agent; was present at the time the escrow was opened; advanced $715 for the down payment and other outlays and later gave Ruth $200 as a part of the sums she had promised to advance. At the time

the escrow was opened Mary stated to her that she hesitated to take title to the property in her own name by reason of the pendency of her divorce action.

"The witness Ware, licensed real estate broker, testified that, in his presence at about the time the escrow was opened, [defendant] stated that they could not buy the property under the name of the association on account of its credit standing and that it was taken by her in trust for the association to be conveyed to it at the proper time. The witness Kohan, sister of Ruth, established that in the summer of 1942 Mary told her that the property belonged to the association; that she desired to collect the moneys she had loaned to make the purchase; that it could be sold at a profit if she and Ruth could share in it; that if it were not sold 'she would use any means possible to make her sell it so she could get her loan therefrom.' One Shoup made a contract for the painting of the house with Mrs. Viner and Mrs. Snyder, president and secretary of the association. He testified that he never discussed the painting with [defendant] during the several weeks he was there employed. * * * When defendant gave notice of her repudiation her language was that 'all agreements between you and Mrs. Untrecht are hereby terminated and cancelled.' From such language of her counsel, in the light of other proof, it is a reasonable inference that defendant acknowledged that she had made a contract with Mrs. Viner on terms advantageous to the latter. * * *"

[4-8] From the foregoing it is apparent that we have an agreement between plaintiffs and defendant under which the latter agreed to loan money to the former for the purchase of real property, the title to which was to be taken in the name of defendant who was to hold it in trust for plaintiffs. Thereafter, and pursuant to that agreement, the loan was made by defendant to plaintiffs and as a part of the same transaction the money representing the loan was paid by defendant to the vendor of the property rather than to plaintiffs, and defendant became obligated to make the balance of the payments on the property. The property was accordingly conveyed to defendant. The rules of law applicable to those facts are clear. In the ordinary case a resulting trust arises in favor of the payor of the purchase price of the property where the purchase price is paid by one person and the title is taken in the name of another. Civ.Code, § 853; 25 Cal.Jur. 178. It is not always necessary that the payment of the purchase price be made by the claimant of the beneficial interest. It may be made by the transferee when it constitutes a loan from the transferee to the claimant. Watson v. Poore, supra; Millard v. Hathaway, 27 Cal. 119; Walton v. Karnes, 67 Cal. 255, 7 P. 676; Ward v. Matthews, 73 Cal. 13, 14 P. 604; Hellman v. Messmer, 75 Cal. 166, 16 P. 766; White v. Costigan, 138 Cal. 564, 72 P. 178; Breitenbucher v. Oppenheim, 160 Cal. 98, 116 P. 55; Brown v. Spencer, 163 Cal. 589, 126 P. 493; O'Rourke v. Skellenger, 169 Cal. 270, 146 P. 633; Webb v. Vercoe, 201 Cal. 754, 258 P. 1099, 54 A.L.R. 1200; Schumacher v. Langford, 20 Cal.App. 61, 127 P. 1057; Crozier v. Soquel, 101 Cal.App. 402, 281 P. 698; Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501; see Stromerson v. Averill, supra; Hidden v. Jordan, 21 Cal. 92; Sandfoss v. Jones, 35 Cal. 481; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236; Hellman v. Messmer, supra; Rest., Trusts, § 448. Nor is a resulting trust prevented by an assumption by the transferee of an obligation to the vendor or transferor to pay the purchase price, where the claimant is obligated to reimburse the transferee. In such a case there is loan of credit by the transferee to the claimant. Watson v. Poore, supra; see Stromerson v. Averill, supra; Rest., Trusts, § 456, comment d. The case of Lincoln v. Chamberlain, 61 Cal.App. 399, 214 P. 1013, is distinguishable inasmuch as there was no loan by the transferee in that case to the claimant at or prior to the time of the transaction. After the transaction the claimant promised to pay for the property. The statement therein that: "* * * it must be shown that the party setting up the trust paid the money either at or before the execution of the conveyance and as a part of the original transaction of purchase," is out of harmony with the foregoing authorities and must be disapproved insofar as it requires that the money be actually paid by the claimant "at or before the execution of the conveyance." Contrary to defendant's contention it is not necessary that there be an express agreement by the claimant to repay the loan. An agreement to repay may be implied. Brown v. Spencer, supra; Couts v. Winston, 153 Cal. 686, 96 P. 357. Of course, the trustee of the resulting trust holds the legal title as security for the loan. Wat-

son v. Poore, supra; Stromerson v. Averill, supra.

[9] Defendant contends that there can be no resulting trust because there was an express agreement between the parties that defendant would make the loan and hold title in trust for plaintiffs. Where the elements of a resulting trust are present, the fact that transferee and payor of the purchase price, and the claimant, made an oral agreement that the former was to hold the property in trust for the latter which was unenforceable under the statute of frauds or otherwise, does not prevent a resulting trust from arising. Indeed, such agreement supports the inference or presumption that the payor did not intend that the transferee should have the beneficial interest. See Bayles v. Baxter, 22 Cal. 575; Breitenbucher v. Oppenheim, 160 Cal. 98, 116 P. 55; Stromerson v. Averill, supra; Watson v. Poore, supra; Gerety v. O'Sheehan, 9 Cal.App. 447, 99 P. 545; Pavlovich v. Pavlovich, 22 Cal.App. 500, 135 P. 303; Root v. Kuhn, 51 Cal.App. 600, 197 P. 150; Juranek v. Juranek, 29 Cal.App.2d 276, 84 P.2d 195; Rest., Trust, § 441, comment j; 12 Mich.L.Rev. 427; Kimmons v. Barnes & Metcalfe, 205 Ky. 502, 266 S.W. 891, 42 A.L.R. 10, 55.

[10] The trust is not defeated by the failure of the association to tender the borrowed moneys.

"Mary's declination to render a statement and her repudiation of the loan agreement and the trust rendered further tenders idle and unnecessary. Penziner v. West American Finance Co., 133 Cal.App. 578, 586, 24 P.2d 501.

"No other equitable ground is alleged or proved that would justify a judicial defeat of the trust relationship. [Defendant] was free to make the loan. She received a valuable consideration for it. She continued to enjoy the relationship for eighteen months at the expiration of which she was free to enforce her lien for the moneys she had advanced.

[11, 12] "It is thus demonstrated that the findings with reference to the La Brea property find abundant and substantial support in the record leaving this court without power to alter the conclusions derived by the court below."

In the light of the law above set forth none of the authorities cited by defendant is controlling in the instant case.

"The evidence is equally abundant to support the findings that the University owns the personal property which it claimed, that Ruth was not a guest of Mary; that [defendant] is not the owner of the chattels used by the association in the La Brea house and that the only moneys advanced by Mary to the association were those used for the purchase and for taxes and improvement of the property. [Defendant] witnessed the conversation whereby Ruth was employed to operate the house. The latter engaged a number of employees to do the menial tasks from February, 1941, till May, 1942. By her own testimony and that of Mrs. Munson, Mrs. Schneider and Miss Yaryan, Ruth established that Mary neither brought any furniture into the house nor made a payment on that which was purchased, and that she did no work either as a domestic or as instructor for [plaintiffs]. Because of such proof and its acceptance by the court, [defendant's] asserted claims of a lien as an innkeeper upon the personal property in the La Brea house are utterly without right (Fox v. Windemere Hotel A. Co., 30 Cal.App. 162, 157 P. 820) * * *."

Defendant "complains that the amount of her award should have been $2,489.31 instead of $1,679.62, allowed by the judgment. In support of this she cites her own testimony with reference to a payment she made to the painter, the constant tendency of Mrs. Viner to exaggerate, and the misstatement of Exhibit 39. For reasons heretofore recited we cannot retry the comparative veracity or accuracy of the witnesses. On the contrary, the findings and decision determined that Mary is entitled to a total of $1,679.62, the full amount of her loans, but that she is indebted to [plaintiffs] for net rentals collected, $623.55; * * * counsel fees, $1,000, * * * [and] costs in the sum of $208.35."

The court reserved the right to a further accounting when defendant had complied with the decree.

The plaintiffs alleged that defendant without right or claim of right has willfully failed to return the personal property for the purpose of harassing them and that they are entitled to $1,000 punitive damages and $1,000 attorney's fees expended in pursuit of that property. The court found the allegation true but did not award punitive damages, rather it found that plaintiffs had incurred attorney's fees in the

sum of $1,000 in pursuit of the property and awarded that amount.

[13, 14] Generally, fees paid to attorneys are not recoverable from the opposing party either as costs, damages or otherwise in the absence of express statutory or contractual authority. Code Civ.Proc. § 1021; 7 Cal.Jur. 286–288; 8 Cal.Jur. 801, 802; 24 Cal.Jur. 1055–1056. Plaintiffs rely upon section 3336 of the Civil Code declaring the detriment caused by the wrongful conversion of personal property is presumed to be "a fair compensation for the time and money properly expended in pursuit of the property." Attorney's fees are not recoverable under that section. Hays v. Windsor, 130 Cal. 230, 62 P. 395; W. R. Bradshaw & Co. v. Eggers, 27 Cal.App. 132, 148 P. 961; Nicholls v. Mapes, 1 Cal.App. 349, 82 P. 265; see Murphy v. Mulgrew, 102 Cal. 547, 36 P. 857, 41 Am.St.Rep. 200; Spooner v. Cady, 5 Cal.Unrep. 357, 44 P. 1018; Greenbaum v. Martinez, 86 Cal. 459, 25 P. 12; Martland v. Bekins Van & Storage Co., 19 Cal.App. 283, 125 P. 759; Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869; Harris v. Smith, 132 Cal. 316, 64 P. 409; Holm v. Davis, 8 Cal.App.2d 328, 47 P.2d 537.

[15, 16] Plaintiffs assert that the allegations in their complaint and statements in the findings concerning attorney's fees should be ignored or interpreted as really referring to punitive damage. While it is true that the court found the detention of plaintiffs' property was without claim of right and for the purpose of harassing plaintiffs, yet no punitive damages are awarded and the findings unequivocally made an award of attorney's fees rather than punitive damages. For illustration, with reference to plaintiff Western States University, the court found that it "has been required to employ * * * attorneys at law, * * * as its attorneys in order to secure a return of said property, and has incurred an attorneys' fee in the sum of $500.00 therefore to said attorneys, and is entitled to judgment in said sum, which said sum is a reasonable sum therefor."

We find no room for interpretation in the matter. Moreover, it is improper to include attorney's fees as a part of exemplary damages. Howell v. Scoggins, 48 Cal. 355; Falk v. Waterman, 49 Cal. 224. Accordingly, the judgment should be modified by striking therefrom the item of $500 for attorney's fees awarded each of the plaintiffs, and as so modified the judgment is affirmed. Neither party to recover costs on this appeal.

GIBSON, C. J., and SHENK, EDMONDS, SCHAUER, and SPENCE, JJ., concurred.

TRAYNOR, Justice.

I concur. My views with respect to the scope of appellate review in cases where "clear and convincing evidence" is required are set forth in my dissenting opinions in Stromerson v. Averill, 22 Cal.2d 808, 817, 141 P.2d 732, and Beeler v. American Trust Co., 24 Cal.2d 1, 29, 147 P.2d 583. These views remain unchanged, but the rule announced in those cases now governs the scope of appellate review in this state.



26 Cal.2d 286

## PACIFIC EMPLOYERS INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

S. F. 17110.

Supreme Court of California.

April 24, 1945.

**1. Workmen's compensation ⇐52**

Workmen's compensation legislation must be liberally construed to compensate employees injured in their employment. St.1937, pp. 265, 269, §§ 3201, 3202, 3600; Const. art. 20, § 21, as amended in 1918.

**2. Workmen's compensation ⇐675, 676**

Injury to hotel bus girl struck in eye as result of horseplay of two fellow employees playing catch with some hard French rolls in which horseplay bus girl did not participate was compensable as "arising out of" and "proximately caused by the employment". St.1937, pp. 265, 269, §§ 3201, 3202, 3600; Const. art. 20, § 21, as amended in 1918.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Employment" and "Proximately Caused by Employment".

In Bank.

Petition by the Pacific Employers Insurance Company to review and annul an order of the Industrial Accident Commission of the State of California allowing compensation benefits to Lillian Carmel.

Award affirmed.

Prior opinion 151 P.2d 141.

James C. McDermott and W. N. Mullen, both of San Francisco, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

EDMONDS, Justice.

Lillian Carmel, while employed in a hotel as a bus girl and attending to her duties, sustained injury as the result of the skylarking of two fellow employees. By this proceeding, Pacific Employers Insurance Company, the hotel's insurance carrier, seeks to annul an award of compensation for the injury, and the question for decision concerns the liability of an employer under such circumstances.

The facts are undisputed. Burton and Orgain, two young bus boys, were working in a dining room of the hotel clearing dishes which had been left by departing guests. It was after 1 a. m. and the boys were throwing hard, round rolls at each other. They had not quarreled, there was no animosity existing between them, and the roll throwing was simply "skylarking." It is not known who threw the first roll, but one which Burton aimed at Orgain missed him and, continuing in its flight, struck Miss Carmel in the right eye. She, with another girl, was then working in a recessed portion of the room at a place where they were not visible to Burton. Neither girl knew what the boys were doing, and at the time of the accident, Miss Carmel did not know what object had struck her nor the source from which it came. The night manager, in charge of all departments of the hotel at the time, testified that horseplay during working hours was in violation of the rules and would be stopped immediately by him or anyone in authority.

As grounds for annulling the award, the insurer contends that, although the applicant's injury occurred in the course of her employment, it did not arise "out of" her employment and, accordingly, is not a compensable injury within the jurisdiction of the Industrial Accident Commission. In support of its position, the petitioner relies upon the rule declared in Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 P. 212, L.R.A.1916F, 1164, and later cases which have followed and applied the rule there stated concerning the liability of an employer for injury caused by horseplay. Fishering v. Pillsbury, 172 Cal. 690, 158 P. 215; Federal Mut. Liability Ins. Co. v. Industrial Acc. Comm., 187 Cal. 284, 201 P. 920; Great Western Power Co. v. Industrial Acc. Comm., 187 Cal. 295, 201 P. 931; Pacific Emp. Ins. Co. v. Division of Ind. Acc. & Safety, 209 Cal. 656, 289 P. 619; Dalsheim v. Industrial Acc. Comm., 215 Cal. 107, 8 P. 2d 840. The commission urges that the doctrine of stare decisis does not call for a perpetuation of the errors of past decisions. It declares that a "frank reappraisal of the law," particularly in view of the changes in the concepts regarding workmen's compensation since 1916, compels the conclusion that the holding in the case of Coronado Beach Co. v. Pillsbury, supra, should no longer be followed.

The legislation authorizing workmen's compensation is now a part of the Labor Code, St.1937, p. 269, which in section 3600 provides as follows: "Liability for the compensation provided by this division * * * shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment * * * in those cases where the following conditions of compensation concur: * * * (b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment. (c) Where the injury is proximately caused by the employment, either with or without negligence." The requirement, that the injury to be compensable must occur in the course of and arise out of the employment, is clear and unmistakable. Admittedly, Lillian Carmel was "acting within the course of her employment at the time of injury, and the evidence supports the commission's conclusion that she was "performing service growing out of and incidental to" her employment. But the insurer argues that the injury was not one "arising out of" such employment nor "proximately caused by the employ-

ment" within the meaning of the Labor Code.

Article XX, section 21, of the California Constitution, as amended in 1918, provides: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability * * * sustained by the said workmen in the course of their employment, irrespective of the fault of any party."

The Legislature has declared that in the determination of controversies arising under the statutes governing workmen's compensation, their provisions "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Labor Code, § 3202. This section, enacted in 1937, is substantially the same as the 1917 act. Stats.1917, ch. 586, p. 831. Likewise, based upon the earlier law is the section by which the Legislature has declared its purpose, in accordance with the constitutional authorization, "to make effective and apply to a complete system of workmen's compensation." Labor Code, § 3201.

[1] "By the * * * constitutional amendment," this court said in Bartlett Hayward Co. v. Industrial Acc. Comm., 203 Cal. 522, 265 P. 195, "the legislation of 1917 was given the stamp of approval as the social public policy of the state in its remedial and humanitarian purposes. So * * * the conclusion seems inevitable that it was intended thereby to enlarge and extend the continuing jurisdiction of the commission beyond that which had obtained under the Act of 1913." 203 Cal. at page 529, 265 P. at page 198. The policy of liberally construing the legislation to compensate employees injured in their employment for the purpose of effecting a complete system of workmen's compensation, has found repeated expression in recent decisions. Douglas Aircraft Co. v. Industrial Acc. Comm., 24 Cal.2d 340, 341, 342, 149 P.2d 702; Goodrich v. Industrial Acc. Comm., 22 Cal.2d 604, 609, 140 P.2d 405; Tingey v. Industrial Acc. Comm., 22 Cal.2d 636, 140 P.2d 410; California Cas. Ind. Exch. v. Industrial Acc. Comm., 21 Cal.2d 751, 760, 135 P.2d 158; California Cas. Ind. Exch. v. Industrial Acc. Comm., 21 Cal.2d 461, 132 P.2d 815; Freire v. Matson Navigation Co., 19 Cal.2d 8, 10, 118 P.2d 809; Rideaux v. Torgrimson, 12 Cal.2d 633, 637, 86 P.2d 826. In the Tingey case, supra, the court declared that "any reasonable doubt as to whether the act of the employee is contemplated by the employment should be resolved in favor of the employee in view of the policy of liberal construction of the workmen's compensation laws." 22 Cal.2d at page 641, 140 P.2d at page 413.

Further indication of this court's determination to liberally interpret the Labor Code to the end of insuring a system of compensation completely covering injuries occurring in the course of employment under the conditions fixed by the Legislature, is found in such recent statements as: "It is not indispensable to recovery, however, that the employee be rendering a service to his employer at the time of the injury. [Citations.] The essential prerequisite to compensation is that danger from which the injury results be one to which he is exposed as an employee in his particular employment" (California Cas. Ind. Exch. v. Industrial Acc. Comm., supra, 21 Cal.2d at pages 465, 466, 132 P.2d at page 818); "Acts of the employee for his personal comfort and convenience while at work, such as taking a drink of water, lighting a cigarette, warming himself, etc., do not interrupt the continuity of the employment, and this exception is not limited to acts performed on the employer's premises. * * * Where an injury occurs to an employee during his hours of employment on the premises of an employer and the factual situation may give rise to a reasonable inference that the injury arose out of and in the course of the employment, the finding of the commission in this respect will not be disturbed. * * * It is the duty of this court to indulge in all reasonable inferences to support the commission's findings. * * * Any reasonable doubt as to whether an act is contemplated by the employment and at what particular time or moment an employee resumes his former duties as an employee performing duties for his employer, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the

employee" (California Cas. Ind. Exch. v. Industrial Acc. Comm., supra, 21 Cal.2d at pages 758 and 760, 135 P.2d at page 163); although "an injury to be compensable * * * must arise out of the employment, that is, occur by reason of a risk or condition incident to the employment. * * * The injuries suffered to be compensable need not be of the kind anticipated by the employer or peculiar to the employment." Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 19 Cal.2d 622, 628, 629, 122 P.2d 570, 573, 141 A.L.R. 798.

In the present case the insurer maintains that although the employee was injured upon the employer's premises during working hours, while performing services growing out of and incidental to her employment, she may not recover for the reason that her injury was caused by frolicking of co-employees in which she did not participate. The petitioner concedes that if skylarking was customary and condoned by the employer (see: Great Western Power Co. v. Industrial Acc. Comm., 187 Cal. 295, 201 P. 931; Metropolitan Redwood Lbr. Co. v. Industrial Acc. Comm., 41 Cal.App. 131, 182 P. 315), or if, under similar circumstances, Miss Carmel had been injured through an altercation between fellow employees over their work (Globe Ind. Co. v. Industrial Acc. Comm., 2 Cal.2d 8, 37 P.2d 1039; San Diego & Ariz. Ry. Co. v. Industrial Acc. Comm., 193 Cal. 341, 223 P. 972; Globe Ind. Co. v. Industrial Acc. Comm., 193 Cal. 470, 225 P. 273; see, generally: 27 Cal.Jur. 373; Scholl v. Industrial Commission, 366 Ill. 588, 10 N.E.2d 360, 112 A.L.R. 1258), she would be entitled to compensation. These judicial distinctions lack realism. As early as Kimbol v. Industrial Acc. Comm., 173 Cal. 351, 160 P. 150, L.R.A.1917B, 595, Ann.Cas.1917E, 312, the court said: "* * * [I]t can make no difference that the danger was not known or anticipated; nor can it make any difference that the employer was entirely without fault. The liability for compensation created by our law is not founded on any want of care on the part of the employer. * * * Under the old law the employer's exemption from liability where he was not negligent in the matter existed solely because he was not negligent and not because the injury did not arise out of the employment. Our industrial compensation system has dispensed altogether with the element of negligence on the part of the employer * * *." 173 Cal. at pages 355, 356, 160 P. at page 152, L.R.A.1917B, 595, Ann.Cas. 1917E, 312. Certainly, a classification of assaults and altercations as incidental to employment, but placing accidents caused by playfulness and frolicking, in which the injured employee took no part and of which he had no knowledge, in the category of those not "proximately caused by the employment," has no sound basis in law or fact.

Although the weight of authority supports the view that injuries resulting to the participants in horseplay are not compensable (Kansas City Fibre Box Co. v. Connell, 8 Cir., 5 F.2d 398, 43 A.L.R. 492; Glenn v. Reynolds Spring Co., 225 Mich. 693, 196 N.W. 617, 36 A.L.R. 1469; Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S.W. 152, 13 A.L.R. 540) the courts are quite evenly divided upon the rights of a nonparticipant. Better reasoned and more aware of the realities of employment are those decisions holding that a nonparticipant is entitled to compensation if at the time of injury he was attending strictly to his duties. West Penn Sand & Gravel Co. v. Norton, 3 Cir., 95 F.2d 498; General Acc., etc., Corp. v. Crowell, 5 Cir., 76 F.2d 341; Pekin Cooperage Co. v. Industrial Bd., 277 Ill. 53, 115 N.E. 128; Chicago, etc., R. Co. v. Clendennin, 81 Ind.App. 323, 143 N.E. 303; Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S.W. 152, 13 A.L.R. 524; Socha v. Cudahy Packing Co., 105 Neb. 691, 181 N.W. 706, 13 A.L.R. 513; Matter of Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522; Chambers v. Union Oil Co., 199 N.C. 28, 153 S.E. 594; Roxana Petro. Corp. v. State Ind. Comm., 134 Okl. 181, 272 P. 847; Marland Refining Co. v. Colbaugh, 110 Okl. 238, 238 P. 831; Borden Mills, Inc., v. McGaha, 161 Tenn. 376, 32 S.W. 2d 1039; Cassell v. United States Fidelity & Guaranty Co., 115 Tex. 371, 283 S.W. 127, 46 A.L.R. 1137; Badger Furniture Co. v. Industrial Comm., 195 Wis. 134, 217 N.W. 734; Newport H. C. Co. v. Industrial Comm., 167 Wis. 630, 167 N.W. 749; see: Brown v. Vacuum Oil Co., 171 La. 707, 132 So. 117; Industrial Comm. v. Weigandt, 102 Ohio St. 1, 130 N.E. 38.

Typical of the modern trend are the conclusions of Judge Cardozo in the leading case of Matter of Leonbruno v. Champlain

Silk Mills, supra: "The claimant while engaged in the performance of his duties in the employer's factory was struck by an apple which one of his fellow servants, a boy, was throwing in sport at another, and as a consequence lost the better part of the sight of one eye. He did not participate in the horseplay, and had no knowledge of it till injured. The question is whether the accident was one 'arising out of and in the course of the employment,' within the meaning of the statute. * * *

"That it arose 'in the course of employment' is unquestioned. That it arose 'out of' employment, we now hold. The claimant's presence in the factory in association with other workers involved exposure to the risk of injury from the careless acts of those about him. * * * Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service. * * * 'For workmen of that age or even of maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to every one who employs labor.' The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. * * * The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day. The test of liability under the statute is not the master's dereliction * * *. The test of liability is the relation of the service to the injury, of the employment to the risk."

The Supreme Court of Texas reached the same conclusion in Cassell v. United States Fidelity & Guaranty Co., supra [115 Tex. 371, 283 S.W. 128]: "Considering every employee peculiarly exposed to such pranks from his coemployees as are inspired by nothing more than a well nigh universal human craving for fun," it declared, "we are forced to consider these pranks as a hazard which the employee required to work with others must encounter in the performance of his duties, and hence such pranks constitute a risk reasonably inherent in or incident to the conduct of the employer's business." And in the recent case of Hartford Acc. & Ind. Co. v. Cardillo, 72 App.D.C. 52, 112 F.2d 11, 14, the United States Court of Appeals for the District of Columbia made the following pertinent observations:

"Nor is it necessary * * * that the particular act or event which is the immediate cause of the injury be itself part of any work done for the employer by the claimant or others. * * * The statutory abolition of common law defenses made easy recognition of the accidental character of negligent acts by the claimant and fellow servants. * * * But these extensions required a shift in the emphasis from the particular act and its tendency to forward the work to its part as a factor in the general working environment. The shift involved recognition that the environment includes associations as well as conditions, and that associations include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. In bringing men together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. Work could not go on if men became automatons repressed in every natural expression. 'Old Man River' is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment. * * * So long as the claimant is merely the victim, not a participant, it makes little difference whether the fighting is by fellow employees or strangers to the work or what is the immediate occasion for the dispute. The same is true in horseplay. It is sufficient that the work brings the claimant within the range of peril by requiring his presence there when it strikes."

Although this court has not gone so far as to hold that every injury to an employee attending to his duties and within the course of his employment is compensable, it has, in many cases, upheld the allowance of compensation for injuries arising out

of acts not strictly within the scope of the employment: returning from lunch (Tingey v. Industrial Acc. Comm., 22 Cal.2d 636, 140 P.2d 410); drinking wine because of indisposition (Elliott v. Industrial Acc. Comm., 21 Cal.2d 281, 131 P.2d 521, 144 A.L.R. 358); smoking (Whiting-Mead Commercial Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518); going to obtain a slicker to wear in performance of his duty (Western Pac. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 415, 224 P. 754); going to obtain an overcoat (Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911); going into a hallway to obtain fresh air (F. W. Woolworth Co. v. Industrial Acc. Comm., 17 Cal.2d 634, 111 P.2d 313); going to obtain water for a fellow employee who had fainted (County of Los Angeles v. Industrial Acc. Comm., 89 Cal.App. 736, 265 P. 362); returning from purchasing a package of cigarettes for employee's own use (Western Pipe, etc., Co. v. Industrial Acc. Comm., 49 Cal.App.2d 108, 121 P.2d 35); domestic servant sewing a hem on her dress (Employers', etc., Corp. v. Industrial Acc. Comm., 37 Cal.App.2d 567, 99 P.2d 1089). And under the so-called "street risks" doctrine, injuries caused by third persons not connected with the employment are held compensable regardless of the fact that others are equally subject to those risks. California Cas. Indem. Exch. v. Industrial Acc. Comm., 21 Cal.2d 461, 132 P.2d 815, supra; California C. I. Exch. v. Industrial Acc. Comm., 5 Cal.2d 185, 53 P.2d 758; Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 19 Cal.2d 622, 122 P.2d 570, 141 A.L.R. 798. When the Coronado case was decided in 1916 the constitutional provisions authorizing the enactment of a workmen's compensation law, and the legislation enacted in pursuance thereof, were not as broad as the present enactments. The Constitution now calls for the enactment of "a complete system of workmen's compensation" (Cal.Const., art. XX, § 21, supra), and the Legislature has required the courts to liberally construe the compensation law in favor of the employee. Labor Code, § 3202, supra.

Also the rule of the case has been considerably weakened by its exception to the effect that if the horseplay occasioning the injury is customary and permitted by the employer, injuries resulting therefrom arise out of the employment. See: Metropolitan Redwood Lbr. Co. v. Industrial Acc. Comm., supra; Great Western Power Co. v. Industrial Acc. Comm., supra; and, Phil Hollenbach Co. v. Hollenbach, 181 Ky. 262, 204 S.W. 152, 13 A.L.R. 540.

[2] Considering, as we may, the propensities and tendencies of mankind and the ordinary habits of life, it must be admitted that wherever human beings congregate, either at work or at play, there is some frolicking and horseplay. Any doubt upon that subject, under the recent decisions of this court, must be resolved in favor of compensability. Accordingly, an injury sustained by a nonparticipating employee through the horseplay of fellow workers arises "out of" and "is proximately caused by the employment" within the meaning of section 3600 of the Labor Code. The cases of Coronado Beach Co. v. Pillsbury, supra; Fishering v. Pillsbury, supra; Federal Mut. Liability Ins. Co. v. Industrial Acc. Comm., supra; Great Western Power Co. v. Industrial Acc. Comm., supra, and Pacific Emp. Ins. Co. v. Division of Ind. Acc. & Safety, supra, are overruled.

The award is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




26 Cal.2d 254

## BALLENTINE v. SUPERIOR COURT OF SAN MATEO COUNTY et al.

S. F. 17137.

Supreme Court of California.

April 10, 1945.

**1. Divorce ⇐269(10)**

Affidavit showing that defendant was required to pay alimony under a decree, that no payments had been made, and that according to affiant's best information and belief defendant was able to make such payments, was sufficient to give court jurisdiction of contempt proceeding for failure to pay alimony, since allegations relating to earnings and employment of defendant were peculiarly within his own knowledge

and could therefore properly be made by affiant on her information and belief.

**2. Divorce ⇐269(11)**

An order requiring husband to pay within five days $250 on account of arrears of alimony, and that unless such payment was made he "shall be adjudged guilty of contempt", was not self-operative, but required future action, and he could not be guilty of contempt of the order unless the five-day period had elapsed and a showing made of noncompliance and of present ability to pay.

**3. Prohibition ⇐23, 27**

Where order directed that unless defendant paid a certain amount on arrears of alimony within five days he should be adjudged guilty of contempt, the issuance of alternative writ of prohibition within the five-day period to restrain court from proceeding with contempt proceedings was improper, since defendant had not yet been adjudged guilty of contempt, and trial court had not at that point exceeded its powers and was not threatening to do so, and Supreme Court could not assume, on prohibition, that trial court would commit error by holding defendant in contempt without the required showing being made.

**4. Divorce ⇐199**

Issue relating to divorce of the parties is severable from issue of support.

**5. Divorce ⇐171, 269(2)**

Where a Nevada action for divorce was in legal effect an action on plaintiff's California judgment of divorce, the California judgment was neither superseded by nor merged in the Nevada judgment as respects jurisdiction of the California Court of contempt proceeding for failure to pay alimony provided in the California judgment.

**6. Divorce ⇐331**

Where a Nevada judgment for alimony was in legal effect a judgment entered on a previous California judgment for alimony, there was no danger of double liability under the judgments, since payment of either judgment discharged the obligation of the other.

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In Bank.

Proceedings by Edward W. Ballentine in prohibition and mandamus directed against anticipated judgment of the Superior Court of San Mateo county and Aylett R. Cotton, Judge thereof, in a contempt proceeding.

Writs denied.

Prior opinions, 150 P.2d 259; 152 P.2d 515.

Paul A. McCarthy and Max H. Margolis, both of San Francisco, for petitioner.

Joseph J. Bullock, of Redwood City, and Sterling Carr and A. Dal Thomson, both of San Francisco, for respondents.

PETERS, Justice pro tem.

Edward W. Ballentine, claiming to have been found in contempt of an order to pay alimony, and alleging that the trial court was without jurisdiction to enforce the order, brings this proceeding in prohibition to restrain its enforcement. His original petition also sought a writ of mandate to compel the trial court to dismiss a certain divorce proceeding pending therein. Prior to reaching this court the petition for a writ of mandate was abandoned.

On September 10, 1943, the San Mateo Superior Court entered an interlocutory decree of divorce in favor of Mary T. Ballentine against Edward W. Ballentine. By that decree the property rights of the parties were adjusted, and Edward was ordered to pay Mary $150 a month alimony, and other sums, not here involved, for the support of the children of the marriage. Edward made such payments until November 1, 1943.

Edward, while the San Mateo action in which he was plaintiff and cross-defendant was pending, went to Nevada, and there commenced an action for divorce against his wife Mary. His wife appeared in the Nevada action, pleaded the pendency of the California proceedings, and filed a cross-complaint. On September 18, 1943, the Nevada court granted Mary an absolute divorce from Edward. The Nevada court found that the San Mateo Superior Court had entered its interlocutory decree on September 10th, and in relation to the property rights and alimony provisions of that decree, found that they were "fair, just and equitable." It embodied in its decree the identical provisions for alimony and support contained in the California decree.

On March 13, 1944, Mary upon affidavit secured from the San Mateo court an order to show cause why Edward should not be punished for contempt for failing to make the payments set forth in the Cal-

ifornia decree. A hearing on this order to show cause at which, apparently, no reporter was present, was held on March 27, 1944, and, after the taking of some testimony, was continued to April 24, 1944. At this last hearing a reporter was present, and the proceedings then had are part of the record. The hearings disclosed that Edward was in arrears in excess of $900, and that he had the present ability to pay $250. At the conclusion of the April 24th hearing, after considerable discussion between the court and counsel, the court stated: "Well, I judge him guilty of contempt and commit him to jail until he pays the sum of $250," and then the court granted a five-day stay. The court entered its formal order the same day but had apparently changed its mind as to the exact nature of the order to be entered. The order recites the entering of the interlocutory decree, finds Edward is over $900 in arrears, finds that Edward has the present ability to pay $250, but has wilfully refused to make such payment, and then orders Edward to pay to his wife $250 within five days of April 24th. The order states: "* * * it is further adjudged that if within the said (5) five days the said Edward W. Ballentine fails to make said payment of $250.00 on account of said alimony as hereinabove set forth, he be adjudged guilty of contempt in disobeying this Order and that by reason thereof he be imprisoned in the County Jail of San Mateo County, State of California, until he complies with this Order, or unless further ordered by the Court in the meantime." On April 28, 1944, before the expiration of the five-day period contained in the order, Edward filed his petition for prohibition to restrain its enforcement.

It frequently happens in such contempt proceedings that the trial court believes that although the party involved is in contempt, the ends of justice will best be served if such person not be thrown into jail immediately but be given a few days' grace to raise the money so that he can purge himself of the contempt. From a practical standpoint such end can be accomplished by continuing the hearing for the desired period. Had the trial court finally followed this procedure the present controversy could not have arisen. The trial court, however, elected to find that Edward had wilfully violated the provisions of the interlocutory decree in that he had the present ability on April 24th to pay $250, and then ordered that unless such payment was made by April 29th he should be found guilty of a contempt. It is important to here note that petitioner has never been found guilty of contempt of the order of April 24th, he having instituted this proceeding before the five days provided therein had elapsed.

[1] Petitioner urges that the affidavit of Mary Ballentine was insufficient to confer jurisdiction to issue the original order to show cause. The alleged insufficiency refers to the allegations of the affidavit relating to petitioner's ability to pay. The point need not be labored. Allegations relating to the earnings and employment of petitioner were peculiarly within his own knowledge and could therefore properly be made by affiant on her information and belief. In re Reilly, 17 Cal.App.2d 55, 61, 61 P.2d 469; Ex parte Brown, 66 Cal.App. 534, 537, 226 P. 650; Selowsky v. Superior Court, 180 Cal. 404, 408, 181 P. 652; In re McCarty, 154 Cal. 534, 537, 98 P. 540; see cases collected 5 Cal.Jur. § 38, p. 938.

Petitioner also contends that the trial court erroneously and prejudicially refused to consider his affidavits. The petition alleges that when petitioner's attorney tendered the counteraffidavit on the first hearing an objection to its introduction was sustained. The record shows that on the second hearing on April 24th, counsel for Mary Ballentine withdrew his objection and an order was made admitting it into evidence, over the strenuous objections of petitioner's attorney. In other words, on the hearing of the 24th, counsel for petitioner no longer desired to introduce the counteraffidavit of his client and it was introduced over his objections at the request of counsel for Mary Ballentine. The petition for prohibition alleges that after the affidavit was so introduced it "was neither read to or by respondent judge nor considered by him." The answers of the trial judge and of Mary Ballentine do not expressly deny this allegation, merely alleging that the affidavit was introduced into evidence. The record of the proceedings of April 24th shows that the trial judge was thoroughly familiar with the affidavit and with the supplemental affidavit in question. On pages 10 and 11 of that record it appears that counsel for Mary Ballentine specifically requested the trial judge to read the counteraffidavit and that most of its provisions were then reviewed or discussed. Therefore, even if it be assumed

in the face of the presumption that official duty has been performed that the quoted allegation could be considered, and assuming that prohibition could be used to reach such an error, which we doubt, the record shows that the allegations of the affidavits were considered by and known to the trial court.

[2, 3] The main contention now urged by petitioner is that there were two orders fixing the amount of alimony, one of September 10, 1943, and one of April 24, 1944. It is urged that the affidavit filed by Mary Ballentine which was necessary to give the trial court jurisdiction of the constructive contempt was filed for the purpose of charging a contempt of the first order, and that no affidavit has ever been filed charging a contempt of the second order. It is contended that Edward has been found guilty of a contempt of the second order, and that the court had no power to punish for a constructive contempt of the second order without the filing of an affidavit. The sole authority relied upon to support this argument is In re McCarty, 154 Cal. 534, 98 P. 540.

There is a superficial resemblance between the McCarty case and the present one. In that case the husband was ordered to pay the wife $90 per month alimony. The wife filed a proper affidavit charging a default in making the required payments. An order to show cause was issued. At the hearing the trial court found that the husband was able to pay part of the back alimony, and made its order directing that he pay $150 within four days, and further directing that unless he should do so he should be adjudged guilty of contempt. Up to this point the facts of the instant case and those of the McCarty case are identical, but from here on the two cases differ widely on their facts and in the legal problem presented. In the McCarty case the four-day time limit expired. The court then held a hearing and when it developed that the payment ordered four days previously had not been made, the husband was adjudged guilty of contempt. The husband challenged the validity of this last mentioned order by certiorari. The court held that the contempt adjudication was void because the court found the husband guilty of a contempt of the order to pay $150 when there was no affidavit on file charging failure to comply with that order. It was held that the filing of such an affidavit is a jurisdictional prerequisite to a constructive contempt proceeding.

This holding is neither conclusive nor persuasive in the instant case. Here there has been no adjudication that Edward is in contempt of the second order. Before the five-day period fixed in the second order had elapsed this proceeding in prohibition was instituted. There has never been an order finding him in contempt of the second order. In the McCarty case the court did not invalidate the order comparable to the one here involved, but invalidated the order (never made in the instant case) finding the husband guilty of contempt of the second order. The precise holding of the McCarty case is that adjudication of contempt without an affidavit is void. Here no adjudication of contempt has been made.

It is true that the order of April 24th provides that unless the payment of $250 be made within five days, Edward shall "be adjudged guilty of contempt." But in the very nature of that order it contemplated and required future action. It was not a self-operative order. Obviously, a showing would have to be made of noncompliance and of then present ability to pay. In order to find the husband guilty of contempt of the order of April 24th, the five-day period would have to elapse and then Mary Ballentine would have to file an affidavit charging noncompliance with that order and alleging a present ability to comply with it, and requesting an order to show cause why the husband should not be found guilty of a contempt of the order of April 24th. Upon evidence and findings adverse to Edward on the issues thus presented Edward could then lawfully be adjudged guilty of contempt. This is exactly the procedure Mary Ballentine states that she had intended to follow in the present case, but before she could act petitioner secured the alternative writ of prohibition which stayed all proceedings. The alternative writ should not have issued. The trial court had not at that point exceeded its powers and was not threatening to do so. If the trial court attempts to proceed in violation of the rule of the McCarty case, ample remedies exist to protect petitioner's rights. We cannot presume, on prohibition, that the trial court will commit error. Since there is a lawful way the court can proceed it would be improper to assume that it intends to proceed unlawfully. Prohibition is not available in such circumstances.

[4-6] In his first brief filed in support of the application for the writ petitioner urged that the Nevada decree of divorce

superseded the earlier decree, apparently upon some theory of merger. It was therefore urged that the California court was without jurisdiction to enforce the California decree. In his various briefs filed in this court the point is not mentioned, and has apparently been abandoned. The point is without merit. The San Mateo court rendered its interlocutory decree on September 10, 1943. The Nevada court granted Mary Ballentine an absolute decree of divorce on September 18, 1943. The California decree was pleaded in the Nevada action. In its findings of fact (finding No. 6) the Nevada court found that the California court had entered its decree on September 10, 1943, and then found "that said interlocutory decree settled the property rights of the parties, support of the said Mary T. Ballentine, and the custody and support of the minor children * * * and the Court finds that said interlocutory decree is fair, just and equitable in all matters to which it pertains." The Nevada court then included in its decree the identical provisions as to support contained in the California decree. It is quite apparent that so far as the issue of support is concerned (and such issue is severable from the issue relating to the divorce of the parties—Newell v. Superior Court, 27 Cal.App. 343, 149 P. 998; Parnham v. Parnham, 32 Cal.App.2d 93, 89 P.2d 189), the Nevada action was in legal effect an action on the California judgment. In such a situation the later judgment on the judgment does not supersede the earlier judgment. Moore v. Justices of Municipal Court of City of Boston, 291 Mass. 504, 197 N.E. 487; Lilly-Brackett Co. v. Sonneman, 163 Cal. 632, 126 P. 483, 42 L.R.A.,N.S., 360, Ann.Cas.1914A, 364; Note, 44 A.L.R. 457, at page 462; Restatement of the Law of Conflict of Laws, § 450, particularly note p. 537; 2 Beale on Conflict of Laws, § 450.-17, p. 1427. There is no danger of double liability under the two judgments. Payment of one would discharge the other. Restatement of the Law of Conflict of Laws, § 442.

For the foregoing reasons the alternative writ of prohibition is discharged and the petitions for a peremptory writ of prohibition and for a writ of mandate are denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

## BRYANT v. MARKET STREET RY. CO.*

Civ. 12724.

District Court of Appeal, First District, Division 1, California.

April 27, 1945.

Rehearing Granted May 26, 1945.

**1. Street railroads ⇐117(24)**

In action for injuries sustained by gripman on westbound cable car when its grip hit cable of defendants crossing line which was being held by defendants' southbound car after crossing intersection, contributory negligence of plaintiff was for jury, in view of rule of defendants' and custom of gripman on southbound cars that cable be dropped immediately after crossing intersection involved.

**2. Street railroads ⇐114(14)**

In action for injuries sustained by gripman on westbound cable car when its grip hit cable of defendants crossing line which was being held by defendants' southbound car, evidence authorized inference that plaintiff gripman had knowledge of defendants' rule, and custom of gripman on southbound cars, that cable be dropped immediately after crossing intersection involved and that plaintiff relied thereon and was justified in operating the westbound car over the intersecting tracks.

**3. Street railroads ⇐117(5)**

In action for injuries sustained by gripman on westbound cable car when its grip hit cable of defendants crossing line which was being held by defendants' southbound car, after passing the intersection, to permit an automobile to park, under evidence that defendants' rule and custom required gripman on southbound car to drop cable immediately after crossing intersection, question whether gripman on defendants southbound car was guilty of negligence was for jury.

**4. Trial ⇐255(3)**

If defendant, after introducing evidence on its own behalf on subject of usage, custom, practice and circumstances and conditions present at time of accident, desired that an appropriate instruction be given, it should have offered one.

**5. Trial ⇐43**

Evidence of operating rules and customs to be admissible must be material to an issue.

* Subsequent opinion 163 P.2d 33.

6. Trial ⇐312(1)

Where about an hour after jury retired they requested to be returned to court and a juror requested the rereading of an instruction, the rereading of the instruction was not error.

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Appeal from Superior Court, San Francisco County; Franklin A. Griffin, Judge.

Personal injury action by Chester Bryant against Market Street Railway Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Cyril Appel, Linforth, Cannon & Miller, and Jesse H. Miller, all of San Francisco, for appellant.

Edmund Gerald Brown, Harold C. Brown, and Melvin M. Belli, all of San Francisco, for respondent.

WARD, Justice.

Defendant appeals from a judgment on a verdict for plaintiff in an action for damages for personal injury. It is urged that there is no evidence of negligence on the part of defendant; that in fact the evidence shows that the accident was caused solely by reason of the negligence of plaintiff. It is also claimed that the trial court erred in denying a motion for nonsuit, a motion for a directed verdict and a motion for a judgment notwithstanding the verdict.

An examination of the evidence indicates that a narration thereof is sufficient to answer the above contentions. Neither the amount of damages awarded, $27,500, nor the testimony in support thereof is attacked. Defendant does suggest, however, that the size of the verdict is referable to the circumstance that it was returned a few days before Christmas, a time when a jury might well feel generous. A point worthy of consideration is the contention that the court erred in giving an instruction on the subject of custom.

The accident occurred in March 1942 about 8 p. m. at the intersection of O'Farrell and Powell Streets in the City of San Francisco. The physical facts appear as follows: At the intersection of O'Farrell and Powell Streets four cable car tracks intersect. There are four cables, two used by the O'Farrell Street line for propelling its cable cars, operating easterly and westerly, and two by the Powell Street line, operating northerly and southerly. The O'Farrell Street cables were installed at a lower level than those of the Powell Street line. The cables operated in slots, and, when disengaged from the car those of the Powell Street line were normally at a level about three inches below the bottom of the grip of an O'Farrell Street car as it crossed the intersection. The O'Farrell Street car was equipped with a grip which extended into the slot, the grip being used to hold the moving cable, thus transmitting motive power to the car. The grip on the O'Farrell Street car as extended into the slot always remained at the same level, not changing its position in the operation of the car. The bottom of the grip was provided with a mechanical device which held the cable. The device could be released by the gripman at any time he desired, allowing the cable to drop from the grip. By reason of the fact that the Powell Street cable was above the level of the O'Farrell Street cable, it was necessary for the westbound O'Farrell car to drop and let go of its cable before reaching the Powell Street tracks. A bumper was inserted along the O'Farrell Street tracks at a point before the Powell Street tracks were reached so that if the O'Farrell Street gripman failed to drop his cable the bumper would prevent any damage to the cables operating the Powell Street line. Since the Powell cables were above the O'Farrell Street cables a Powell car could proceed across the intersection without dropping the cable. However, holding the cable would raise it several inches so that if a Powell Street car were within the intersection, or within two or three car-lengths of the property line of O'Farrell Street, the cable would be raised to such a point that the grip of a crossing O'Farrell Street car would strike this cable. Northbound cars on Powell Street are moving upgrade and must therefore hold onto the cable. A signal has been placed at the southeast corner of the intersection to warn O'Farrell Street operators of the presence of northbound Powell Street cars at or near the intersection. The northbound cars at all times have the right of way. There is no signal to warn of the presence of southbound Powell cars.

Plaintiff Bryant was a gripman on the O'Farrell Street car proceeding westerly on the level toward the intersection at Powell Street, which at that particular

time was free of either north or southbound cars. The O'Farrell car halted at about the east property line of Powell Street and took on passengers. Plaintiff looked to see whether the signal for northbound cars was clear. He then started up, holding onto the cable to gain momentum, but dropping it at the "let go" mark so as not to be stopped by the protective bumper. Plaintiff testified: "I made the let-go and then I hit something that stopped me suddenly, and that is all I know." Plaintiff's grip hit the Powell cable which at that moment was being held by a southbound Powell car. The Powell car had stopped out of the intersection but near the south curb line of O'Farrell Street in order to avoid striking an automobile.

Plaintiff and defendant differ in their versions of the duties of gripmen when crossing the intersection of Powell and O'Farrell Streets. This variance grows out of instructions given Powell Street gripmen, employees of the defendant system, and certain testimony relative to custom. Student gripmen of defendant were given instructions which included a list of questions and answers. One of the questions was: "Where are the six places to coast?" Coasting means that the grip does not hold the cable. The answer included the blocks on Powell north and south of O'Farrell. Whether such instructions were mandatory or optional was a disputed matter. Defendant officials testified they were optional. Plaintiff contended successfully before the jury that they were mandatory.

The assistant superintendent of the California Street Cable Car Company (the O'Farrell line) was called by plaintiff. The following resume of his testimony favoring defendant was given on cross-examination: That from his observation when a southbound car on Powell Street stops north of O'Farrell, the gripman on the Powell car holds onto the cable and enters the intersection. When he reaches the O'Farrell tracks he throws the cable out if the track ahead is clear. In case the track ahead is obstructed so that he cannot continue down Powell Street, some gripmen hold the cable and some do not.

The instructor of gripmen on the O'Farrell line testified against the position taken by plaintiff on the trial as follows:

"Now, your instructions with reference to—that you gave to Mr. Bryant with reference to the distance that the Powell Street car should be before it was safe to go across—will you tell us what those instructions were in that regard. A. Well, I instructed him to wait until the Powell Street car got three or four car lengths over the crown.

"Q. Three or four car lengths over the crown? A. Three or four car lengths over the crown before he started his car.

"Q. Now, when a car is standing there in that area, that is, a southbound Powell Street car is standing somewhere in the area of that south cross-walk there of O'Farrell Street, have you, as a gripman standing on your platform on the westbound car, a way of determining whether that gripman has dropped the cable. A. If the car isn't crowded you can see when he has thrown the lever over forward and you know that he has dropped the cable out; if the lever is standing straight up, he has got the rope in the cable [grip].

"Q. And can you see that from your position in the car? A. Yes.

"Q. Did you give Mr. Bryant instructions as to how he should act if a car was crowded, and he couldn't see the lever? A. I gave him instructions to ring the gong and get a signal back from the gripman so that he was satisfied it was safe to get across."

Other witnesses for defendant company, including former employees, testified favorably to defendant. Had the jury decided in favor of defendant there would be evidence sufficiently substantial to uphold such verdict. This is equally true of the evidence supporting plaintiff's side of the case, which the jury was entitled to believe. This evidence consists in part of the instruction to Powell Street gripmen to coast on Powell Street between Sutter and Ellis, and plaintiff's statement that he was familiar with the instructions through talking with men on the Market Street and O'Farrell Street lines. There was also the testimony of fellow employees that as soon as the back end of the Powell car was clear the O'Farrell car could proceed.

[1, 2] There is a decided conflict in the evidence relative to negligence on the part of plaintiff. The trial court could not say as a matter of law that plaintiff was guilty of contributory negligence. Evidence of custom was introduced by both plaintiff and defendant. Defendant argues that there is no authority for holding a party negligent "by reason of having failed to follow a usual custom to do a thing in a

certain specified way or manner" and that the evidence in this case does not "rise to the dignity of establishing any custom or practice to drop the cable under the conditions and circumstances shown to have existed." The latter contention might well be addressed to a jury. On the first contention there is evidence of the custom of the Powell Street gripman in passing over the O'Farrell Street tracks. In addition, there is the rule referred to by each side during the trial. It may be inferred from the testimony of plaintiff that he had knowledge of defendant's rule and custom and that he relied thereon and was justified in operating the O'Farrell car over the Powell tracks under all the circumstances as they existed at the time of the accident. Ross v. San Francisco-Oakland Terminal Railways Co., 47 Cal.App. 753, 191 P. 703; Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376; Delmonte v. Southern Pacific Co., 2 Cal.App. 211, 83 P. 269; Sanchez v. Pacific Auto Stages, 116 Cal.App. 392, 2 P.2d 845.

From all the evidence introduced by plaintiff and defendant, a reasonable inference may be drawn that "coasting" means moving on a car's momentum, without gripping the cable; that a car may coast as well while holding the cable "loosely." This latter method is often used so that the gripman may change quickly from coasting to the use of the cable as a means of propelling the car. Because the Powell cable runs above the O'Farrell cable, a southbound Powell car can coast across the intersection by holding the cable loosely in the grip. It is necessary that the westbound O'Farrell car drop its cable before reaching the Powell tracks.

[3] On this occasion the southbound Powell car was holding the cable, after passing the intersection, to permit an automobile to park. The gripman could have held the car in its position with the use of the brakes. The dangerous condition that would exist if the Powell Street car held onto the cable while within three or four car lengths of O'Farrell Street was so real that a warning light had been erected to warn O'Farrell Street car operators of the approach of northbound Powell Street cars. The fact that no such signal had been erected to warn of the presence of southbound cars may be some indication that the company did not think there was danger from such cars. The only way that there would not be danger from the southbound cars would be if such cars dropped the cable. Here the operator of the Powell car, after crossing the crown of the intersection, and while on the down grade, continued to hold the cable. He should have known that in thus even loosely holding the cable after passing the intersection he was creating a dangerous condition for any O'Farrell Street car. The jury could reasonably infer from the evidence that such conduct violated the rule of the company and the custom of operators. Whether under all of the circumstances it was negligence for the gripman to act as he did was a question for the jury. The motion for nonsuit, the motion for a directed verdict and the motion for judgment notwithstanding the verdict need be given no further consideration.

The court instructed at the request of plaintiff: "If you find from the evidence that it was the duty or it was the custom of the gripmen on the southbound Market Street cable cars to hold the cable with the grip while crossing the tracks of the California Street Cable Company at O'Farrell Street and then immediately drop or let loose of said cable and that plaintiff had knowledge of such custom or such duty, and that such custom or duty had been the practice on and prior to the 28th day of March 1942, and you further find that such custom or duty was generally known to and of common knowledge among the gripmen of the California Street Cable Company, and you further find that F. A. Van Beeber, the gripman of the Market Street Railway Company, did not let go of and drop the cable immediately upon crossing or immediately after the rear end of the car he was operating had cleared the southmost rail of the California Street cable car, you may consider these circumstances upon the question of whether defendant, Market Street Railway, was negligent." Defendant urges that the instruction was erroneous and highly prejudicial for the following reasons: "First. It allows the jury to find from the evidence the existence of a duty or custom with reference to holding the cable and dropping the same *without any reference to the particular circumstances and conditions which were present at the time* the Powell Street car was required to stop by reason of the obstruction on its track. Second. It allows the jury to find that a custom existed with reference to holding and dropping the cable when there is no evidence in the

record to justify the finding of the existence of any such custom or duty. Third. It allows the jury to find that the plaintiff had knowledge of such custom or such duty when there is no evidence in the record to justify the finding of any such fact. Fourth. It allows the jury to find that such custom or duty had been the practice on and prior to the 28th day of March, 1942, when there is no evidence in the record to justify the finding of any such fact. Fifth. It allows the jury to find on something which was generally known to and common knowledge among the gripmen of the California Street Cable Company, where their knowledge on such a subject would be immaterial to any issue on this case as it is only the knowledge of the plaintiff, and his reliance thereon, which could have caused him to have acted in such manner as to bring about his injury, and there is no evidence in the record that he had any knowledge of any such alleged custom. Sixth. It allows the jury to find that the gripman of the Market Street Railway Company was negligent if he did not let go of the cable and drop the cable upon crossing, or immediately after the rear end of his car had cleared the southmost rail of the California Street cable car tracks when there is no evidence in the record that under the particular conditions and circumstances then existing the gripman was supposed to so act, or that ordinary care required him to so act; on the contrary, the evidence being that whether he held the cable or dropped the same, under the circumstances which then existed, was a matter for his judgment and that holding the cable was good railroading and a safe practice. This instruction is also erroneous in that it violates the well established rule that instructions should not single out, emphasize, and argue to the jury, a portion of the evidence."

[4, 5] The second and sixth grounds refer to the evidence. Defendant claims that there is no evidence of a custom or that gripmen were to act in a designated manner. This point has been heretofore discussed. The third, fourth and fifth points refer to the knowledge of plaintiff of the duty, practice and custom of defendant. These matters likewise have been disposed of previously. With reference to the first point, if defendant, after introducing evidence on its own behalf on the subject of usage, custom, common practice and the circumstances and conditions present at the time of the accident, desired that an appropriate instruction be given, it should have offered one. Our attention has not been called to an instruction proposed by defendant on this subject. Evidence of operating rules and customs to be admissible must be material to an issue in the case. If not material, instructions thereon should not be given. In this case one of the principal issues was the rule and custom of defendant in operating cars and in particular this car at the time of the accident. The court in other instructions specifically referred to negligence, if any, "at the time and place alleged in the complaint" and "in the light of all the surrounding circumstances as shown by the evidence." At the request of defendant the court also fully instructed on contributory negligence.

[6] The objection that the instruction was emphasized by giving it a second time is without merit. About an hour after the jury retired they requested to be returned to court to hear the testimony of one of the witnesses read. After a reading of the testimony one of the jurors requested the re-reading of the "instruction regarding Mr. Bryant's prudence in proceeding across the intersection relying on the custom of the Market Street Railway to drop their cable." The instruction was read. It might have been error not to do so. No objection was made before or after the jury was returned to the jury room, and in the opinion of this court no valid objection could be made.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

68 Cal.App.2d 725

**GARDNER v. RICH MFG. CO., Limited, et al.**

**HEFFRON v. SAME.**

**Civ. 14524, 14525.**

District Court of Appeal, Second District, Division 3, California.

April 14, 1945.

**Hearing Denied June 12, 1945.**

**1. Automobiles ⇐121**

The Highway Carriers' Act was enacted to establish just and reasonable rates for transportation of property by motor vehicle over public highways, and to prevent discrimination among shippers. St. 1935, p. 878.

**2. Automobiles ⇐121**

The schedule of minimum rates prescribed by Railroad Commission for contract highway carriers, and rules and regulations governing such schedule, become a part of every contract between a highway contract carrier and shipper. St.1935, p. 878.

**3. Automobiles ⇐121**

The tariff applicable to any particular shipment as provided by schedule established by Railroad Commission under Highway Carriers' Act cannot be changed by an agreement between parties. St.1935, p. 878.

**4. Public service commissions ⇐19½**

Where freight charges paid motor carriers were less than the legally prescribed rates, superior court had jurisdiction of actions against shippers to recover the difference, and it was unnecessary to resort first to Railroad Commission, since no question of fixing rates or rules and regulations was involved. St.1935, p. 878.

**5. Evidence ⇐555**

In actions for additional freight charges for motor carrier shipments, where decisions and orders of Railroad Commission fixing applicable rates were introduced in evidence, an expert auditor in rate matters was properly permitted to explain what decisions, orders and rates he used in making up the exhibits attached to plaintiffs' complaint. St.1935, p. 878.

**6. Evidence ⇐558(8)**

In actions to recover additional freight charges on motor carrier shipments, where no objection was made in first instance to qualifications of rate expert, and full opportunity was given to cross-examine witness on his direct testimony, court did not abuse its discretion in restricting cross-examination of witness as to his qualifications as an expert. St.1935, p. 878.

**7. Automobiles ⇐121**

Where Railroad Commission's rate order relating to oil well supplies specifically mentioned pipe or tubing and fittings, cast or wrought, under heading "oil, water or gas well outfits and supplies and other articles", rate fixed under that order was applicable to cast iron pipe and fittings transported by motor carrier, regardless of whether those commodities were in general use in oil industry. St.1935, p. 878.

**8. Automobiles ⇐121**

In actions to recover additional charges on motor carrier shipments, where Highway Commission's rate order provided that every carrier should issue a freight bill for each shipment, and the prescribed form, which could serve both as a shipping order and a freight bill, was used in one case, and in the other the shipper admitted that exhibit attached to amended complaint contained correct statement of freight bill numbers, date of each shipment and rate charged and paid, trial court was entitled to rely on data contained in freight bills rather than shipping orders or bills of lading as basis for computing undercharges. St.1935, p. 878.

**9. Automobiles ⇐121**

The failure to use freight bill form prescribed by order of Highway Commission or to have it completely filled out could not, for reasons of public policy, prevent recovery of undercharges from shippers. St.1935, p. 878.

**10. Evidence ⇐353(7)**

In actions to recover additional freight charges on motor carrier shipments, freight bills and shipping orders under which shipments involved were transported were admissible. St.1935, p. 878.

**11. Evidence ⇐368(11)**

In actions to recover additional freight charges on motor carrier shipments, where some of freight bills were missing and shipper failed to produce missing records when notified to do so, secondary evidence

made up by expert from examination of books and records of shipper and carriers, and checked against accounts receivable ledger and dispatching book, was admissible. St.1935, p. 878.

**12. Bankruptcy ⇐284**
**Names ⇐10**

Where bankrupt motor carrier had not complied with codal provision requiring filing and publication of notice of doing business under a fictitious firm name, trustee in bankruptcy was authorized to do so, and, on so doing, bankrupt's prior omission did not preclude maintenance of action by trustee to recover additional freight charges on motor carrier shipments. St. 1935, p. 878; Civ.Code, § 2466.

**13. Licenses ⇐39**

The fact that rate expert had contract with trustees in bankruptcy to audit business of bankrupt motor carriers on contingent basis, including any legal expense that might be incurred, did not require dismissal of actions by trustees in bankruptcy, authorized by bankruptcy court, to recover additional freight charges on ground that actions were being prosecuted by an unlicensed collection agent in violation of collection agency laws, since rate expert was not acting as a collection agency. St. 1935, p. 878.

**14. Bankruptcy ⇐250(1), 278**

One of primary duties of trustee in bankruptcy is to preserve and collect assets of bankrupt and to prosecute any actions necessary to accomplish that end.

**15. Trial ⇐377(2)**

On filing of notice of intention to move for new trial, court was authorized within its discretion to reopen cases for introduction of additional evidence. Code Civ.Proc. §§ 662, 663.

**16. Motions ⇐62**

The true measure of a court order is not an isolated phrase appearing therein, but its effect when considered as a whole, and same rules of interpretation will apply as in ascertaining meaning of any other writing.

**17. Motions ⇐62**

If language of a court order is uncertain, reference may be had to circumstances surrounding, and the court's intention in making, order.

**18. Trial ⇐377(2)**

Where plaintiffs filed notice of intention to move for new trial and notice of motion to set aside judgment, and court reopened cases in order that plaintiffs might introduce further evidence, and court thereafter decided cases for plaintiffs, and entered new findings, conclusions of law, and judgments, court would be deemed to have proceeded under statute authorizing reopening of case for introduction of additional evidence. Code Civ.Proc. § 662.

**19. Trial ⇐377(2)**

The statute authorizing reopening of case for further proceedings and introduction of additional evidence should be liberally construed to achieve purpose it was designed to accomplish. Code Civ.Proc. § 662.

**20. Trial ⇐377(2), 388(1)**

Where trial court in setting aside findings of fact, conclusions of law, and judgments was acting under statute authorizing reopening of case for additional evidence, it was duty of court, after receiving additional evidence, to make new findings of fact, conclusions of law, and order such judgment as each case in its entirety required. Code Civ.Proc. § 662.

**21. Trial ⇐377(2)**

Where action of trial court, on filing of notice of intention to move for new trial and notice of motion to set aside judgment, in setting aside findings of fact, conclusions of law and judgments, receiving further evidence, and entering new findings, conclusions of law, and judgments, was authorized under statute authorizing reopening case for additional evidence, fact that court erroneously attempted to accomplish the result by granting motions under provision for vacating judgments did not render its action ineffective. Code Civ.Proc. §§ 662, 663.

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Appeals from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Actions by George Gardner, as trustee for James E. Smith, bankrupt, and by William I. Heffron, as trustee for Betty Boyd Krug, bankrupt, against the Rich Manufacturing Company, Limited, and others, to recover additional freight charges for transporting shipments of cast iron

pipe fittings. Judgment for the plaintiffs, and the named defendant appeals.

Judgment in each case affirmed.

George W. Manierre and G. M. Cuthbertson, both of Los Angeles, for appellant.

Ernest W. Pitney, of Los Angeles, for respondents.

FOX, Justice pro tem.

Defendant appeals from a judgment in favor of plaintiff Gardner, as trustee in bankruptcy of the estate of James E. Smith, a bankrupt. Defendant also appeals from a judgment in favor of plaintiff Heffron, as Trustee in bankruptcy of the estate of Betty Boyd Krug, a bankrupt. Plaintiffs' assignors, the bankrupts, had been engaged in business as licensed highway contract carriers under the Highway Carriers' Act, Stats.1935, chap. 223, p. 878, transporting property for compensation by motor vehicle over the public highways of the state. As such highway contract carriers plaintiffs' assignors had transported for defendant certain shipments of cast iron pipe and fittings. The theory of both complaints is that plaintiffs' assignors charged and collected freight charges less than the minimum rates prescribed by the California Railroad Commission for such services. Plaintiffs therefore seek to recover the difference between the legally prescribed rate and the rate paid by the defendant pursuant to a purported contract with said carriers.

The Gardner case is based upon the Railroad Commission's decision and order No. 29313, effective February 5, 1937, and orders supplementary thereto, in case No. 4088, part "C" and the schedules of minimum rates therein established and prescribed, together with the rules and regulations governing the same. The second cause of action in the Heffron case is based upon the same decision and order. The first cause of action, however, in the Heffron case is based on the Railroad Commission's decision and order No. 28761, effective June 1, 1936, in case No. 4088, part "A." The third cause of action in the Heffron case is based on said commission's decision and order No. 30370, effective April 1, 1938, in said case No. 4088, parts "U" and "V." Each of the complaints also has a cause of action in the form of a common count for the reasonable value of the transportation services alleged to have been rendered to the defendant.

[1-4] The purpose of the Highway Carriers' Act is, among other things, to establish just and reasonable rates for the transportation of property by motor vehicle over the public highways of the state and to prevent discrimination among shippers of this class. To this end the act confers jurisdiction on the railroad commission to hold hearings and establish and prescribe schedules for minimum rates for contract highway carriers, and to make rules and regulations governing the same. It was pursuant to this authority that the railroad commission rendered the decisions and promulgated the orders hereinbefore referred to establishing and fixing schedules of minimum rates, rules and regulations upon which these actions are based. The schedule of minimum rates thereby established and prescribed and the rules and regulations governing the same became a part of every contract between a highway contract carrier and the shipper. Pittsburgh, C. C. & St. L. R. Co. v. Fink, 1919, 250 U.S. 577, 40 S.Ct. 27, 63 L.Ed. 1151; Johnston v. L. B. Hartz Stores, 1938, 202 Minn. 132, 277 N.W. 414. The tariff applicable, on the facts, to any particular shipment cannot be changed by an agreement between the parties (New York Cent. & H. R. R. Co. v. York & Whitney Co., 1921, 256 U.S. 406, 41 S.Ct. 509, 65 L.Ed. 1016), and the carrier or its assignee is entitled to collect the proper rate. 13 C.J.S. Carriers sec. 393, pp. 873–75; see also note, 83 A.L.R. 245, et seq., and cases there cited. Otherwise the statute would be ineffectual for the purpose for which it was enacted. The defendant, however, contends that the superior court had no jurisdiction to render the judgments herein on the ground that exclusive primary jurisdiction to determine controversies concerning the interpretation and application of rates, orders, decisions, rules and regulations of the railroad commission has been fixed by law in said commission, and plaintiffs were required to seek and to exhaust the administrative remedy with that commission before applying to the courts. In making this argument defendant misconceives the nature of these actions. They are simply actions to recover a stated amount of money—the difference between the amount paid under the contract between the carriers

and the shipper and that due under the rates fixed by the railroad commission in the aforesaid decisions and orders. The court was called upon to determine what rate the railroad commission had established for a particular commodity transported by motor vehicle in a given territory in specified quantities. It was then simply a question of the application of these rates to the facts as disclosed by the evidence. No question of fixing rates or rules and regulations was in any way involved. That had already been determined by the railroad commission in its decisions and orders. There is, therefore, no reason why the superior court should not have jurisdiction of these cases for the effect of the judgments, if properly rendered, is to enforce the rates already established by the railroad commission.

In California Adjustment Co. v. Atchison, T. & S. F. R. Co., 1918, 179 Cal. 140, 175 P. 682, 13 A.L.R. 274, the shipper claimed reparations for deviation from the long and short haul clause of the State constitution. It was there argued, as it is here, that the superior court had no jurisdiction of the action—that jurisdiction was with the railroad commission in the first instance and not with the courts. This contention, however, was not sustained. In passing on it the court pointed out that: "When a charge has been paid to a carrier or a demand exacted in violation of the long and short haul clause of the Constitution there is nothing which can call for the action of the Railroad Commission. As the transaction fixes conclusively the liability of the carrier the transaction itself furnishes the measure of damage which the shipper suffered as soon as it occurred and the commission could neither decrease nor enlarge it." 179 Cal. p. 145, 175 P. 684, 13 A.L.R. 274. That principle by analogy applies to the instant cases. Defendant points out, however, that section 71(d) of the Public Utilities Act, St.1931, p. 1687, provides that complaints for the collection of lawful tariff charges of public utilities may be filed in any court of competent jurisdiction and that the Highway Carriers' Act does not contain such a provision. The right of a highway contract carrier to collect undercharges in the absence of a provision in the statutes authorizing the filing of an action therefor was directly presented in the case of Johnston v. L. B. Hartz Stores, supra. The Minnesota Supreme Court held the action to recover the undercharges could be maintained. In passing on the point the court had this to say [202 Minn. 132, 277 N.W. 416]:

"There is no specific provision in chapter 170 that a carrier may recover such an undercharge, but we are asked to imply that right from the language of section 8 and the general purpose of the act as announced by the Legislature.

"Under the Interstate Commerce Act, common carriers are permitted to recover undercharges, although the language of that act is not quite so strong as is section 8 of chapter 170, and although there is no specific provision for the recovery of undercharges. See paragraph 7 of section 6 of chapter 1 of title 49 U.S.C.A. p. 283. It is quite true that the purposes underlying the regulation of common carriers are primarily the establishment of reasonable rates and the prevention of discrimination, but in order to effectuate such purposes it becomes necessary to render contracts for any other rate nugatory and to treat the contract for carriage as one for the established rate and permit a recovery for an undercharge. Obviously, the permitting of such a recovery is a much more effective way of enforcing the law than any other could possibly be. The same is true of the contract carrier act. Fines and penalties might be imposed, but the pressure of the shippers upon the carriers for reduced rates in violation of the statute will almost entirely be relieved if the shippers know that notwithstanding any illegal bargain that is made, recovery may still be had on the basis of the minimum rate fixed by the commission. Collusion between the carrier and the shipper to circumvent the law, which would otherwise be easy of accomplishment, will be practically eliminated. All of these considerations apply with equal force to the maintenance of the contract carrier rates fixed by the commission."

This reasoning, in our opinion, effectively answers defendant's argument on this point.

Defendant relies strongly on Entremont v. Whitsell, 1939, 13 Cal.2d 290, 89 P.2d 392; Abelleira v. District Court of Appeal, 1941, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; and Texas & P. R. Co. v. Abilene Cotton Oil Co., 1907, 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann. Cas. 1075. In the Entremont case the

question (apart from that of the constitutionality of the act) was whether the transaction there involved constituted the transportation of property for compensation over the public highways and was therefore within the purview of the Highway Carriers' Act or whether it was merely the leasing or renting of trucks within the meaning of certain sections of the Streets and Highways Code. The commission determined that the transaction came within the act. Consequently, the rate *previously* fixed for such service by the commission was automatically applied. No such problem is here presented. Obviously, the transactions involved in these cases come under the Highway Carriers' Act. The Abelleira case [17 Cal.2d 280, 109 P.2d 949] which involved an application of the rule that "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act" has no application here. There was nothing further for the railroad commission to do so far as the fixing of rates or their application was concerned. The decisions and orders of the commission had become final, subject, of course, to amendment and modification by the commission in accordance with the provisions of the act. These actions represent an effort through the courts to enforce in these particular instances the rates established by the commission. In the Tex. & Pac. Ry. case the shipper sued the carrier in a state court to recover freight charges alleged to be in excess of a reasonable rate. The case clearly has no application here for in that case there was involved a question of determining whether or not the charges were in excess of a reasonable rate. The determination of what was a reasonable rate would be a matter of fixing rates and the court had no jurisdiction to determine that question. It would have to be determined by the rate fixing authority before the court would have any jurisdiction. In the instant cases the rates, as we have said, had already been fixed.

[5] Defendant's next point is that the court committed error in permitting the plaintiffs' witness Faus to give "Opinion Evidence as to the law of the Forum." There is no merit in this point. The decisions and orders of the railroad commission which fixed the rates, rules and regulations under which the several shipments were made were introduced in evidence. These were part of the legal foundation of plaintiffs' cases. Mr. Faus qualified as an expert auditor in rate matters. He explained to the court what particular decisions, orders and rates he used in making up the exhibits attached to plaintiffs' complaints. This was entirely permissible. In Texas & N. O. R. Co. v. Miller & Co., La.App.1941, 4 So.2d 762, which was an action by the carrier to recover the balance of freight charges alleged to be due on certain shipments, the carrier's chief rate clerk was permitted to testify to the effect that the charges contended for by it were correct. This testimony was based on the witness' examination of published tariffs and not on his own independent knowledge of these rates.

[6] Defendant also contends that the court unduly restricted its cross-examination of witness Faus as to his qualifications as an expert. The witness had stated his experience in this field when he initially took the witness stand. No objection was then raised by the defendant to his qualifications as an expert in rate auditing matters. Nor did defendant ask permission of the court to further inquire into his qualifications at that time. After the witness had testified on direct at length, counsel for defendant, on cross-examination, then sought to go into his qualifications as a rate auditor. After a few questions had been asked and answered as to his experience in this field, the court refused to permit counsel to pursue this line of interrogation further. We see no abuse of discretion in the court's ruling. Certainly no prejudice is shown. Full opportunity was given counsel for defendant to cross-examine the witness on his direct testimony and thus develop whether or not he had correctly applied the decisions, orders and rates established by the railroad commission to the facts at hand, for the transportation of cast iron pipe and fittings.

[7] Defendant's next point is that the rates fixed by the railroad commission's decision and order No. 29313, case No. 4088, part "C," generally referred to as the oil well supply order, are not applicable. (The Gardner case and the second cause of action in the Heffron case are based on said decision and order.) This proposition seems to be based on the idea that the railroad commission could not have intended to include cast iron pipe and

fittings in the oil well supply group because these commodities are not in general use in the oil industry. The answer to this argument is found in the said decision and order. Section 1 of appendix A to said order is entitled "Commodity Rates." The subheading is "Commodities for which rates are provided in this Appendix." Next appears "Item No. 10." The heading under this item as amended by decision No. 30106 is "Oil, Water or Gas Well Outfits and Supplies, *and other Articles*" (italics added). Under said item No. 10 is a list of commodities for which rates are thereby established which covers nearly two pages. In this list of commodities is the following: "Pipe or Tubing and Fittings, Cast or Wrought." Thus we find that the particular commodity which plaintiffs' assignors transported for defendant is specified as one of those for which transportation rates were established in the Oil Well Supply Order.

The inclusion of cast iron pipe and fittings in said order was not by accident or mistake. The propriety of including these commodities in the oil well supply order was recommended to the railroad commission during the course of the hearings to establish rates for highway contract carriers. This is pointed out in the commission's decision No. 29313. It is there said that the "Carriers suggest that the oil well supply group should include the articles enumerated under the heading of 'Oil, Water or Gas Well Outfits and Supplies' in the Western Classification, and in addition, pump working barrels (well pump cylinders), oil well countershafts, sucker rod joints, sucker rods, pump working barrel valves, and the following iron and steel articles: boiler flues, boiler tubes, *cast iron pipe and fittings,* wrought iron pipe or tubing and fittings, pipe or tubing (not cast or wrought) plate or sheet, 16 gauge or thicker. Certain of those representing shippers concurred in this suggestion." (Italics added.)

It is also pointed out in this same decision of the railroad commission that rates may not properly be based upon the *use* which is to be made of the commodity. This is what the commission had to say on this question: "Manifestly an arrangement whereby one set of rates is provided for the movement of traffic to other than oil well supply houses and another and different set of rates is maintained for the movement of the same traffic destined to oil well supply houses, all located at the same destination, is unsound and discriminatory. *It has repeatedly been held that rates may not properly be made dependent upon the use which is to be made of the commodities transported.* (United Dredging Co. v. A. T. & S. F. Ry. Co., et al (1922), 22 C.R.C. 559.)" (Italics added.)

Furthermore, the amendment of the heading under item No. 10 by the addition of the words "and other articles" indicates an intention not to limit the commodities covered by this rate order to those which were generally used in the oil industry.

It is therefore clear that the rate established in the oil well supply order for the transportation of cast iron pipe and fittings was applicable to the appropriate causes of action in these cases.

[8] Defendant's next contention is that it was error to use the freight bills rather than shipping orders or bills of lading as the basis for computing the undercharges. There might be some point to this contention if it had been established that the defendant tendered shipments to the carrier in lots of more than 30,000 pounds so as to be entitled to the lower rate per 100 pounds, because of the quantity of the shipment, and that the carrier had broken up the shipments into smaller lots so that each lot fell into a lower weight bracket and therefore carried a higher freight rate per 100 pounds and that the carrier had billed these smaller lots as separate shipments at the higher rates. ("Shipment means a lot received from one shipper on one shipping order or bill of lading at one point of origin at one time for one consignee at one destination" according to the definition promulgated in the Oil Well Supply decision and order.) This question, however, is not presented for it is not established that defendant actually tendered to the carrier any such specific "shipment" and that the carrier then broke it up into smaller lots and shipped it at higher rates. If defendant claimed that it had complied with the definition of a shipment and was therefore entitled to a lower rate than that actually charged, it should have presented shipping documents or other satisfactory proof thereof. This was not done.

[9] Furthermore, it is provided in the Oil Well Supply order that every "high-

way contract carrier shall issue to the shipper, *for each shipment received* for transportation, a freight bill in substantially the form set forth in Appendix 'B' hereof." (Italics added.) The form set forth in said appendix has the heading "Shipping Order and Freight Bill." It is thus apparent that the form prescribed by the railroad commission may serve a dual purpose of being both a shipping order and a freight bill. This form appears to have been used in the transactions involved in the Heffron case. The failure to use this form or to have it completely filled out cannot, of course, for reasons of public policy prevent the plaintiffs' recovery of undercharges. Johnston v. L. B. Hartz Stores, supra; 13 C.J.S., Carriers, § 394, p. 876. In the Gardner case where the approved form does not appear to have been used by the carrier, the defendant in its answer admits that exhibit "A" attached to the second amended complaint contains a correct statement of the freight bill numbers, the date of each *shipment*, the rate charged and paid to plaintiff's assignor by the defendant, and the consignee and destination. Under the circumstances the trial court was entitled to rely on the data contained in the freight bills as reflecting the shipments that were made and to use said data as a basis for computing the undercharges.

[10, 11] Defendant further contends that the court erred in admitting in evidence the freight bills upon the ground that no foundation was laid for their introduction, and that certain freight bills were missing and were prepared from other records by the witness Faus. We see no reason why the freight bills and shipping orders which were the documents under which the commodity was transported in the Heffron case were not admissible in evidence. In the Gardner case all the evidence which these records would tend to establish was admitted in the pleadings. As to the missing freight bills a notice was served upon defendant to produce the particular records which were missing. The documents were not produced. This laid sufficient foundation for the introduction of secondary evidence. It was made up from an examination of the books and records of the defendant and from those of the bankrupt produced through the trustee in bankruptcy. These two records were then checked together against the accounts receivable ledger and the dispatching book. This gave the witness a three way check on the items that should have been on the missing documents. Such secondary evidence was properly admitted.

[12] Defendant also contends that no evidence could be received in the Gardner case because the bankrupt had not complied with section 2466, Civil Code, concerning the filing and publication of a notice of doing business under a fictitious firm name. The plaintiff as trustee in bankruptcy, however, did execute in his name a certificate in the form required by said code section and caused the same to be published and filed prior to filing the complaint. Defendant argues that the plaintiff is not entitled to do this. We think it places too narrow a construction on the code section. It was held in Goldtree v. Swinford, 1888, 74 Cal. 586, 16 P. 493, that an agent holding a power of attorney could sign and acknowledge such a certificate for his principal. The court said (74 Cal. p. 589, 16 P. 495): "* * * we think that the certificate so signed and acknowledged satisfied the requirements of the Code. The object of those requirements is doubtless quite as well subserved by having it signed and acknowledged by an agent as it would be if it were personally signed and acknowledged by the principal. And the provisions of the Code, and all proceedings under it, are to be liberally construed, with a view to effect its objects and to promote justice." To hold contrary to the trial court on this point would mean that none of the debts owing to the bankrupt estate could ever be collected by suit. "Plainly the Code provisions were not designed to work that result." Henning v. Clark, 1920, 46 Cal.App. 551, 189 P. 714, 715.

[13, 14] Defendant also argues that these actions are being prosecuted by an unlicensed collection agent in violation of the collection agency laws of the state and should therefore be dismissed. This proposition is based on the fact that witness Faus has a contract with the trustee in bankruptcy to audit the business of these carriers on a contingent basis of 50 per cent of any recovery. This contingent fee includes any legal expense that may be incurred. It is of course fundamental that one of the primary duties of a trustee in bankruptcy is to preserve and collect the assets of the bankrupt and to prosecute any actions necessary to ac-

complish this end. These actions were authorized by the bankruptcy court and the trustee in bankruptcy is the plaintiff. The trustee was duly authorized by the bankruptcy court to employ Faus, who appears to be well versed in rate matters, to make the necessary audits and otherwise assist the trustee in the performance of his duty to collect any undercharges that might be discovered. Faus was not acting as a collection agency within the meaning of the collection agency law of this state.

After the conclusion of the trial the judge prepared a memorandum opinion directing judgments for defendant. Findings of fact, conclusions of law and judgments were accordingly prepared and signed by the court.

Thereafter, in each case, the plaintiff filed (1) notice of intention to move for new trial, and (2) notice of motion to set aside and vacate judgment and to enter new and different judgment under section 663, Code of Civil Procedure. As a result of the motions that were made pursuant to said notices the court set aside the findings of fact, conclusions of law and judgments and reopened said cases for further evidence which was received. The court thereupon decided the cases for the plaintiffs. New findings, conclusions of law, and judgments were accordingly entered.

Defendant challenges these proceedings. It claims that the court erred, (1) in reopening the cases, (2) in receiving evidence before the findings and judgments were vacated and set aside, and (3) in adopting different findings on a motion made under section 663, Code of Civil Procedure. None of these claims is well founded.

[15] Section 662, Code of Civil Procedure, provides that the court, in ruling on a motion for a new trial in a case tried without a jury (and these cases were so tried), "in lieu of granting a new trial, may vacate and set aside the findings and judgment and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after the submission thereof and before findings had been filed or judgment rendered." Under this provision the court had ample authority, and it was within its discretion, to reopen the cases for the introduction of additional evidence. There was clearly no abuse of discretion in this ruling.

During the argument on the motions counsel for plaintiffs asked that the findings and judgment be set aside and the case be reopened. Later the court said, "we will reopen the case and the plaintiff may put on such testimony as he is advised, subject to objections and rulings thereon, and the defendant may do the same thing." While the trial judge did not in so many words say that the findings and judgment are vacated and set aside, that was undoubtedly the intention of the court for he was obviously intending to grant the request that counsel for the plaintiff had made. That such was the purpose and intention of the court is made manifest from the judgment the court later signed. It is there recited that "said Motions having been presented to the Court on said 14th day of September, 1943, and having been argued on said date, and *the Court having set aside the Findings of Fact and Conclusions of Law and Judgment and re-opened said case for further evidence* * * *." (Italics added.) It seems that it must have been understood by counsel for defendant that procedurally the findings, conclusions of law and judgments were being set aside else some objection raising this point would then have been made. It is clear that he understood that the cases were reopened for further evidence because he read to the court from a statement previously prepared as follows: "On the application of the plaintiff, the court has *re-opened these cases* to permit the plaintiff to offer evidence as to another rate schedule * *." (Italics added.) Counsel does not appear to have been misled or the defendant prejudiced by any incompleteness in the statement of the court in his ruling.

[16-19] An examination of the minutes of the court covering these proceedings reveals that they are somewhat ambiguous and uncertain. If only the first sentence is read it would appear that the trial court was attempting to proceed under section 663, Code of Civil Procedure. The two following sentences, however, disclose that the court was deciding the cases in favor of the plaintiffs instead of the defendant in whose favor they had been previously decided; that new findings of fact and conclusions of law were to be drafted by the attorney for the plaintiffs consistent

with judgment for the plaintiffs; and that the motions for a new trial were denied. These latter provisions would indicate that the court was proceeding under section 662, Code of Civil Procedure. The fact that different findings were prepared at the direction of the court by counsel for the plaintiffs and were signed by the court and filed, is a further indication that the court was proceeding under the authority of that section. In such circumstances the statement of the court in Roraback v. Roraback, 1940, 38 Cal.App.2d 592, at page 596, 101 P.2d 772, at page 774, is pointedly applicable. It is there said: "The true measure of an order, however, is not an isolated phrase appearing therein, but its effect when considered as a whole. [Citing cases.] In construing orders they must always be considered in their entirety, and the same rules of interpretation will apply in ascertaining the meaning of a court's order as in ascertaining the meaning of any other writing. If the language of the order be in any degree uncertain, then reference may be had to the circumstances surrounding, and the court's intention in the making of the same. [Citing cases.]" Applying this rule to the circumstances surrounding the making of the order and the action of the court pursuant thereto it is apparent that it was the court's intention to set aside the findings of fact, conclusions of law and judgments and to decide the cases upon all the evidence, including that which had been received upon the cases being re-opened, for the plaintiffs. This could only be done under section 662, Code of Civil Procedure. The provisions of this section are to be liberally construed to achieve the purpose it was designed to accomplish. Roraback v. Roraback, supra, 38 Cal.App.2d p. 597, 101 P.2d 772.

This procedural problem was considered in Gossman v. Gossman, 1942, 52 Cal. App.2d 184, 198, 126 P.2d 178, 186. It was there pointed out that: "The record discloses that plaintiff's motion for a new trial was denied and her motion under sections 663 and 663a [C.C.P.] was granted." "But," says the court, "this does not mean that the order modifying and changing the judgment was not made pursuant to the authority vested in the trial court on a motion for new trial by the terms of section 662 of the Code of Civil Procedure. The authority, within the limits stated, may be exercised *in ruling on the motion* whether it be granted or denied." The court proceeded to say that (52 Cal. App. pp. 198, 199, 126 P.2d 186): "In view of the fact that * * * the court, on hearing plaintiff's motion * * * evidently did reopen the case and receive further evidence or at least did re-examine the evidence before it—a procedure which it could not follow under sections 663 and 663a [citing cases]—it becomes obvious that the court was proceeding under section 662 * * *." So, here, although the court did not mention section 662, Code of Civil Procedure, or follow the language thereof, it should be held that it was proceeding under the authority of that section.

[20, 21] Since the court was proceeding under section 662, Code of Civil Procedure, in reopening said cases and in receiving the additional evidence, it follows that it was then the duty of the court to make such new findings of facts, conclusions of law and order such judgments as each case in its entirety required. This point is made clear in Wyman v. Monolith Portland Cement Co., 1935, 3 Cal.App.2d 540, 39 P.2d 510. At page 545 of 3 Cal. App.2d, at page 512 of 39 P.2d, the court had this to say: "The next point urged by appellant is that the trial court had no right upon the motion for a new trial to change the findings and modify the judgment. At the conclusion of the trial, judgment was ordered in favor of defendant cement company, and thereafter findings were prepared and a judgment entered. Later, upon motion for a new trial, the court denied the motion for a new trial and vacated and set aside the judgment, findings, and conclusions of law theretofore entered, and ordered judgment for plaintiffs, and prepared and filed new findings and conclusions of law and judgment in accordance therewith. This the court did under the authority granted by section 662 of the Code of Civil Procedure, and properly so if it believed the original findings and judgment were erroneous. The very purpose of the section is to permit a court to correct its own errors without incurring the delay and expense incident to a new trial or appeal." The fact that the court erroneously attempted to accomplish the result it did in these cases by also granting the motions under section 663, Code of Civil Procedure, does not detract from the legal effectiveness of the new findings and judgments, which were made pursuant to the authority of

section 662, Code of Civil Procedure, in connection with the ruling on the motions for a new trial.

The evidence is ample to support the judgments.

The judgment in each case is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.




68 Cal.App.2d 780

**In re WILCOX' ESTATE.**

**BEATTY v. WILCOX.**

**Civ. 14644.**

District Court of Appeal, Second District, Division 3, California.

April 19, 1945.

**1. Statutes ⇐184**

The purpose sought to be accomplished by legislation is important factor in determining legislative intent which must be sought first in language used by the Legislature.

**2. Executors and administrators ⇐431(1)**

The statute relieving executor or administrator from liability on rejected claim on which suit was filed unless notice of pendency of action is filed in the estate proceedings is a remedial statute in construing which courts will not blindly follow letter of the law when its purpose is apparent. Probate Code, § 714.

**3. Executors and administrators ⇐431(1)**

The purpose of statutory amendment requiring notice of pending action on rejected claim to be filed in the estate proceedings within ten days after filing of complaint was to protect executor or administrator in final distribution of estate against liability on rejected claim on which suit had been filed, and about which he had no knowledge. Probate Code, § 714.

**4. Executors and administrators ⇐437(7)**

The statute providing that if holder of rejected claim against an estate does not file suit thereon within time therein specified, claim shall be forever barred constitutes a statute of limitations. Probate Code, § 714.

**5. Executors and administrators ⇐431(1)**

Under statutory amendment providing that within ten days after filing of complaint on rejected claim against an estate plaintiff "shall file" or cause to be filed in the estate proceedings a notice of pendency of the action quoted words are not necessarily mandatory. Probate Code, § 714.

**6. Executors and administrators ⇐431(1)**

The statutory amendment requiring holder of rejected claim against an estate to inform executor or administrator that an action has been filed on such claim is not a statute of limitations, and hence claimant's action on rejected claim was not barred because no notice of such action was filed, where executor had actual notice of pendency of such action. Probate Code, § 714.

**7. Executors and administrators ⇐314(12), 510(2)**

An order settling executor's final account and ordering final distribution of the estate is appealable. Probate Code, § 1240.

**8. Executors and administrators ⇐314(12), 510(3)**

Claimant who filed an action on rejected claim was not precluded from appealing from order which settled executor's final account and ordered final distribution of estate without providing for payment of the claim notwithstanding claim was not reduced to judgment at time order was made, since such claimant is a "party aggrieved". Probate Code, §§ 927, 953.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Aggrieved".

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Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding in the matter of the estate of Edward E. Wilcox, deceased, wherein Zoa Beatty contested the first and final account of Charles W. Wilcox, as executor of the estate of Edward E. Wilcox, deceased. From an order settling the first and final account of the executor and granting his petition for distribution, the contestant appeals.

Reversed and remanded with instructions.

Ben Koenig, of Hollywood, and Aaron B. Rosenthal, of Los Angeles, for appellant.

Philbrick McCoy, of Los Angeles, for respondent.

FOX, Justice pro tem.

This is an appeal from an order settling the first and final account of Charles W. Wilcox, executor of the estate of Edward E. Wilcox, deceased, and granting his petition for distribution. Objections were interposed by Zoa Beatty who asserted a claim against the estate. The account, however, was settled and distribution ordered without any provision being made for her claim. She has appealed from said order and the whole thereof.

Edward E. Wilcox died testate in Los Angeles County on June 15, 1943. Appellant on September 30, 1943, filed her amended claim for $647.36, the alleged balance due her for services rendered to him as nurse and housekeeper. The executor, Charles W. Wilcox, allowed this claim in part only, namely, for $217.87. On November 12, 1943, appellant filed an action on her claim for $647.36 in the Municipal Court of Los Angeles. The defendants were Charles W. Wilcox, individually and as executor of said estate. Summons and complaint were served on the defendant November 29, 1943. He filed his answer on December 15, 1943. The action was set for trial for March 13, 1944. No notice of the pendency of said action was filed in the probate proceedings within ten days after the filing of the complaint, as provided by the 1941 Amendment of section 714 of the Probate Code. On February 4, 1944, respondent filed his first and final report and account as executor and his petition for final distribution. In his petition respondent recited the foregoing facts with respect to said Municipal Court action, and the failure of appellant to file notice of the pendency of said action in the probate proceedings.

Appellant filed her written objections to said report and account and petition for final distribution, on the ground that the executor had made no provision therein for the payment of her claim or the setting aside of any money of the estate with which to pay same, and had not paid into court the amount of said claim, to be paid over to her in the event she became entitled thereto. Her objections were overruled. The executor's final account was then settled and approved and final distribution ordered without making any provision for appellant's claim.

The material portion of section 714 of the Probate Code, with the 1941 amendment in italics, reads as follows: "When a claim is rejected either by the executor or administrator or by the judge, written notice of such rejection shall be given by the executor or administrator to the holder of the claim or to the person filing or presenting it, and the holder must bring suit in the proper court against the executor or administrator, within three months after the date of service of such notice if the claim is then due, or, if not, within two months after it becomes due; otherwise the claim shall be forever barred. *Within 10 days after the filing of such complaint the plaintiff shall file or cause to be filed in the estate proceedings, in the office of the clerk of the court in which the estate proceedings are pending, a notice of the pendency of such action. If such notice is not filed within said period, the executor or administrator shall incur no liability whatsoever by reason of any distribution of the estate. Personal service of a copy of the summons and complaint upon the executor or administrator within said period is equivalent to the filing of such notice.* * * *"

Appellant contends that the 1941 amendment to section 714 of the Probate Code operates purely as a statute of lis pendens and that since the executor had actual notice of the pendency of the Municipal Court action on her claim, prior to filing his final report and account and petition for final distribution, it was not necessary for her to comply with the provisions of said amendment. Respondent, however, contends that the amendment is in effect a statute of limitations and that since appellant failed to comply with its provisions she can no longer enforce her claim against the estate and that therefore final distribution can be made without any provision for paying or securing appellant's claim and without any liability being incurred by the executor with respect thereto. In our opinion appellant's position is correct.

[1, 2] The primary problem here is one of legislative intention. That is to be sought first in the language used by the legislature, but, as was said in California Drive-In Restaurant Ass'n v. Clark, 1943, 22 Cal.2d 287, 292, 140 P.2d 657, 660, 147 A.L.R. 1028, "the purpose and object sought to be accomplished by legislation is an important

factor in determining the legislative intent." In construing a remedial statute, which this amendment clearly is, "reason must have its just proportion" (Los Angeles County v. Frisbie, 1942, 19 Cal.2d 634, 639, 122 P.2d 526, 529), and "the courts will not blindly follow the letter of a law, when its purpose is apparent." Jordt v. California State Board of Education, 1939, 35 Cal.App.2d 591, 595, 96 P.2d 809, 811.

[3] The apparent purpose of the 1941 amendment to section 714 of the Probate Code was to provide protection to an executor or administrator in the final distribution of the estate against liability on a rejected claim on which suit had been filed but summons and complaint had not been served and about which he had no knowledge. Before this amendment it was possible for an executor or administrator to close an estate in good faith believing that all claims had been disposed of and later find proceedings to set aside the orders settling his accounts and distributing the estate initiated by the holder of a rejected claim on which suit had been filed in time but in which summons and complaint had not been served. Such an executor or administrator might even be faced with an action to hold him personally liable for the amount of the claim. See Thayer v. Fish, 1942, 49 Cal.App.2d 618, 122 P.2d 358. To fully protect against these hazards required a search of the pending actions in the local courts or contacting the holders of all rejected claims. This placed an undue burden on the representative of an estate. There is much more reason for placing upon the holder of a rejected claim the responsibility of furnishing the information that an action has been filed thereon. That in effect is what the amendment to section 714, Probate Code, sought to accomplish. The important thing is that the executor or administrator should have notice or knowledge of the pendency of the action on the rejected claim before he files his final account and has the estate finally distributed. That purpose was accomplished in this case because summons and complaint were served on the executor 17 days after the action was filed. He filed his answer approximately two weeks thereafter and more than a month and a half prior to filing his final report and account and petition for distribution. The amendment therefore should not operate to bar appellant's claim since the purpose of the amendment, namely, to give notice to the executor of the pendency of the action on the rejected claim had been accomplished. As thus construed the amendment is in harmony with sections 953 and 956 of the Probate Code which contemplate that the claims against an estate shall either be paid or provision made therefor before final settlement and distribution of the estate.

[4] If the legislature had intended that the amendment should operate as a statute of limitations and that the failure of the claimant to file in the probate proceedings notice of the pendency of action on said claim within 10 days after filing the complaint (or to serve the summons and complaint within said period) should bar further liability thereon it would have been easy to so state. The legislature had before it a perfect example of such simple and direct provision in the first sentence of the very section that was being amended. It is there provided that if the holder of a rejected claim does not file suit thereon within the time therein specified "the claim shall be forever barred." This provision constitutes a statute of limitations. Laukkare v. Abramson, 1935, 9 Cal.App.2d 447, 449, 50 P.2d 478; San Francisco Bank v. St. Clair, 1941, 47 Cal.App.2d 194, 201, 117 P.2d 703; Thayer v. Fish, 1942, 49 Cal. App.2d 618, 620, 122 P.2d 358. The failure to use the same language in the amendment or to incorporate the amendment in the first sentence of the section which has long had an established interpretation as a statute of limitations (see Benedict v. Hoggin, 1852, 2 Cal. 385, interpreting the 135th section of the "Act to regulate the settlement of the estates of deceased persons") is indeed significant. It lends support to the conclusion that the legislature did not intend that the 1941 amendment should operate as a statute of limitations.

[5, 6] The words "shall file" in the amendment are not necessarily mandatory. Cake v. City of Los Angeles, 1913, 164 Cal. 705, 709, 130 P. 723. In the Estate of Mitchell, 1942, 20 Cal.2d 48, 51, 123 P.2d 503, 504, it is said that: "The word 'shall' has been held in some cases to be merely directory. Pappadatos v. Superior Court, 209 Cal. 334, 335, 287 P. 342; Rutledge v. City of Eureka, 195 Cal. 404, 424, 234 P. 82. Whether it should be construed to be mandatory or directory depends on the intention of the legislature in enacting the section. In re Chadbourne's Estate, 15 Cal. App. 363, 114 P. 1012, 1014. In the last cited case it was stated: 'We must assume

that the Legislature had before it this policy of the law when it enacted the statute in controversy. And, while the language upon its face seems to be mandatory, the cardinal canon of interpretation requires, of course, that we give effect to the intention of the lawmakers, though it may seem opposed to the letter of the statute,' citing Chauncey v. Dyke Bros., 8 Cir., 119 F. 1, 9, 55 C.C.A. 579." Construing the language of the amendment as directory gives effect to the apparent purpose and object sought to be accomplished by the legislation.

It is unreasonable to construe the amendment as constituting a statute of limitation. There is no practical reason or principle of public policy which would support such a holding. The very shortness of the period argues against such a construction when we consider that under the earlier provisions of the section a claimant has three months within which to file his action on a matured claim after written notice of its rejection. This last provision is of course to facilitate the prompt administration of estates. But no such purpose can be ascribed to the amendment under discussion for failure to file the notice within the prescribed ten days cannot possibly delay the prosecution of the action on the rejected claim.

Respondent particularly relies on Thayer v. Fish, supra, and Dabney v. Dabney, 1942, 54 Cal.App.2d 695, 129 P.2d 470. In the Thayer case the executrix distributed the estate in absolute ignorance of the pendency of Thayer's action against her on the rejected claim although her attorney had telephoned to the clerk of the Justice's Court where defendant resided and was informed that no action had been filed. (The action had been filed in another township.) The Dabney case throws no light at all on the problem here involved.

[7] Respondent also contends that the appeal should be dismissed on the ground that the order appealed from does not fall within any of the orders enumerated in section 1240 of the Probate Code from which appeals may be taken. In this he is in error. The order appealed from was of a dual character: It settled the final account of the executor and ordered final distribution of the estate. Appeal from each of such orders is expressly provided for in section 1240.

[8] Respondent further contends that appellant has no right of appeal because her claim was not reduced to judgment at the time the order appealed from was made. This proposition is not well founded. Under section 927 of the Probate Code "Any person interested in the estate may appear and file written exceptions to the account, and contest the same." In section 953, Probate Code, it is provided that "If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require." In view of these code provisions "It is patent" as the Supreme Court said in Estate of Mailhebuau, 1933, 218 Cal. 202, 204, 22 P.2d 514, 515, "that one whose claim has been rejected and who is prosecuting an action upon it is a person interested in the estate." Such a claimant is clearly a "party aggrieved" when the Probate Court makes an order settling the final account and ordering final distribution of the estate without making any provision for payment of his claim in the event it is established, and he is entitled to test on appeal the validity of such an order. "One of the principal objects of administration is the payment of the debts of the deceased. For that purpose, the assets are subjected to the jurisdiction of the court, and to that extent it is a proceeding for the benefit of the creditors. Each creditor is entitled to have the proceeding kept on foot and the property kept in legal custody, until his debt is paid, or secured in some manner provided in the statute * * *." Estate of Washburn, 1905, 148 Cal. 64, 68, 82 P. 671, 672.

The order is reversed and the cause remanded to the superior court with instructions to proceed in accordance with the views expressed in this opinion and the appropriate provisions of the Probate Code.

DESMOND, P. J., and PARKER WOOD, J., concur.

68 Cal.App.2d 798

**Ex parte DAVIS.**

**Cr. 1899.**

District Court of Appeal, Third District, California.

April 20, 1945.

**1. Extradition ⇐32**

The extradition provisions of Federal Constitution and statutes do not cover the whole ground relative to extradition between states, and do not prohibit states from enacting statutes providing that fugitives from other states may be extradited on demand based upon information as well as indictment or affidavit made before magistrate. 18 U.S.C.A. §§ 662, 663; U.S.C.A. Const. art. 4, § 2.

**2. Extradition ⇐32**

Where prosecution by information was authorized by both Iowa and California, and California statute authorized recognition of a demand for extradition accompanied by a copy of an information duly authenticated, as distinguished from indictment as provided in federal statutes, a demand of the Governor of Iowa for extradition of petitioner from California, accompanied by copy of an information duly authenticated, was sufficient to justify extradition. Code Iowa 1939, § 13501; Pen. Code Cal. § 1548.2; 18 U.S.C.A. §§ 662, 663; U.S.C.A. Const. art. 4, § 2.

**3. Extradition ⇐32**

Where affidavit, accompanying demand for extradition, showed that it had been filed in a district court of Iowa and specifically charged that petitioner committed an offense, affidavit was sufficient although sworn to before the clerk of the district court and the affidavit concluded with the statement "as I verily believe". Code Iowa 1939, § 13501; Pen. Code Cal. § 1548.2, 18 U.S.C.A. §§ 662, 663; U.S.C.A. Const. art. 4, § 2.

**4. Extradition ⇐34**

A demand for extradition supported by two affidavits sworn to before a judge of the district court of Iowa complied with federal statute requiring demand to be accompanied by an affidavit made before a magistrate. 18 U.S.C.A. § 662; Code Iowa 1939, §§ 13403, 13501; Pen. Code Cal. § 1548.2.

**5. Habeas corpus ⇐21**

Delay in making demand for extradition did not justify the release of the alleged fugitive on habeas corpus, where there was nothing in the statutes limiting the time within which demand was to be made and statute of limitations as a defense must be asserted on the trial of the offense charged. 18 U.S.C.A. § 662; Code Iowa 1939, § 13501; Pen. Code Cal. § 1548.2.

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In the matter of the application of Lyle Davis for a writ of habeas corpus.

Writ discharged and petitioner remanded.

Thos. O'Hara, of Sacramento, for petitioner.

Robt. W. Kenny, Atty. Gen., James O. Reavis, Depy. Atty. Gen., and John Quincy Brown, Dist. Atty., and John B. Heinrich, Asst. Dist. Atty., both of Sacramento, for respondent.

ADAMS, Presiding Justice.

Petitioner Lyle Davis was arrested in Sacramento County for extradition, after the issuance of a warrant by the Governor of this state upon requisition and demand by the Governor of Iowa. He has petitioned this court for a writ of habeas corpus, contending that his arrest and restraint are illegal and without due process of law in that the requisition and demand of the Governor of Iowa "is unsupported by copy of an indictment found or an affidavit made before a Magistrate of the State of Iowa charging the petitioner with having committed any crime as required by Section 662 of Title 18, U.S. Codes Annotated."

The writ having issued, respondents, the Sheriffs of Sacramento County, California, and Greene County, Iowa, filed their return, setting up that petitioner was being held under and by virtue of a warrant of arrest issued by the Governor of California, and upon hearing of the matter submitted as exhibits the demand made by the Governor of Iowa with its supporting papers. Included among those papers is an information which recites:

"That the said Lyle Davis, on or about the 22nd day of July, A. D. 1936, in the County of Greene and State of Iowa, did knowingly, wilfully and feloniously while confined in the county jail of Greene County, Iowa, after conviction for a criminal offense, break jail and escape therefrom,

contrary to the provisions of Section 13358 of the 1935 Code of Iowa."

It is signed by the County Attorney of Greene County and sworn to before the clerk of the District Court, on December 23, 1936, the verification reciting that affiant has made a full and careful investigation of the facts upon which the charge is based, and that the allegations contained in the information are true "as I verily believe." Following the verification appears a signed statement of the judge of the District Court that being satisfied that the cause should be prosecuted by information, the same is approved.

Section 662 of Title 18, U.S.C.A., provides:

"Whenever the executive authority of any State * * * demands any person as a fugitive from justice, of the executive authority of any State * * * to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State * * *, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State * * * from whence the person so charged has fled, it shall be the duty of the executive authority of the State * * * to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

No indictment has been produced and petitioner contends that the information filed by the district attorney is insufficient to constitute an affidavit made before a magistrate, in that it was verified before the county clerk who is not a magistrate, and that it is based solely upon the "belief" of affiant, since it alleges that the allegations of the information "are true as I verily believe."

Respondents contend that under the law of Iowa as well as that of California criminal offenses may be prosecuted by information, that under the laws of both states extradition may be ordered on demand supported by an information, and that it is not necessary that a demand be supported by either an indictment or an affidavit sworn to before a magistrate. They also contend that the information is sufficient even as an affidavit, and that, furthermore, the demand is supported by two affidavits made before a magistrate which are in themselves sufficient to support the demand even if the information be disregarded.

Section 1548.2 of the California Penal Code provides that a demand for the extradition of a person charged with crime in another state "shall be accompanied by a copy of an indictment found *or by information* or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; * * *. The indictment, *information*, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that State; and the copy of indictment, *information*, affidavit, judgment of conviction or sentence must be certified as authentic by the executive authority making the demand." (Italics ours.)

Chapter 624 of the 1939 Code of Iowa, entitled "Fugitives from Justice," covers the statutory provisions of that state regarding extradition, and section 13501 found in that chapter provides that a requisition by another state shall be issued only if accompanied "by sworn evidence that the party charged is a fugitive from justice, and by a duly attested copy of an indictment, preliminary information, or complaint, made before a court or magistrate authorized to receive the same."

It thus appears that both California and Iowa authorize extradition on a demand based upon an information filed in the demanding state, and we are called upon to determine whether the provisions of the federal statute are exclusive or whether extradition may be ordered where the charge of crime is made by information where prosecution by information is authorized by the laws of both the demanding and the asylum state.

[1] Petitioner contends that the federal statute covers the whole ground relative to extradition between the several states, and supersedes all state legislation upon the subject. Article IV, section 2, of the Constitution of the United States provides:

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled,

be delivered up to be removed to the State having Jurisdiction of the Crime."

It has been held that this constitutional provision is not self-executing (Roberts v. Reilly, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544; Innes v. Tobin, 240 U.S. 127, 36 S.Ct. 290, 60 L.Ed. 562), and that sections 5278 and 5279, R.S., 18 U.S.C.A. §§ 662, 663, were enacted to give it effect. However, we find nothing either in the constitutional provision nor in the federal statute that expressly prohibits states from enacting statutes, such as the provisions of the California and Iowa code sections above-quoted, providing that fugitives from other states may be extradited on demands based upon informations as well as indictments or affidavits made before magistrates. Petitioner relies upon Prigg v. Commonwealth of Pennsylvania, 16 Pet. 539, 10 L.Ed. 1060, 1090-1091; Innes v. Tobin, supra; Commonwealth of Kentucky v. Dennison, 24 How. 66, 16 L.Ed. 717; Roberts v. Reilly, supra; and Hyatt v. New York ex rel. Corkran, 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657, as holding that the federal statute "covers the whole ground relative to extradition between the several states"; and that it "supersedes all state legislation upon the same subject." We are not convinced that they so hold. In Innes v. Tobin, supra, Innes, who was a fugitive from the state of Texas, had been taken to that state for trial for murder and acquitted, but was thereafter detained for delivery to an agent of the state of Georgia for removal to that state as a fugitive from its justice. She sought release on habeas corpus on the ground that she had not fled to Texas but had been taken there against her will, and that the governor of Texas had no authority under the federal statute to order her extradition to Georgia. The Supreme Court said, 240 U.S. at pages 133-135, 36 S.Ct. at page 292, 60 L.Ed. 565, 566:

"To appreciate this question, the proposition relied upon needs to be accurately stated. It is this: The Constitution provides for the rendition to a state of a person who shall have fled from justice and be found in another state; that is, for the surrender by the state in which the fugitive is found. This, it is conceded, would cover the case and sustain the authority exercised, as the accused was a fugitive from the justice of Georgia and was found in Texas. But the proposition insists that the statute is not as broad as the Constitution, since it provides not for the surrender of the fugitive by the state in which he is found, but only for his surrender by the state into which he has fled, thus leaving unprovided for the case of a fugitive from justice who is found in a state, but who has not fled into such state, because brought into such state involuntarily by a requisition from another. And the argument is supported by the contention that, as the statute exercises the power conferred by the Constitution and is exclusive, it occupies the whole field and prohibits all state action even upon a subject for which the statute has not provided, and which therefore in no manner comes within its express terms. But we are of the opinion that the contention rests upon a mistaken premise and unwarrantedly extends the scope of the decided cases upon which it relies. The first, because it erroneously assumes that although the statute leaves a subject with which there was power to deal under the Constitution unprovided for, it therefore took all matters within such unprovided area out of any possible state action. And the second, because, while it is undoubtedly true that in the decided cases relied upon (Kentucky v. Dennison, supra; Roberts v. Reilly, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544; Hyatt v. New York, 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657) the exclusive character of the legislation embodied in the statute was recognized, those cases, when rightly considered, go no further than to establish the exclusion by the statute of all state action from the matters for which the statute expressly or by necessary implication provided.

"No reason is suggested nor have we been able to discover any, to sustain the assumption that the framers of the statute, in not making its provisions exactly coterminous with the power granted by the Constitution, did so for the purpose of leaving the subject, so far as unprovided for, beyond the operation of any legal authority whatever, state or national. On the contrary, when the situation with which the statute dealt is contemplated, the reasonable assumption is that by the omission to extend the statute to the full limits of constitutional power it must have been intended to leave the subjects unprovided for not beyond the pale of all law, but subject to the power which then controlled them,—state authority until it was deemed essential by further legislation to govern them exclusively by national authority."

In an earlier case, Compton v. Alabama, 214 U.S. 1, 29 S.Ct. 605, 53 L.Ed. 885, 16 Ann.Cas.1098, also cited by petitioner, the court referring to section 5278, R.S., 18 U.S.C.A. § 662, said, at p. 6 of 214 U.S. at page 606 of 29 S.Ct., 53 L.Ed. at page 886, 16 Ann.Cas. 1098:

"Undoubtedly, the statute does not make it the duty of a governor to issue a warrant for the arrest of an alleged fugitive from justice unless the executive of the demanding state produces to him either a copy of an indictment against the accused in the demanding state, or an affidavit before a *magistrate* of such state, charging the fugitive with the commission of crime in the state making the demand. It is, we think, equally clear, that the executive of the state in which the fugitive is at the time may decline to honor the requisition of the governor of the demanding state if the latter fails to furnish a copy of an indictment against the accused, or of any affidavit before a magistrate. But, has the executive of the state upon whom the demand is made for the arrest and extradition of the fugitive, the power to issue his warrant of arrest for a crime committed in another state, unless he is furnished with a copy of the required indictment or affidavit? We are of opinion that he has not, so far as any authority in respect to fugitives from justice has been conferred upon him *by the statute of the United States.* The statute, we think, makes it essential to the right to arrest the alleged fugitive under a warrant of the executive of the state where the alleged fugitive is found that such executive be furnished, before issuing his warrant, with a copy of an indictment or an affidavit before a magistrate in the demanding state, and charging the fugitive with crime committed by him in such state."

That court itself italicized the words shown in italics, and the inference therefrom is that the executive authority of an asylum state might have authority under some statute other than that cited to issue his warrant on a lesser showing.

Also, in Re Strauss, 197 U.S. 324, 25 S. Ct. 535, 49 L.Ed. 774, where it was contended that a complaint filed before a committing magistrate who could only charge or hold for trial before another tribunal was not sufficient under the constitutional provision (Art. IV, sec. 2) and R.S. section 5278, 18 U.S.C.A. § 662, to support a warrant for extradition—that a person against whom such a complaint had been filed, was not "charged", within their meaning, the court said, 197 U.S. at page 331, 25 S.Ct. at page 536, 49 L.Ed. at page 778:

"Under the Constitution each state was left with full control over its criminal procedure. No one could have anticipated what changes any state might make therein, and doubtless the word 'charged' was used in its broad signification, to cover any proceeding which a state might see fit to adopt by which a formal accusation was made against an alleged criminal. In the strictest sense of the term a party is charged with crime when an affidavit is filed, alleging the commission of the offense and a warrant is issued for his arrest; and this is true whether a final trial may or may not be had upon such charge."

It also said, 197 U.S. at pages 332, 333, 25 S.Ct. at page 537, 49 L.Ed. at page 779:

"It may be true, as counsel urge, that persons are sometimes wrongfully extradited, particularly in cases like the present; that a creditor may wantonly swear to an affidavit charging a debtor with obtaining goods under false pretenses. But it is also true that a prosecuting officer may either wantonly or ignorantly file an information charging a like offense. But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify an extradition? Such possibilities as these cannot be guarded against. While courts will always endeavor to see that no such attempted wrong is successful, on the other hand care must be taken that the process of extradition be not so burdened as to make it practically valueless. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt."

While the foregoing is probably dictum it has not been contradicted by that court in any case brought to our attention.

It is said in 22 Am.Jur. 249, that "the validity of state legislation ancillary to, and in aid of, the act of Congress in regard to interstate extradition is now well established." Also, p. 250, that "While it has been declared that state laws cannot make any requirements further than those made by the act of Congress, yet the laws of a state may require the governor to surrender a fugitive on terms less exacting than those imposed by the act of Congress, and also that the states may provide

for cases not provided for by the United States."

Our own Supreme Court in Ex parte Tenner, 20 Cal.2d 670, 677, 128 P.2d 338, 342, said that the validity of legislation in *aid* of the act of Congress concerning extradition is now well established; also that "since the extradition provision is not for the benefit of the fugitive, an asylum state may require the governor to surrender a fugitive on terms less exacting than those imposed by the act of Congress. State ex rel. Treseder v. Remann, 165 Wash. 92, 4 P.2d 866, 78 A.L.R. 412. As authority to require the return of fugitives originally existed in the states and remains there except as expressly limited by the Constitution, even in the field of federal extradition, the act of Congress is not exclusive of state action which does not come within its express terms. On the contrary, said the Supreme Court of the United States, it must have been intended to leave subjects within the constitutional power and not provided for by that statute subject to the state authority which then controlled them. Innes v. Tobin, supra."

While there is authority to the contrary in numerous cases it has been held directly that where, under the law of a state, an information is put upon an equality with an indictment it is sufficient as a basis for extradition. It was so stated in People v. Stockwell, 135 Mich. 341, 97 N.W. 765, citing Moore on Extradition, sec. 551, and In re Hooper, 52 Wis. 699, 58 N.W. 741. In the latter case the court said, 58 N.W. at page 742, that the Constitution of the United States does not prescribe the form in which the "charge" must be made, and that, while the act of Congress speaks of an indictment found or an affidavit made before a magistrate, it did not think that it was intended to exclude a case where the charge was in the form of a criminal information.

In People v. Smith, 352 Ill. 496, 186 N.E. 159, at page 160, the court said, quoting from Spear on the Law of Extradition, 3rd Ed., 363, that an information being in its form and substance similar to an indictment is a charge of crime filed in the office of the clerk of a court by the proper law officer of the government; and where this method is provided for by the laws of a state, an information takes the place of an indictment in respect to the crimes to which it is applicable and serves the same purpose as far as bringing the accused party to trial is concerned; and that a charge of crime in this form, where it is legal according to the laws of a state though not technically an indictment and not mentioned in the law of Congress, comes within the meaning of the law and should be so regarded for the purpose of extradition. Matter of Strauss, supra, and other authorities are there cited in support of the foregoing statement of the law. Also see Ex parte Nash, D.C., 44 F.2d 403; People v. Enright, 112 Misc. 568, 184 N.Y.S. 248, 250-251, affirmed 196 App.Div. 964, 188 N.Y.S. 945; Cook v. Rodger, 215 Ind. 500, 20 N.E.2d 933; Ex parte Rogers, 33 Okl.Cr. 82, 242 P. 781; Morrison v. Dwyer, 143 Iowa 502, 121 N.W. 1064; Ex parte Ryan, 75 Okl.Cr. 144, 129 P.2d 204, 207.

[2] Section 1548.2 of our Penal Code is not inconsistent with section 2 of Art. IV of the Constitution of the United States, nor does the federal statute, sec. 662, 18 U.S.C.A., purport to exclude legislation by the states in *aid* of the purposes of the constitutional provision, which are not for the benefit of an alleged fugitive, but to secure his presence for trial in the courts of the state where he is charged with crime. And since prosecution by information is authorized by both Iowa and California, and the California statute specifically authorizes the governor of this state to recognize a demand for extradition accompanied by a copy of an information duly authenticated by the governor of the demanding state, we conclude that the contention of petitioner herein, that the record before us is insufficient to justify his extradition, cannot be sustained.

[3] However, even were we to assume that an information merely as such is insufficient, the question would remain whether the information in the instant case can be said to be insufficient to constitute an affidavit made before a magistrate within the language of section 662, 18 U.S.C.A., supra. Petitioner asserts that it is based only upon the "belief" of the County Attorney and that an affidavit based upon "information and belief" is insufficient to support a governor's warrant, citing Ex parte Spears, 88 Cal. 640, 26 P. 608, 22 Am. St.Rep. 341, and Ex parte Dimmig, 74 Cal. 164, 165, 15 P. 619. Those cases so hold, but in the Spears case it does not appear that the affidavit accompanying the governor's demand for extradition had even been filed in a court, and it recited that affiant "has reason to believe, and does believe,

that * * * W. A. Spears embezzled or fraudulently converted to his own use, one carload mules," etc. [88 Cal. 640, 26 P. 609.] The Dimmig case was not an extradition case; but even there the court said, 74 Cal. at page 166, 15 P. at page 620, citing sections of the Penal Code:

"Under these provisions a magistrate has no jurisdiction to issue a warrant of arrest without some evidence tending to show the guilt of the party named in the warrant. The original information may be sufficient, though made only upon information and belief, if followed by the deposition of the complainant or some other witness, stating facts tending to show the guilt of the party charged. Of course, where there was some evidence upon which the magistrate acted, we would not interfere. It may be also true that the original information might be treated as a deposition, and in such view, if it contained positive evidence of facts tending to show guilt, it might be sufficient as a basis for the issuance of a warrant."

In Re Keller, D.C., 36 F. 681, 682, where an affidavit, as in the case before us, charged a crime directly and positively, it was held that it was not vitiated by the conclusion "as said deponent verily believes." Also in that case, while the oath of the affidavit of the complaint on which demand for extradition was based was administered by the clerk of the municipal court, it was said that upon the face of the papers it appeared that the affidavit was made before the court, in the presence of the presiding magistrate; and that was held a sufficient compliance with the federal statute. That case has not been overruled by any federal court and is cited, though not on this point, in Pettibone v. Nichols, 203 U.S. 192, 204, 27 S.Ct. 111, 51 L.Ed. 148, 153, 7 Ann.Cas. 1047. Also see Rice v. Ames, 180 U.S. 371, 375, 376, 21 S.Ct. 406, 45 L.Ed. 577, 582, and Riley v. Colpoys, 66 App.D.C. 116, 85 F.2d 282, 284. In the case before us the charge in the information is made directly and positively that petitioner committed the offense; it is not asserted that it is made upon information and belief. Also petitioner was charged in the regular course of judicial proceedings. The information is headed, "In the District Court of Greene County," and bears the approval of the judge of the District Court.

In Ex parte Davis, 333 Mo. 262, 62 S.W. 2d 1086, 1088, 89 A.L.R. 589, it was held that the record sufficiently showed that an affidavit for extradition was made before a magistrate, though sworn to before the clerk of the district court. It was captioned, "In the District Court," etc., and the warrant issued by the judge of the court recited that affiant "has this day complained in writing to the District Court * * * on oath." The court said that "before" in the federal statute meant in the presence of the magistrate, not that he actually administered the oath, citing Gugenhine v. Gerk, 326 Mo. 333, 31 S.W.2d 1, certiorari denied 282 U.S. 810, 51 S.Ct. 180, 75 L.Ed. 726, and In re Keller, supra.

The language used by the court in Compton v. Alabama, supra, is pertinent here. It said, 214 U.S. at page 9, 29 S.Ct. at page 607, 53 L.Ed. at page 887, 16 Ann.Cas. 1098:

"When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective states concerned as a sufficient basis, in law, for their acting,—the one in making a requisition, the other in issuing a warrant for the arrest of the alleged fugitive,—the judiciary should not interfere, on habeas corpus, and discharge the accused upon technical grounds, and unless it be clear that what was done was in plain contravention of law."

[4] Finally, as is urged by respondents, regardless of other objections by petitioner, it appears from the record that the demand of the governor of Iowa is supported by two sufficient affidavits sworn to before a magistrate, to wit, an affidavit by Harry Upton, now Sheriff of Greene County, Iowa, and an affidavit by Edward Farrell, both being subscribed and sworn to before F. H. Cooney, Judge of the District Court, 16th Judicial District. Upton's affidavit avers that on July 22, 1936, he was Deputy Sheriff of Greene County, and that at that time Lyle Davis, Roy Ritchie, Harold Gilland and Ed Farrell were confined in the county jail; that he was called to the jail and found that Davis, Ritchie and Gilland had knocked brick out of the jail wall and left, and that the only remaining prisoner was Farrell. The affidavit of Farrell avers that he was confined in said jail on that date, together with Davis, Ritchie and Gilland, and that the latter three knocked brick out of the wall of the jail, took all the money he had, crawled out of the hole in the wall and left.

By the statutes of Iowa the judge of the District Court is a magistrate, section

13403, 1939 Code of Iowa, and the foregoing affidavits are made a part of the record accompanying the demand made by the Governor of Iowa, and authenticated by him.

We therefore conclude that the record produced amply supports the demand for petitioner's extradition, and fully justifies the issuance of the warrant by the Governor of this state.

[5] Petitioner suggests that he should not be extradited because of the long delay in making the application, but we find no merit in this contention. There is nothing in either the California or Iowa statutes or in the statutes of the United States limiting the time within which such demand shall be made, nor are we cited to any authorities holding that delay in making demand for extradition would justify the release of a petitioner on writ of habeas corpus. The statute of limitations as a defense must be asserted on the trial of the offense with which petitioner is charged. Biddinger v. Commissioner of Police of City of New York, 245 U.S. 128, 135, 38 S.Ct. 41, 62 L.Ed. 193, 199.

The writ of habeas corpus is discharged and the petitioner remanded.

PEEK and THOMPSON, JJ., concur.




68 Cal.App.2d 745

**CHAPMAN v. TITLE INS. & TRUST CO. et al.**

**Civ. 14719.**

District Court of Appeal, Second District, Division 2, California.

April 17, 1945.

**Hearing Denied June 14, 1945.**

**1. Landlord and tenant ⇐169(11)**

Evidence that tenant, while leaving apartment building through partially opened swinging doors, the stops of which were resting against edge of threshold, lost her balance and fell, established that tenant's negligence caused or contributed to her injury and authorized judgment of nonsuit.

**2. Landlord and tenant ⇐164(7)**

Where tenant knew of alleged defective condition of stops on swinging doors at entrance of apartment, tenant could not base action against landlord for injuries sustained in a fall upon such alleged defective condition.

**3. Landlord and tenant ⇐168(1)**

Where there are visible structural defects in common facilities of an apartment house, they are used by tenant at his peril.

**4. Landlord and tenant ⇐164(6)**

Where a defective condition develops without knowledge of tenant, there is no liability of landlord unless it be proved either that landlord had gained knowledge of new condition and had opportunity to make repairs, or that condition had existed long enough to warrant inference of such knowledge.

**5. Landlord and tenant ⇐164(7)**

The presence of swinging doors equipped with springs at entrance of apartment building, which doors tenant had used many times over a period in excess of three years, was not negligence.

**6. Landlord and tenant ⇐164(1)**

The fact that swinging doors at entrance way of apartment building, when opened to an angle of 90 degrees, extended some five inches over the threshold step, did not disclose either a structural defect or negligence, particularly in view of 20 years' use of exit.

**7. Landlord and tenant ⇐169(6)**

In tenant's action against landlord for injuries sustained when she fell while leaving entrance of apartment house, where tenant was uncertain as to whether door knocked her out of entrance way or struck her as she lay upon sidewalk, or whether she was injured by door or by her fall, it could not be inferred that any particular one of such circumstances was true.

**8. Negligence ⇐136(14)**

In order to warrant a judgment for negligence, plaintiff must supply more proof than that which raises a conjecture, a suspicion, or a speculation that alleged tort-feasor has committed a wrongful act.

**9. Negligence ⇐136(25)**

To warrant a finding of negligence, a connection must be established between act charged and injury suffered, and a suspected cause is not sufficient.

**10. Appeal and error ⇐1135**

In absence of proof that any negligence of landlord caused tenant's injury, judgment of nonsuit was affirmed.

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Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by Mary E. R. Chapman against Title Insurance & Trust Company to recover for injuries sustained by plaintiff while lawfully using the common exit of an apartment building owned and operated by defendant, and of which plaintiff was a tenant. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Lin Price, of Los Angeles, for appellant.

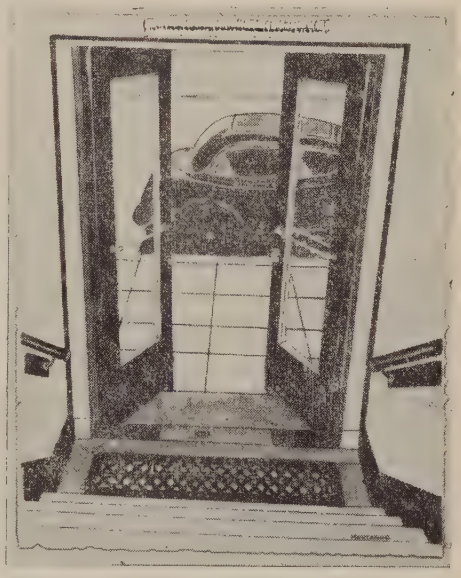
Joseph A. Ball, of Long Beach, for respondents.

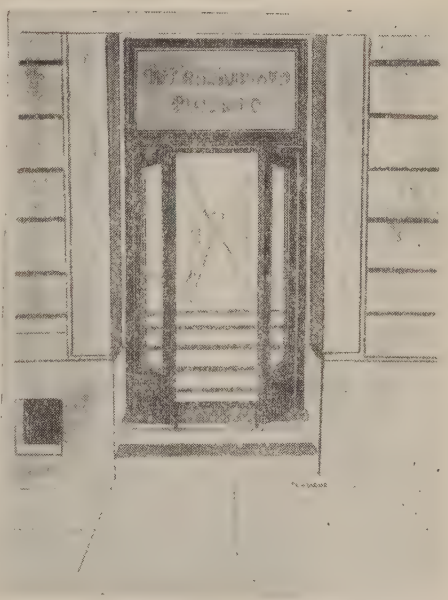
MOORE, Presiding Justice.

In this action sounding in negligence judgment of nonsuit is questioned on the appeal.

Plaintiff fell and was injured while lawfully using the common exit of the apartment building of which she was a tenant. Basing her action upon the claims that she was free from negligence and that the common facilities of the building were defective and unfit for such use, she sued the proprietors for the damage she had suffered. For the purpose of this appeal the hall and the steps down to the doors, the doors of the exit and the steps on the outside below the doors are deemed common facilities and were under the control of defendants. Having heard and considered all of plaintiff's evidence the trial court granted defendants' motion for nonsuit. Plaintiff's appeal from the minute order is predicated upon the proposition that the evidence introduced on plaintiff's behalf together with all reasonable inferences therefrom entitled her to the jury's determination.

[1] The entire evidence leaves no doubt that plaintiff's own negligence caused or contributed to cause her injuries. Also, it discloses that defendants were free from negligence. A resume of all of plaintiff's testimony demonstrates the former; the substance of the testimony of Messers McNamara and Woodworth establishes the latter. Those gentlemen testified that the use of stops on the doors in holding them open is a safe condition; that there had never been any trouble or complaint on account of them; that the doors are held open by pressing the stops against the surface of the marble threshold on which they stand or by allowing the extremities of the stops to rest against the outer edge of the threshold. The doors when opened perpendicularly to the building extend five inches over the top step.





Mrs. Chapman, then 80 years of age, had lived in the Omar H. Hubbard Building in Long Beach approximately three and a half years with her sister, Mrs. Ream. About 10 a.m. of August 8, 1942, the two

ladies took the elevator from their apartment on the ninth floor for the purpose of visiting a market across the street to purchase some fresh berries. On the ground floor they proceeded to the Cedar street exit and descended three steps to the doors which permit egress to the street. Both doors stood partially open (see drawings), the stops resting against the edge of the threshold. Walking in advance and more briskly than her sister, Mrs. Ream did not witness appellant's attempt to reach the sidewalk. It was proved by the unfortunate lady that as she "went to push the right door out further" the door swung back. She tried to regain her hold but could not "because there was nothing under that door" to hold her from falling into the street. The door pushed off; she tried to balance herself but could not; she stepped off, "the door flew back" and "flung" her out. She had gone out of the same exit hundreds of times, both when the doors were open and when they were closed. She knew they were swinging doors and had pushed them open many times; knew the step below extended the entire width of the two doors. At one time in the course of her testimony she declared her accident happened in this wise: "I made no effort to hold the door after I got it open. * * * and after I got out of there I did not get out fast enough and it knocked me out before I could get out."

On some material points she testified in contradiction to her deposition given twenty days prior to trial. At that time she said the doors were closed; at the trial she declared they were partially open; then she deposed that she and her sister were in a hurry to get out because the luscious berries did not last long; on the stand she asserted such statement to be untrue; then she testified that she took hold of the door to open it and it slammed shut before she could get out; at the trial she said she pulled it toward her, also that she pushed it in order to get out and that it flew back and struck her hip; on the former occasion she said that Mrs. Ream let loose the door and it swung back too quickly and hit her; in the presence of the court she declared such was not the truth.

[2] Following the efforts of her persistent counsel to establish the cause of her accident to have been the actionable negligence of defendants, the patient trial judge was unable to elicit anything more than that when she went out the door struck her hip and caused her to fall upon the stone step and that the fall broke her femur. From such evidence no reasonable inference can be drawn other than that appellant lost her balance and fell. It is not satisfactorily proved that the door knocked her down or struck her after she had fallen to the sidewalk on which she lay when observed a moment later by her sister. Conceding the doors to have had defective stops, their condition was known to appellant for she had oftentimes entered and passed out of the same exit and it had suffered no alteration or deterioration. If the stop was not pressed against the threshold but rested against its exterior edge no showing was made that the latter condition was negligence. The doors had been so propped open scores of times. In passing to the outside it was necessary for appellant to apply some force to the door whether propped or anchored by the stop. If she miscalculated the amount of exertion to be applied it was because of her inattention or her haste.

[3-6] If there are visible structural defects in the common facilities of an apartment house they are used by the tenant at his peril. Watwood v. Fosdick, 212 Cal. 84, 297 P. 881. If a defective condition develops without the knowledge of the tenant, there is no liability of the landlord unless it be proved either that he had gained knowledge of the new condition and had opportunity to make repairs (Williams v. Owl Drug Co., 10 Cal.App.2d 621, 52 P. 2d 499), or that the condition had existed long enough to warrant the inference of such knowledge. Gold v. Arizona Realty & Mortgage Co., 12 Cal.App.2d 676, 55 P. 2d 1254. If the doors were heavy and the springs strong they had always been so. It was not negligence to have such doors and springs. They functioned as usual. The charge of negligence because the doors opened partially over the step leading to the sidewalk is novel indeed. When opened to an angle of 90 degrees, about two feet of each door stood above the threshold allowing only a margin of five inches of the door to extend over the step. If such had been structurally unsafe, the architect who designed it and the municipal authorities who accepted it would have disapproved of it and twenty years' use of the exit would have demonstrated its unfitness. Also, if it was a defect, appellant had had more than three years familiarity with it and was

negligent in using it in a manner to cause her injury.

[7-10] Inasmuch as she was uncertain as to whether the door knocked her out or struck her as she lay upon the sidewalk or whether she was injured by the door or by her fall, it cannot be inferred that either is true. Leach v. Board of Dental Examiners, 87 Cal.App. 207, 262 P. 61. In order to warrant a judgment for negligence the complainant must supply more proof than that which raises a conjecture, a suspicion, or a speculation that the alleged tort feasor had committed a wrongful act. To warrant a finding of negligence a connection must be established between the act charged and the injury suffered; a suspected cause is not sufficient. 20 Am.Jur. 1028. Since there is no proof that any negligence of defendants caused the injuries of appellant (Dull v. Atchison, T. & S. F. R. Co., 27 Cal.App.2d 473, 81 P.2d 158), the judgment must be affirmed.

It is so ordered.

McCOMB, J., concurs.

Hearing denied; CARTER, J., dissenting.




## ANDREWS et al. v. CALIFORNIA EMPLOYMENT COMMISSION. *

Civ. 3160.

District Court of Appeal, Fourth District, California.

April 27, 1945.

Hearing Granted June 25, 1945.

**Taxation ⇐219**

Services in girdling, thinning and picking grapes, performed on the respective farms on which the fruit was produced, constituted "agricultural labor" exempt from contributions under Unemployment Insurance Act. Gen.Laws Supp.1939, Act 8780d, §§ 7(a), 45.10.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action by Norris Andrews and others, doing business as a general copartnership under the firm name of Natomas Fruit Company, and another against the California Employment Commission, formerly the Unemployment Reserves Commission, to recover unemployment insurance assessments paid under protest. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Kimble & Thomas, Joseph C. Kimble, and Howard B. Thomas, all of Fresno, T. Newton Russell, of Palo Alto, and Maddox & Abercrombie, Dickson F. Maddox, and James K. Abercrombie, all of Visalia, for respondents.

BARNARD, Presiding Justice.

This is an action involving contributions assessed under the Unemployment Insurance Act, Deering's Gen.Laws Supp.1939, Act 8780d.

The contributions were levied on account of services performed by certain employees of the Natomas Fruit Company during the years 1939 and 1940 in girdling, thinning, picking and hauling grapes to a packing house operated by Diamond K Vineyards, a corporation. The assessments were paid under protest and this action was brought to secure a refund thereof, pursuant to the provisions of section 45.10 of the Act. The court held that all these services were agricultural and exempt from such contributions under section 7(a) of the Act. Judgment was entered in favor of the plaintiffs, and the defendant has appealed.

At the hearing the appellant conceded, for the purposes of this case, that the services performed in hauling this fruit were of the same nature as those involved in girdling, thinning and picking the fruit, and should be considered agricultural or not in accordance with the decision with respect to those other services. The necessity for considering the question as to whether or not services in hauling fruit to a packing house constitutes agricultural labor, within the meaning of this Act, is thus eliminated from this appeal.

The only question here involved is whether services in girdling, thinning and picking this fruit, all of which services were performed on the respective farms on which the fruit was produced, constitute

* Subsequent opinion 165 P.2d 929.

"agricultural labor" within the meaning of this Act. In this regard the services involved and the surrounding circumstances are practically identical with, and the applicable principles of law are exactly identical with, those involved in the case of California Employment Commission v. Kovacevich, Cal.App., 157 P.2d 416, recently decided by this court. On the authority of that case, and for the reasons there stated, the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.




68 Cal.App.2d 821

**SIMPSON et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.**

**Civ. 14797.**

District Court of Appeal, Second District, Division 1, California.

April 24, 1945.

**1. Stipulations ⇐14(11)**

Where defendants objected to introduction of any testimony, and as matter of convenience it was stipulated to defer objections until after evidence had been taken and that objections would then be argued and after argument would be submitted, plaintiffs were not by such stipulation precluded from dismissing the actions without prejudice.

**2. Dismissal and nonsuit ⇐19(1)**

Under statute providing for dismissal and nonsuit if "affirmative relief" is not sought by defendant, quoted phrase does not include mere defensive matter but means the allegation of new matter which in effect amounts to a counter-attack. Code Civ.Proc. § 581.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Relief".

**3. Dismissal and nonsuit ⇐12**

The privilege of dismissing an action as provided by statute is designed to afford to plaintiff a certain freedom of action within limits prescribed that cannot be circumscribed indirectly. Code Civ.Proc. § 581.

**4. Dismissal and nonsuit ⇐19(1), 43(4)**

In actions to enjoin defendants from violating race restrictions contained in deeds, answers which only raised issues whether contract was valid and whether its enforcement would be equitable did not request "affirmative relief" and hence court could not entertain defendants' motion to set aside plaintiffs' dismissals without prejudice. Code Civ.Proc. § 581.

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Proceeding in prohibition by Theodore A. Simpson and another to restrain the Superior Court of the State of California in and for the County of Los Angeles and the Honorable John Beardsley, Judge of such Superior Court, from taking further steps or proceedings in connection with actions pending in such court.

Writ granted.

Lindstrom & Bartlett and LeCompte Davis, all of Los Angeles, for petitioners.

J. H. O'Connor, County Counsel, and Ernest Purdum, Deputy County Counsel, both of Los Angeles, for respondents.

Katz, Gallagher & Margolis, Wills O. Tyler, and Loren Miller, all of Los Angeles, for respondents Bessie A. Johnson and others, real parties in interest.

DORAN, Justice.

This petition for a writ of prohibition relates to the validity of dismissals filed in three actions in respondent Superior Court.

The record reveals that the three actions in question were assigned to Department Eleven of said superior court for trial; that the trial commenced on the afternoon of December 7th and continued throughout the following day, December 8th. At the conclusion of the court session on said last-mentioned date, the trial was continued to Monday morning, December 11th. Plaintiffs' case had not been completed when, on the morning of December 11th, before the court convened, plaintiffs (petitioners herein) filed with the clerk of respondent court, dismissals without prejudice, together with a written tender of costs in connection therewith. The clerk of said court duly filed said dismissals and entered the same upon the register of actions.

At the opening of the session of said court, defendants disputed the validity and

effect of said dismissals, and made a motion to set aside said dismissals. Over the objection of plaintiffs, who then and there contended that said court was without jurisdiction to entertain such motion, or to proceed further with any matters pertaining to said actions, the court heard argument after which an order was made and entered purporting to grant said motion and to set said dismissals aside.

The complaints in the three actions which were consolidated for trial seek to enjoin defendants from violating certain race restrictions contained in the deeds to the property described in said actions.

Respondents take the position that, "This case involves the right of petitioners herein (plaintiffs below) to dismiss an injunction action (1) after stipulating that a motion to exclude all evidence was submitted, to be ruled upon before the case was closed and (2) despite the fact that the respective answers to the three complaints consolidated for trial requested affirmative relief as set forth in numerous affirmative defenses concluding with the prayer for such relief as might be equitable."

With regard to plaintiffs' right to dismiss the action after the stipulation referred to respondents argue that, "At the time that petitioners (plaintiffs below) dismissed the three complaints involved herein, which had been consolidated for trial, there was pending before the trial court for determination and decision a motion that all evidence be excluded on various grounds including the ground that the complaint did not state facts sufficient to constitute a cause of action," and, "that the parties had stipulated that there should be a determination of the question of the legal sufficiency of the complaint by the trial judge which estopped plaintiff from exercising the usual right to dismiss in a proper case." The record reveals that defendants, at the trial, objected to the introduction of any testimony on various grounds and in that connection, appears the following,

"I think your honor will be able to pass upon these points much better at the conclusion of the case than now. I ask the ruling on the objection be held until the conclusion of the case when the evidence is in and argument permitted then.

"The Court: Is that satisfactory?

"Mr. Davis: Provided the court will pass upon them before the case is submitted.

"The Court: Oh, yes; that is a suggestion.

"Mr. Margolis: And without repeating the objection, I would like to have a stipulation that the objection be deemed made to each and every witness and to each and every question.

"Mr. Bartlett: So stipulated. I am perfectly willing to argue now or at the conclusion of the evidence.

"The Court: Apparently that is agreeable to both sides. You may proceed."

[1] It is the foregoing that respondent contends foreclosed plaintiffs from dismissing the actions. There is no merit to such contention. As petitioners point out, "The most that could possibly be said from the record is that as a matter of convenience it was determined to defer defendants' objection until after the evidence had been taken and that such objection would then be first argued and, after argument, would be submitted."

[2-4] With reference to respondent's contention that the answers requested affirmative relief, it should be noted at the outset that the expression "affirmative relief sought" as provided by Section 581 of the Code of Civil Procedure does not include mere defensive matter, by whatever name it may be called. The answers to the three actions, in addition to the denials in the usual form, alleged from eight to fifteen separate defenses in substance that, the complaints do not state a cause of action; that the declaration of restrictions was void and in violation of the constitution of the State of California and of the United States; that said restrictions were against public policy; that said declaration of restrictions was not duly signed and lacked adequate consideration; that necessary parties are not included; that said restrictions constitute an "illegal restraint upon alienation"; that the period of time provided for is indefinite; that the enforcement of said restrictions would be inequitable; that the defendants acquired the property in question without notice; and that the character of the community had changed.

The prayers were in the usual form, namely, that plaintiffs take nothing and that defendants have judgment and "for such other and further relief as to the court may seem just and equitable".

It is at once evident from the foregoing that the only issues raised by the pleadings

were whether the contract in question was valid and enforceable and whether its enforcement would be equitable.

The answers were no more than a variety of defenses set up to defeat the action. Indeed, whether any affirmative relief in such an action is available, is at least problematical.

By affirmative relief as used in Section 581 of the Code of Civil Procedure is meant the allegations of new matter which in effect amounts to a counter attack. In other words, the relief sought, if granted, operates not as a defense but, affirmatively and positively to defeat plaintiff's cause of action. The privilege of dismissing an action as provided by Section 581 is designed to afford to the plaintiff a certain freedom of action within the limits prescribed that cannot be circumscribed indirectly. Any attempt to wrest such control in any manner except as provided and clearly intended by its provisions, is ineffective for all purposes.

In the light of the record herein, the court was without power to entertain the defendant's motion to set aside the dismissals and such action, as well as the procedure that followed, was without legal sanction and void.

Let a peremptory writ of prohibition issue as prayed for.

YORK, P. J., and WHITE, J., concur.




69 Cal.App.2d 1

**In re CAZAURANG'S ESTATE.**

**THOMAS v. GRAY et al.**

**Civ. 3375.**

District Court of Appeal, Fourth District, California.

April 25, 1945.

**1. Appeal and error ⇐654**

Motion to augment record on appeal by showing argument which took place before trial court on a particular occasion, supported only by affidavit of counsel of moving party setting forth his version of such argument, was denied when court reporter was present and took down the proceedings.

**2. Appeal and error ⇐654**

Motion to augment record on appeal by inclusion of certain minute entries of clerk of court, wherein oral demand for a jury trial, objections made thereto and trial court's ruling thereon was noted, was granted.

**3. Appeal and error ⇐654**

Where affidavit in support of motion to augment record on appeal set forth what counsel for moving party believed was stated by opposing counsel in open court bearing on rights of claimants moving counsel represented, in face of contradictory affidavit by opposing counsel, motion was denied.

**4. Appeal and error ⇐654**

District Court of Appeal should not be called upon to decide conflict in affidavits of counsel in support of and in opposition to motion to augment record on appeal as to what was stated in argument before trial court.

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Appeal from Superior Court, San Diego County; Franklin G. West, Judge.

Proceedings in the matter of the estate of Jean Cazaurang, deceased, wherein Marie Lees Thomas had executed certain assignments of undivided interests of various percentages of her interest in such estate. From that portion of judgment of distribution making allowance to Gordon Gray and others as claimant-assignees, Marie Lees Thomas, as administratrix of decedent's estate and personally, appeals, and from the judgment in its entirety, Gordon Gray and others appeal. On motion of Marie Lees Thomas to augment the record on appeal.

Motion granted in part and denied in part.

Marion P. Betty and Porter C. Blackburn, both of Los Angeles, for appellant and respondent.

Gray, Ames & Driscoll, of San Diego, and James T. Phillips, in pro. per., of Pasadena, for respondents and appellants.

GRIFFIN, Justice.

On July 30, 1930, Marie Lees (Thomas) executed an assignment to Attorney E. W.

Brewer, Jr., Gordon Gray, Walter Ames and J. G. Driscoll, Jr., of an undivided 30 per cent of her right, title and interest in the estate of Jean Cazaurang, deceased, and therein authorized the Superior Court to make distribution accordingly. On April 5, 1935, Marie Lees (Thomas) substituted A. G. Reily, Esq., as her attorney in the place and stead of Messrs. Gray, Ames & Driscoll. Later, Marion P. Betty, Esq., was substituted in his stead. One James T. Phillips, Esq. claimed an assignment from Marie Lees (Thomas) of two per cent of the net proceeds of her interest in the estate for services rendered and to be rendered by him. After several hearings on a petition for distribution and upon the objections thereto by the above-entitled claimants, the trial court, on February 23, 1944, entered its decree which, among other things, awarded claimants Gray, Ames & Driscoll and E. W. Brewer, Jr., 15 per cent of 90 per cent of the estate of Jean Cazaurang, deceased, available for distribution, and also awarded claimant James T. Phillips 2 per cent of 90 per cent of the amount available. Claimants appealed from the judgment in its entirety. Marie Lees (Thomas) personally and as administratrix appealed from that portion of the judgment making any allowance to those claimants.

This comes before us now on a motion of Marie Lees (Thomas) for an order augmenting the record on appeal.

The affidavit of Marion P. Betty, in support of the motion, recites that certain proceedings were omitted from the record. One point raised on the appeal is that the trial court was without jurisdiction while sitting in probate to try the issues tendered by the respective claims of assignments above mentioned. In this connection, counsel for the administratrix argues (a) that on June 19, 1942, the matter of the settlement of the final account and petition for distribution came on for hearing in department 5 of the Superior Court; that claimants had filed objections thereto and that they argued for recognition of their claimed assignments. He then sets forth certain discussion which he claims took place between all counsel and the court wherein it was contended, by him, that the probate court had no jurisdiction to hear the matter; that objection was made thereto on the grounds stated and that the court then allowed the administratrix to file additional pleadings by way of a petition for "disallowance of assignments".

It is next represented to us in paragraph (b) of the affidavit of Marion P. Betty that at the hearing of the above-mentioned petition the following discussion and rulings took place: that on Monday, July 7, 1941, a claimed "partial minute entry" was made by the clerk of the court which, in effect, recited that counsel for the administratrix, in open court, orally demanded a jury trial on the petition for allowance of assignments; that on July 8, 1941, arguments on objections to such jury trial were proceeded with and later continued to July 9, 1941; that on that day further argument thereon ensued and that the trial court denied such application for a jury trial and denied the administratrix' demand for a bill of particulars.

The third point argued is (c) that at the hearing, Mr. Driscoll, representing the claimants, made the following reply to a question propounded by the trial judge: "Mr. Driscoll, is it your contention that you are entitled to recover the full amount of the percentage (30 per cent) as specified under the terms of your assignment with Mrs. Thomas, and that unless you got the full amount that you are entitled to nothing?" A. By Mr. Driscoll: "Your Honor, our office has had considerable discussion on this point and while we feel that we are entitled to stand on the contract to demand a recovery of full percentage of 30 per cent, we will abide by Your Honor's decision and award for compensation for our services on a quantum meruit basis, as you believe we are entitled to." Affiant then states that there was no court reporter at such hearing to report the argument and there was no account of said statement by Mr. Driscoll transcribed; that therefore that statement does not appear in the reporter's transcript; that the same should be added to the record as it may constitute material evidence of a waiver of the right of the claimants herein to appeal. Affiant then prays that the record be augmented in the particulars set forth in paragraphs (a), (b) and (c), and that the transcripts be amended accordingly.

In opposition to this motion, claimant J. G. Driscoll, Jr., by affidavit, recites that, as to the matters mentioned in subdivision (a) above, said paragraph is not a substantially correct record of the proceedings; that he was present at all times; that the

matter of the settlement of the final account and distribution did not come on to be heard on June 19, *1942* as alleged, but that the matter of objections did come on for hearing on June 19, *1941*; that it was then continued to June 26, 1941, in department 5, before Judge West; that after some argument the issues were set down for trial for July 7, 1941; that on June 19, 1941, there was no court reporter present, and that he had no distinct recollection of what was said on argument at that time. A certified copy of the minute entry accompanied his affidavit. It shows that on June 19, 1941, in department 5, "All matters in the above entitled matter" were continued to June 26, 1941. Apparently a court reporter was present and took down the proceedings on June 26, 1941, but no request was made for a transcript thereof.

The affidavit then recites "that affiant is the person alleged to have made the statement set out in paragraph (c)" above; "that the said allegation is incorrect; that affiant did not state that he or" that any of the claimants "would abide by the decision of the trial court awarding" them "compensation on a quantum meruit" basis; that in reply to a question on the general import of that set out in the affidavit of Marion P. Betty, affiant said in substance that the said claimants "felt that they were entitled to stand on their assignment and recover the full thirty per cent (30%) assigned but that if the court should hold to the contrary the said" claimants "should at least be awarded compensation on a quantum meruit basis."

Accompanying defendant's affidavit is an affidavit of the court reporter setting forth the fact that he reported in shorthand the proceedings on June 26, 1941, in the matter of the estate of Jean Cazaurang; that he received no request that any part of the proceedings be transcribed either as a part of the record on appeal or for any other purpose; that he has not transcribed any part of said proceedings, and that the matter set out in paragraph (a) of the Betty affidavit is not a part of or a copy of a part of any transcript prepared by him of the said proceedings.

Claimants then argue that the record now includes all matters material to a determination of the points on appeal and ask that the motion to augment it be denied.

[1] The administratrix' request to the clerk to prepare a transcript on appeal did not include any request for copies of minute entries. Likewise, the request to the reporter did not include a transcript to the proceedings had prior to July 24, 1941. We have before us only the affidavit of counsel for the administratrix which gives his version of what objections were made in open court in reference to the claimed objection to the jurisdiction of the probate court to hear the matter which is set forth under paragraph (a) supra. If a court reporter was present and took down the proceedings, as indicated, no good purpose would be served by substituting therefor, as part of the record on appeal, affiant's version of the argument which took place before the court. Therefore, this request must be disallowed.

[2] As to paragraph (b), the affidavit sets forth certain quoted minute entries of the clerk of the court as of July 7, 8, and 9, 1941, wherein it is noted that there was an oral demand for a jury trial, objections made thereto, and the trial court's ruling thereon. These minute entries, if properly certified, may become necessary in considering the questions raised on appeal.

[3, 4] As to paragraph (c), it is conceded that there was no court reporter present. Counsel for administratrix has merely set forth what he believes "in substance and effect" was stated by Mr. Driscoll in open court bearing on the rights of the claimants he represented, and which it is claimed pertains to their right to recover the full percentage of 30 per cent or whether they would abide the court's decision on a quantum meruit basis. The affidavit of Mr. Driscoll contradicts Mr. Betty's version of the "substance and effect" of his claimed statement in open court. This court, on appeal, should not be called upon to decide any such conflict. In the absence of some properly authenticated record, it would be improper to accept and augment the record on appeal with no more than the controverted affidavit of counsel for administratrix which bore on that subject.

Motion to augment record with certified copies of minute entries specified in paragraph (b) granted. Remaining portion of motion denied.

BARNARD, P. J., and MARKS, J., concur.

## KLINE v. BARKETT et al.

Civ. 14613.

District Court of Appeal, Second District, Division 3, California.

April 19, 1945.

Rehearing Denied May 18, 1945.

Hearing Denied June 14, 1945.

**1. Appeal and error ⇐930(1)**

On defendant's appeal from adverse judgment, as in automobile collision case, evidence must be viewed in light most favorable to plaintiff.

**2. Automobiles ⇐244(14)**

Evidence that collision stopped automobile immediately and that it was wedged under rear of trailer angling into highway warranted finding that tractor and trailer were stopped at time of collision.

**3. Pleading ⇐124, 129(2)**

A denial that driver negligently drove or operated or parked tractor-trailer was a denial, not of parking, but of negligent parking, and hence allegation that vehicle was parked was admitted by failure to deny it.

**4. Pleading ⇐93(1)**

Defendant is entitled to allege inconsistent defenses, and admission as to certain matter in one defense will not preclude him from relying on denial thereof in another defense.

**5. Automobiles ⇐242(1)**

Where only evidence as to whether place of automobile collision was within a business or residence district consisted of maps and photograph, from which it appeared that place was not within such a district, it was conclusively presumed that it was outside a business or residence district under statute raising such presumption unless district is duly signposted. Vehicle Code, § 758, St.1941, p. 2718.

**6. Automobiles ⇐242(3), 244(14)**

Proof that defendant's tractor-trailer angled onto four-lane highway, blocking most of outer lane, established prima facie case of violation of parking statute, and burden was on defendant to prove that it was not practicable to park off highway. Vehicle Code, § 582, St. 1935, p. 190.

**7. Automobiles ⇐173(2)**

If tractor-trailer was not disabled, question whether it was practicable to park off highway as required by statute necessitated consideration of physical conditions immediately to the right, and also of any other possible parking spaces. Vehicle Code, § 582, St.1935, p. 190.

**8. Automobiles ⇐244(14)**

Evidence that tractor facing west was next to curb at outer edge of 7-foot shoulder of highway having four 10-foot lanes, but that trailer angled 7 feet onto highway, and that there was street intersection 350 feet west and no curbing for about 150 feet at drive-in restaurant 1,000 feet east, warranted finding that vehicle was unlawfully parked. Vehicle Code, § 582, St. 1935, p. 190.

**9. Automobiles ⇐201(5), 245(62)**

The parking of tractor-trailer facing west and angling onto four-lane highway was act of continuing negligence, and whether it was proximate cause of collision was jury question, though collision might not have occurred if westbound motorist, having started into the passing lane, had not been blinded by spotlight on eastbound automobile and turned back into lane partly blocked by trailer. Vehicle Code, § 582, St.1935, p. 190.

**10. Automobiles ⇐245(62)**

The question of causation, as of collision with negligently parked vehicle, is one of fact depending on particular circumstances and is ordinarily for jury.

**11. Automobiles ⇐245(17)**

Whether operator of parked tractor-trailer angling onto highway should have anticipated that motorist approaching from rear might be blinded by headlights or spotlight of oncoming automobile and collide with trailer was question of fact.

**12. Automobiles ⇐173(1)**

Operator of negligently parked tractor-trailer struck by overtaking motorist blinded by spotlight of oncoming automobile was not entitled to assume that others using highway would not be negligent.

**13. Automobiles ⇐245(64)**

Whether negligence of eastbound motorist whose spotlight blinded westbound motorist who struck rear of defendant's parked tractor-trailer angling onto highway was sole proximate cause of collision, or whether such negligence and defendant's negligence were concurring causes, were jury questions.

**14. Automobiles ⇐245(78)**

Evidence that when automobile traveling 35 miles an hour struck rear of parked tractor-trailer 53 feet long, side of automobile hood was caved in, cowl was pushed back, and footboards were pushed against front seat, did not show contributory negligence as matter of law as regards speed.

**15. Automobiles ⇐245(83)**

Under evidence that motorist traveling about 35 miles an hour in the outer of four lanes of 40-foot highway saw lights on rear of tractor-trailer 300 to 400 feet ahead, and when 50 to 60 feet away started into the passing lane but was blinded by spotlight on oncoming automobile and turned back and struck rear of parked trailer angling 7 feet onto highway, his contributory negligence was for jury.

**16. Negligence ⇐93(2)**

Contributory negligence, if any, of driver, who was husband of automobile owner who was asleep in front seat at time of collision with parked vehicle about 5 a. m. following 10-hour drive with only 3 stops would be imputable to owner.

**17. Appeal and error ⇐1064(1)**

In action by automobile owner riding with husband at time of collision with defendant's vehicle, instruction defining contributory negligence as negligence on part of person injured, etc., though conflicting with other instructions referring to husband's negligence, was not prejudicial to defendant, where it clearly appeared from evidence and instructions that defendant was relying on husband's negligence.

**18. Trial ⇐267(3)**

In automobile collision case, where court gave a formula instruction on intervening cause, it was not error to delete phrases "which proximately caused" and "I instruct you that", together with conclusion that plaintiff could not recover.

**19. Trial ⇐295(6)**

In automobile collision case, instructions considered as a whole, including instructions on intervening cause and proximate cause, and instruction that plaintiff could not recover if defendant's negligence was not a proximate cause of any injury to plaintiff, adequately instructed jury concerning proximate and remote causes.

**20. Trial ⇐260(1)**

Refusing instruction substantially the same as instruction given was not error.

**21. Trial ⇐241**

Where it was conclusively presumed under statute that scene of collision of automobile with rear of parked tractor-trailer was outside a business or residence district, court properly gave instruction embodying provisions of statute forbidding parking on highway when it is practicable to park off of highway. Vehicle Code, § 582, St.1935, p. 190; § 758, St.1941, p. 2718.

**22. Appeal and error ⇐1033(5)**

In action by occupant of automobile which struck rear of defendant's parked tractor-trailer allegedly angling onto highway outside of business or residence district, instruction on statute requiring parking within 18 inches of curb was erroneous, but defendant could not complain, since it was more favorable to him than correct instruction on applicable statute forbidding any parking on highway. Vehicle Code, § 582, St.1935, p. 190; § 588, St.1939, p. 1504.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action for personal injuries by Louise L. Kline against M. Barkett, individually and doing business as National Trailer Transport. Judgment for plaintiff, and defendant appeals.

Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, for appellants.

Paul Nourse and Pat A. McCormick, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from a judgment upon a verdict in favor of plaintiff for $18,000 damages for personal injuries sustained by plaintiff in a collision between her automobile and defendant's truck and trailer.

On October 24, 1942, about 7 p. m., plaintiff and her husband left Las Vegas, Nevada, in plaintiff's sedan automobile, intending to go to Los Angeles. The husband drove the automobile and plaintiff sat on the right side of the front seat. The collision occurred about 5 o'clock the next

morning in Glendora, California, on highway 66 approximately 350 feet east of the intersection of that highway and Pasadena Avenue. The highway for several hundred feet east and west of the place of the collision was straight, paved and 54 feet wide. In the center of the highway there were double white lines, and on each side of the highway there were two 10-foot traffic lanes which were separated by a white line. Adjoining each of the outer lanes there was a 7-foot paved shoulder. At the outer edge of the shoulder on the north half of the highway there was a cement curb. The 10-foot lane on the north side of the highway, next to the center, will be referred to as lane 1, and the other 10-foot lane on the north side will be referred to as lane 2.

Defendant's truck and trailer were 53 feet in length. The truck, also known as a truck tractor, had dual wheels in the rear and single wheels in front. The trailer had dual wheels in the rear but no wheels at the front and it was connected with the truck tractor by a swivel or fifth-wheel in the center of the rear of the tractor upon which the front of the trailer platform rested. By such a swivel connection the truck tractor could be turned or set "at an angle to the trailer." The platform or bed of the trailer was flat without side stakes or uprights, was 4 feet above the ground, 8¾ feet wide, and was made specially to carry 2 house trailers when loaded lengthwise thereon—one house trailer in front of the other. Two red lights and 2 reflectors were on the rear end of the trailer. The trailer was empty.

Plaintiff's husband testified that he was driving about 35 miles an hour in lane 2 when he first saw defendant's truck which was then "300 to 400 feet" ahead of him in lane 2; that at that time he observed 3 or 4 red lights on the rear of the truck, but he did not observe whether the truck was moving; that the night was "dark" and he could not see the highway farther than the range of the automobile headlights which lights were "on" the ordinary driving beam; that when he arrived at a point in lane 2 "50 to 60" feet behind the truck he turned the automobile to his left and "started to go" into lane 1 for the purpose of passing the truck; that he "did not get clear over" into lane 1, but as he was making such attempt to pass the truck the rays of a spotlight on an eastbound automobile which was traveling close to the center line of the highway, but south of it, struck him in the eyes and temporarily blinded him; that the oncoming automobile was then about opposite the front of the truck; that when the light was flashed in his eyes he applied the brakes, "turned back" and "stayed right in" lane 2, and after traveling about 50 feet, at the approximate rate of 35 miles an hour, collided with the rear end of the trailer; that he did not observe the truck or trailer after the light was flashed in his eyes until the collision had occurred; that the right front 1/2 of the width of the automobile for a distance of approximately 3 feet from the front end of the automobile was "pinioned" under the left end of the trailer; that the collision stopped the automobile immediately; that immediately after the collision he got out of the automobile from its left side, and the truck driver got out of the cab of the truck, and they had a conversation; that at that time the automobile "was directly in line parallel with the markings on the highway"; that at that time the right side of the truck tractor was within a few inches of and parallel with the north curb (as shown by the map in evidence), and the trailer extended diagonally into the street—the right rear corner of the trailer being about 5 feet from the north curb, and the left rear corner being about 13¾ feet from the north curb or 6¾ feet into lane 2; that his wife, who was sitting on the right side of the front seat at the time of the collision, was "pinned" under the wreckage of the right front portion of the automobile; that after he had extricated her he laid her on the front seat of the automobile, her head extending outside the left door of the automobile, and he held her head while awaiting the arrival of the ambulance; that her head was bleeding and a blood spot, about 1 foot in diameter, was formed on the pavement at the left side of the automobile while the automobile remained in the position it was in when the collision occurred; and that the center of that blood spot was about 15 feet from the north curb. On the way from Las Vegas plaintiff and her husband stopped only at Baker, Barstow and Victorville.

Plaintiff's son, who was called as a witness by her, testified that he went to the scene of the collision the next morning with plaintiff's husband (his step-father); that the blood spot was about 15 feet from the north curb and about 2 feet north of the white line which separated lanes 1 and 2; that there were 2 skid marks just east

of the blood spot—one being 4 feet and the other 2 feet in length; that the right side of the hood of the automobile was caved in, the cowl was pushed back, and the foot boards on the inside were pushed back against the front seat; that the first place along the north edge of the highway, east of the point of the collision, where there was no curbing was at a drive-in restaurant about 1,000 feet away and at that place there was no curbing for a distance of approximately 150 feet.

Plaintiff was asleep at the time of the collision and did not testify concerning it.

The truck driver was in the armed forces at the time of the trial and did not testify.

The chief of police of Glendora, called as a witness by defendant, testified that he went to the scene of the collision about 5:30 a. m.; that the right wheels of the truck and trailer were "up against" the north curb; that he did not see any blood spot or any skid mark on the highway; that the automobile was parallel with the center white line on the highway and was not "angled into the truck"; and that it was "open country" at the place of collision.

Another police officer, called as a witness by defendant, testified that he went alone to the scene of the collision about 5:15 a. m.; that the right wheels of the truck and trailer were parallel with, and within 1 foot of, the north curb; that plaintiff was lying on the front seat of the automobile—her head extending outside the left front door, and plaintiff's husband was holding her head; that plaintiff asked her husband what had happened, and the husband said, " 'I don't know whether I went to sleep or what happened' "; that he (this witness) assisted the other officer in making notes concerning the collision, but they did not include therein a note of said alleged statement by the husband, and he (this witness) did not tell the other officer that he had heard such statement; that he did not observe whether plaintiff's head was bleeding; and that he placed flares on the highway. The husband, upon being recalled, testified that he did not make said statement.

Plaintiff's theory of the case was that the defendant was negligent in that the truck and trailer were parked unlawfully on the highway.

[1-4] Defendant (appellant) contends that the evidence was insufficient to justify the implied finding of the jury that defendant was guilty of negligence. He argues that no one testified that the truck and trailer were stopped at the time of the collision, and that there was no evidence from which it could be inferred that they were stopped at that time. It is true the driver of the automobile, who was the only eyewitness to the collision testifying at the trial, did not testify that he observed, before the collision, that the truck and trailer were stopped. There was evidence, however, that the automobile stopped *immediately* when the impact occurred and that when it so stopped it was "pinioned" or wedged under the trailer. The automobile being so fastened to the trailer, it is reasonable to conclude that it would have been pulled forward by the truck if the truck had been moving. If the automobile stopped immediately, of course it was not pulled forward by the truck. Viewing the evidence in the light most favorable to the respondent, as a reviewing court is required to do, it should be concluded that the jury herein interpreted the word "immediately," as used in the testimony to mean that the automobile did not go forward at all after it became fastened to the trailer. From that evidence, and from the evidence that after the collision the right wheels of the truck tractor were "up against" and parallel with the curb and the trailer was in a diagonal position, and from the evidence as to the size and kind of vehicles involved, the jury could have inferred that the truck and trailer were stopped when the collision occurred. Furthermore, the issue as to whether defendant's vehicle was parked was settled by the pleadings. The complaint alleged in part that Kenneth Francis Dawson, the driver of the truck and trailer (admittedly the agent of defendant), "did so negligently recklessly and carelessly drive, operate, control and park said described truck and trailer as to cause the same to collide with" plaintiff's automobile. The answer stated in part that defendant "denies that said collision was caused or occasioned by any fault, carelessness or negligence of this defendant or of its servant, agent or employee; denies that Kenneth Francis Dawson so or at all *negligently* or recklessly or carelessly drove or operated or controlled, or *parked* said truck and trailer as to cause the same to collide with said automobile." (Italics added.) In a separate defense of contributory negligence, the answer alleged that the "truck and

trailer owned by this defendant and being operated by one, Kenneth Francis Dawson *was parked* on Highway 66 in the City of Glendora * * * with all due care and caution." (Italics added.) It therefore appears that the part of the answer first above referred to was merely a denial that the truck and trailer were *negligently* parked, and was not a denial that they were *parked.* That part of the answer did not put in issue the question as to whether the vehicle was parked, but only put in issue the question as to whether it was negligently, recklessly or carelessly parked. The separate defense, above referred to, alleged that the vehicle was parked. A defendant is entitled to allege inconsistent defenses, and an admission as to a certain matter in one defense will not preclude him from relying on a denial thereof in another defense; however, in this instance the alleged defenses were not inconsistent upon the issue of parking. In the first defense, the allegation of the complaint that the vehicle was parked was admitted by failing to deny it; and in the second or separate defense, the defendant expressly alleged that the vehicle was parked on the highway. It appears that the allegations in the answer as to the issue of parking were not made through inadvertence or mistake. During the trial plaintiff's husband testified that the truck was stopped at the time the collision occurred, but when it appeared further from his testimony that he had not observed, before the collision, whether the truck was stopped, his testimony that it was stopped at the time of the collision was excluded upon motion of the defendant. Thereupon, counsel for plaintiff said that the pleadings admitted the vehicle was parked; and counsel for defendant said, "You have charged us with *negligently* operating, driving, *parking, stopping,* or a few other things, all of which is denied." (Italics added.) Counsel for plaintiff then stated that the defendant had alleged in the affirmative defense that the vehicle was parked; and the court then said, in referring to counsel for plaintiff, "[Y]our observation relative to the pleadings is well taken." Plaintiff's counsel then asked defendant's counsel if he was "going to take the position that the truck was or was not stopped"; and defendant's counsel replied, "I am going to take the position that you cannot prove whether it was stopped or not." Plaintiff's counsel said, "That raises the point, is the defendant going to stand upon his verified pleading or not?" Defendant's counsel said, "We have two answers in there, one is that we were not negligent, that is the first thing you have got to prove." Plaintiff's counsel said, "We will take care of that, but I want an understanding as to whether Mr. Sterry wants to withdraw his verified pleading under oath that this truck was parked at the time of the accident." Counsel for defendant replied, "No, I do not wish to withdraw the pleading." It therefore appears that the defendant has not been taken by surprise concerning the condition of the pleadings. The record is sufficient legally to establish that the truck and trailer were parked on the highway.

[5-8] A further question is whether the truck and trailer were parked unlawfully. There was no evidence as to whether the scene of the collision was within a business or residence district, except the maps and photograph of the scene, which were received as exhibits, and from those exhibits it appears that the place of the collision was not within a business or residence district. It is therefore conclusively presumed that the scene was outside a business or residence district. Vehicle Code, sec. 758, St.1941, p. 2718. Section 582 of the Vehicle Code, St.1935, p. 190, provides: "Upon any highway outside of a business or residence district no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of the highway when it is practicable to stop, park or so leave such vehicle off such part or portion of said highway." The evidence shows, in the light most favorable to respondent, that the right rear corner of the trailer was 5 feet from the curb and the left rear corner of the trailer was 13¾ feet from the curb (the trailer being 8¾ feet wide), that is, the left rear corner of the trailer projected 6¾ feet into lane 2, leaving 3¼ feet of lane 2 open to travel. No evidence was offered to show that it was not practicable to park off the highway. The burden was upon defendant to prove that it was not practicable to park off the highway, and plaintiff established a prima facie case of violation of said Section 582 by proof that the vehicle was parked on the paved portion of the highway. Thomson v. Bayless, 1944, 24 Cal.2d 543, 546, 150 P.2d 413. If the truck was not disabled the question as to whether it was practicable to park it off the highway required "a consideration not only of the physical conditions immediately

to the right but also of any other possible parking spaces to which the vehicle might reasonably be taken, no matter in what direction." Thomson v. Bayless, supra, 24 Cal.2d p. 547, 150 P.2d 415. In that case it did not appear how far along the highway the curb extended, but it did appear that there was an intersection about 600 feet from the parked truck and a service station and restaurant about 375 feet from it, and it was held therein that it was not impracticable to park off the highway. In the present case there was a drive-in restaurant about 1,000 feet east of the parked truck and at that place there was no curb. The truck driver had traveled that highway in a truck many times. The evidence was sufficient legally to support the implied finding of the jury that defendant's vehicle was parked unlawfully.

[9, 10] Defendant contends further that if it be assumed that defendant was guilty of negligence in parking the trailer illegally upon the highway, such negligence was not a proximate cause of the collision. He argues that the alleged parking of the trailer was a condition of the collision but not a cause of it; that the proximate causes of the collision were the flashing of the spotlight into the eyes of the driver of plaintiff's automobile, and his act in turning the automobile back into lane 2 from lane 1; that there was a space of 13 feet, at least, between the center of the highway and the left rear corner of the trailer, and if the automobile, which was 5½ feet wide, had continued to travel in lane 1, after having left lane 2, the accident could not have occurred; and that the act of flashing the spotlight into the eyes of the driver of plaintiff's automobile was an intervening independent cause of the collision which could not reasonably have been anticipated by the truck driver. The defendant had parked the truck and trailer in violation of the statute and in such a manner that all the seven-foot paved shoulder and practically all of lane 2 of the highway were blocked. His violation of the statute and his negligence did not cease when he parked his vehicle in such manner, but such parking was an act of continuing negligence. See Inai v. Ede, 42 Cal.App.2d 521, 524, 109 P.2d 400. It is true, as appellant argues, that if the driver of plaintiff's automobile had not been blinded by the light from the spotlight he might have avoided the collision, but that does not render the defendant's negligence any less continuing and does not turn the question as to whether defendant's negligence was a proximate cause of the collision from one of fact into one of law. In the case of Inai v. Ede, supra, defendant's parked automobile obstructed 3½ feet of the highway, and plaintiffs, pedestrians, were required thereby to walk on the traveled part of the highway and were injured when another automobile skidded on snow and ice and struck defendant's automobile which then struck plaintiffs. The court said therein (42 Cal.App.2d p. 526, 109 P.2d 403): "Can a court say *as a matter of law* that the negligence * * * in parking his car in such a manner * * * did not in any sense contribute proximately to plaintiffs' injuries? The question of causation is one of fact depending upon the circumstances of each particular case and is ordinarily for the jury to determine. * * *" Appellant's argument that a proximate cause of the collision was the act of the driver in turning back into lane 2, assumes it be a fact that he had left lane 2. The evidence in the light most favorable to respondent was that he started into lane 1 but did not get entirely into it, and that after the collision the automobile was parallel with the lines on the pavement.

[11, 12] Whether defendant should have anticipated that a driver of an automobile approaching from his rear might be blinded by lights of an automobile approaching from the opposite direction—either by its spotlight or headlights—with the result that the driver approaching from the rear would be unable to see the trailer which was obstructing the highway was not a question of law. The evidence does not show that the light was wilfully or maliciously flashed into the eyes of the driver, and such flashing of the light might have been the result of a defect in the mechanism of the light. Many automobiles are equipped with spotlights, and many drivers negligently fail to dim headlights when meeting another automobile. It is not unreasonable to conclude that one should anticipate that the lights of an automobile might temporarily blind the driver of another automobile approaching from the opposite direction. Defendant having been negligent in parking his truck was not entitled to assume that others using the highway would not be negligent, and it was a question of fact as to whether he should have anticipated that some person might

drive with lights in such condition that another driver might be blinded thereby and collide with his illegally parked vehicle.

[13] Whether the negligence of the driver of the approaching automobile, with the spotlight on it, was the sole proximate cause of the collision, or whether the negligence of that driver and the negligence of defendant in parking his truck and trailer were concurring causes were questions of fact for the jury. In the case of Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, it was said at page 101, 29 P.2d 781 at page 783: "When, as here, it is claimed that an injury was caused both by the continuing negligent act of one defendant and the independent concurring negligent act of a third person, many facts are to be considered in determining the provimate cause. * * * If the jury believed the evidence so introduced by the plaintiff, and from its verdict we must assume it did, this court may not say *as a matter of law* that the issue of proximate cause was not proved." (Italics added.)

The case of Mounts v. Tzugares, 9 Cal. App.2d 327, 49 P.2d 883, upon which appellant relies strongly, is distinguishable from the present case in that there was no collision with the parked truck and the automobile which struck plaintiff's automobile had been driven on the wrong side of the highway in passing the truck, when there was a space of 14½ feet on the right side of the highway between the truck and the center of the highway in which the automobile could have been driven. The case of McMillan v. Thompson, 140 Cal.App. 437, 35 P.2d 419, 421, upon which appellant also relies, is distinguishable from the present case. In that case an automobile, traveling in the direction in which the parked truck was headed and passing the truck by going on the left (wrong) side of the highway, was struck in the rear by another automobile, going the same direction, which was also on the wrong side of the highway, and the front automobile then struck the parked truck. The court held therein that the truck was not unlawfully parked, but stated, that if it be assumed that the truck driver was negligent in parking, it is not "to be expected that a driver will cross to the left half of a highway when the way is not clear, and then crash into a car ahead which is not stopped, but is moving in the same direction as himself."

[14-16] Another contention of appellant is that plaintiff's husband was guilty of contributory negligence as a matter of law. There was no direct evidence of unreasonable speed on his part, and it cannot be concluded as a matter of law that the damage to plaintiff's automobile was such as would not have resulted to such an automobile, traveling at a reasonable speed, when it collided with a standing truck and trailer of the size described herein. Appellant asserts that the husband was negligent because he proceeded while he was blinded by the light. He was not blinded until he was 50 or 60 feet from the point of collision, when he was suddenly confronted with danger, and from that time until the collision occurred, a period of approximately one second, he was acting in an emergency. It was a question of fact as to whether he should have stopped the automobile within that distance, and as to whether he exercised the care that a reasonably prudent person would have exercised in the same situation. Negligence on the part of plaintiff's husband would have been imputable to her, but it was a question of fact as to whether he was negligent.

[17] A further contention of appellant is that the court erred prejudicially in giving an instruction (of its own motion) which stated in part: "Contributory negligence is negligence *on the part of a person injured*, which, cooperating * * * with the negligence of another, helps in * * * causing the injury * * *." (Italics added.) This argument is that it was not contended that plaintiff, who was asleep at the time of the collision, was personally guilty of any negligence, and the jury must have concluded, in the light of a further instruction that the burden of establishing contributory negligence was upon defendant, that the defendant was required to prove that plaintiff was personally guilty of contributory negligence. Immediately following the first instruction above mentioned the court gave an instruction which was in part: "By contributory negligence as used in these instructions is meant the want of ordinary care or caution upon the part of plaintiff's husband * * *." Immediately following that instruction the jury was instructed that it could not "compare the negligence of the defendant, if any, with the negligence of plaintiff's husband, for it does not matter whether one was more negligent than the other * * *." Later in the in-

structions the court stated that if plaintiff's husband conducted himself in violation of any of certain sections of the Vehicle Code which had been read to the jury that such conduct constituted negligence as a matter of law. Further in the instructions the jury was instructed that if it found that plaintiff's husband was negligent, and that negligence contributed in any degree as a proximate cause of the accident the verdict must be for the defendant. Although the instruction, first above referred to, was in conflict with other instructions, as above noted, it was not prejudicially erroneous. It clearly appeared from the evidence, as well as from the instructions, that defendants were relying upon the alleged negligence of the husband and the jury no doubt understood that fact.

[18-20] Appellant contends further that the jury was not advised that if defendant's negligence was a remote cause of the accident plaintiff could not recover. The court gave the following instruction: "There is what is known in the law as the Doctrine of Intervening Cause. By this is meant an act performed by some party not under the control of either of the parties to an action, which comes later in point of time than an original act of negligence and which proximately causes the injury complained of. Thus, in this case, if you should find from the evidence that the defendant was guilty of negligence in parking the truck and trailer, still, if you find that subsequent to the parking of said truck and trailer, a third party, over whom the defendant had no control, committed an act of negligence ~~which proximately caused~~ and this third party's negligence proximately caused the collision between the automobile in which plaintiff was riding and said truck and trailer, and that such act of said third party was one not to be reasonably anticipated by the defendant as likely to occur and follow through from his act in parking said truck, then ~~I instruct you that~~ the original negligence, if any, of the defendant in parking said truck and trailer was a remote rather than a proximate cause of the injuries sustained by the said plaintiff, ~~and no recovery can be had by plaintiff for such injuries.~~" (Portions crossed out were deleted.) Appellant asserts that the instruction as given was a correct statement of the law but it should not have been modified and, as modified, it did not go far enough in that it did not advise the jury that under the circumstances therein stated the plaintiff could not recover. The instruction, prior to the modification as above shown, was a formula instruction and it was not error to omit from it the part shown in the modification. In another instruction the court correctly defined proximate cause. In another instruction the court stated that a violation of law was of no consequence unless it was a proximate cause of an injury. In another instruction it was stated that when the negligent acts of two or more persons contribute concurrently and as a proximate cause, each of such persons is liable in the absence of contributory negligence. In stating the issues to be determined, a further instruction was in substance that if the defendant was negligent and that negligence was "not a proximate cause of any injury to the plaintiff" the plaintiff was not entitled to recover. When the instructions are considered as a whole it appears that the jury was adequately instructed concerning proximate and remote causes. Appellant's further contention that the court erred in refusing to give another instruction, requested by him, which was in substance the same as the first instruction discussed in this paragraph, cannot be sustained.

[21, 22] Appellant contends also that the court erred in refusing to give two other instructions requested by him. One of them was that if the truck and trailer "were parked parallel with the curbing and with the right wheels within eighteen inches of said curbing," then defendant was not guilty of negligence. The other was that if the truck and trailer were "parked parallel with the curbing and with the right wheels thereof within eighteen inches of said curbing, and * * * a portion of the truck and trailer so parked extended upon the paved portion of the highway, and that under the circumstances as disclosed by the evidence it was not practical to park said truck and trailer off such * * * portion of said highway, the * * * defendant in so parking * * * was not guilty of negligence." Those requested instructions were based principally on the provisions of Section 588 of the Vehicle Code, St.1939, p. 1504. Of its own motion the court gave an instruction that Section 588 of the Vehicle Code provided in part that "no person shall park or leave standing any vehicle at the curb or edge of a State highway unless both right

wheels of the vehicle are within eighteen inches of the curb or edge of such highway." This instruction was in substance the same as the first instruction, referred to in this paragraph, which was requested by defendant; and it included the provision relative to parking within 18 inches of the curb which was in the other instruction requested by defendant. Since it is conclusively presumed, as hereinabove stated, that the collision did not occur within a business or residence district, the appellant's duties as to parking his vehicle were governed by Section 582 of the Vehicle Code and not by Section 588, which related to parking within 18 inches of the curb. The court properly gave an instruction embodying the provisions of said Section 582, as quoted previously herein. The defendant was negligent, according to the provisions of that section, if he parked on the highway at all at the place of collision under the circumstances here, irrespective of whether he parked the right wheels of his vehicle within 18 inches of the curb. The instruction as to said 588 was erroneous but was not prejudicial for the reason it was more favorable to defendant than a correct statement of the law under said Section 582.

The evidence was sufficient legally to support the judgment, and the jury was instructed adequately.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.




69 Cal.App.2d 6

**PEOPLE v. GOULDY.**

**Cr. 563.**

**District Court of Appeal, Fourth District, California.**

**April 25, 1945.**

**1. Assault and battery ⇐92**

Evidence indicating that defendant, in kitchen, assaulted his wife by striking her in the face twice, each time with sufficient force to cause her to fall, and that defendant was holding baby in one arm and struck his wife with other hand while holding wine bottle in it and disclosing that shortly thereafter parties left residence in their automobile, that later defendant's wife was seen lying in the road unconscious and defendant was stopping traffic, and that wife died without regaining consciousness, sustained conviction for committing an assault on the person of another by means of force likely to produce great bodily injury. Pen.Code, § 245.

**2. Criminal law ⇐1159(1)**

Where evidence presents a factual question for jury, its determination will not be disturbed on appeal.

**3. Criminal law ⇐517(4)**

Evidence was sufficient to establish corpus delicti of assault by means of force likely to produce great bodily injury, and justified reception of defendant's confessions or admissions into evidence.

**4. Criminal law ⇐517(4)**

Under the rule that defendant's confessions or admissions are not admissible in evidence until corpus delicti has been established, it is not necessary to establish corpus delicti beyond reasonable doubt or even by a preponderance of evidence.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Gordon Lee Gouldy was convicted of committing an assault on the person of another by means of force likely to produce great bodily injury, and he appeals.

Affirmed.

David E. Peckinpah and Harold M. Child, both of Fresno, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and James M. Thuesen, Dist. Atty., and Robert M. Wash and Clarence L. Kincheloe, Deputy Dist. Attys., all of Fresno, for respondent.

GRIFFIN, Justice.

On April 29, 1944, defendant and his wife, with their baby, drove in their car to a store in Fresno, and while there purchased some wine. On the return trip they quarreled. During this quarrel defendant slapped his wife. After they arrived back home, while in the kitchen, they quarreled again. Defendant struck her in the face and knocked her against the wall.

She fell to the floor. He helped her up and the quarrel continued. He again struck her, causing her to fall to the floor a second time. He picked her up once more. Shortly thereafter, the parties left the residence in their car and traveled west on Tulare Street. Later, defendant's wife was seen lying in the road unconscious. Defendant was stopping the traffic. A passerby assisted defendant in placing his wife in his car. She was taken to the hospital and within ten minutes died without regaining consciousness. She had a basal fracture of the skull. Defendant, after trial by jury, was convicted of violation of section 245 of the Penal Code, i.e., committing an assault upon the person of another by means of force likely to produce great bodily injury. Defendant appealed from the judgment that followed and from an order denying a motion for new trial.

It is first argued by defendant that the evidence is insufficient as a matter of law to support the verdict and judgment. The main argument on this subject is that the corpus delicti was not established independently of the statements of the defendant, citing such cases as People v. Lamson, 1 Cal.2d 648, 36 P.2d 361; People v. Bowers, 79 Cal. 415, 21 P. 752.

The medical testimony shows that there was a small laceration on the back of the head of the deceased and burn-like injuries on her back and certain bruises on her face; that those bruises "while they could have been caused by falling out of an automobile, also could have been caused either by a fist or blunt instrument of some kind." The autopsy surgeon, after describing in minute detail the results of his examination, testified that the cause of death was a "basal fracture of the skull with intracranial hemorrhage of subdural type. Multiple abrasions and contusions * * *"; that the injuries disclosed were of several different types; that there were abrasions, contusions and "lacerations where the tissues were torn, and there were definite friction type burns of the skin." He testified that "In taking these all together, I don't think anyone could say that they all occurred practically simultaneously" and in his opinion the bruises on the face were caused more than an hour before death. He testified that the immediate cause of death was a basal fracture of the skull caused by force exerted over the vertex or top of the skull and that he found no friction burns on the scalp at the point where the force had been exerted; that he found no sand, straw or foreign substance in the hair; that in his opinion the fracture occurred more than 35 minutes before death and that the deceased would not necessarily have been rendered unconscious by the blow that caused the fracture.

A deputy sheriff testified that defendant stated in his presence immediately after the death of his wife that, while in the kitchen, he had hit his wife in the face twice, knocking her down each time. When asked the question whether or not defendant stated he used his hand or fist the witness answered "At one time he admits using the fist. The second time he got up on his feet and illustrated by holding the baby in his left arm. Quoting him, 'I had a bottle of wine in my right hand. I took a drink. She said something. I seen red. I hit her again.' Right there he said, 'What the hell am I saying? I must have hit her with my fist. I didn't hit her with the bottle.' We let it go at that. 'She then fell down the wall, sliding down the wall.' * * * 'The only place she could possibly have hit the back of her head was the edge of the mop board.' He was asked if there was any blood there. He thought for a little bit. He said, 'If there had been, if there were any blood it must have come from her nose or mouth as her lips were swollen.' "

Another deputy sheriff testified in relation to the possible use of a wine bottle, that defendant said " 'I was standing with Jimmie in this arm, and I was just going to take a drink of wine when she called me a ——— ———' and he says, 'I hit her * * * But I didn't hit her with the bottle I don't think.' * * * "

Defendant testified that after purchasing some wine and whiskey at the store, they drove around in the park; that his wife got out of the car, drank some wine, and spilled some of it on her dress; that on the way home they had a quarrel and she turned off the switch and defendant hit her across the mouth with his hand; that when they arrived home and while in the kitchen they became angered again and he slapped her and knocked her up against the wall; that she slid down to the floor; that he helped her up; that she cursed him and he thought she was going to scratch him so he struck her again with the back of his hand and she fell to the

floor; that afterwards her mouth was swollen and bruised; that she decided to go to Seattle to her parents; that she picked up her suitcase and walked out to the car with him; that as they were driving to town, at a speed of approximately 35 miles per hour, his wife suddenly said that she was going to commit suicide; that she opened the car door and jumped out; that he flagged down two passersby and took his wife to the hospital as fast as he could.

Defendant's grandmother testified that as Mrs. Gouldy was leaving the house after the struggle or fracas in the kitchen, she walked out to the car; that she was crying and that she, the grandmother, asked the defendant what was the trouble and that he replied "I am not telling nothing"; that after Mrs. Gouldy's death defendant called her to the hospital. She then testified that immediately thereafter, about 1:30 A. M. she returned to the home; that although there was no blood on the kitchen floor she mopped up the floor and scrubbed it anyway.

There was testimony that at least on one other occasion Mrs. Gouldy jumped or fell from a moving car while she was in an intoxicated condition.

Defendant produced expert medical testimony, based upon the report of the autopsy surgeon and other facts testified to at the trial. This opinion evidence was to the effect that the deceased could have received all of the injuries indicated as the result of a fall from a moving car.

[1, 2] From the foregoing testimony the jury was justified in finding that the defendant, in the kitchen, assaulted his wife by striking her in the face twice, each time with sufficient force and violence to knock her up against the wall and that as the result of those blows she fell to the floor. From defendant's own statement, it might be reasonably determined that defendant was holding the baby in one arm and struck his wife with the other hand while holding the wine bottle in it. From this evidence, when considered in connection with the medical testimony of plaintiff, the jury could have been justified in finding that defendant struck the deceased with the bottle, notwithstanding his denial of that fact. While it is not entirely necessary to support the verdict, it would appear that the jury might have been justified in finding that the basal fracture of the skull which actually caused the death of the deceased was inflicted by the defendant at the time of the assault in the kitchen, or it might well have determined that the fracture was due to a fall from the moving automobile. This was a factual question for the jury and its determination will not be disturbed on appeal. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301.

[3, 4] Originally, the defendant was charged with the crime of murder. He was held to answer and prosecuted on a charge of assault by means of force likely to produce great bodily injury. Forms of verdicts were given to the jury based on the charge set forth in the information as well as the included charge of simple assault. The question here presented for the jury was not whether an assault was committed, for such was admitted by the defendant in his testimony in open court, but the question was whether or not the assault was one by means of force likely to produce great bodily injury. The jury was amply justified in its finding that it was. The evidence was sufficient to establish the corpus delicti. The reception of defendant's confessions or admissions into evidence was not error. It is not necessary for the purpose of satisfying this particular rule to establish the corpus delicti beyond a reasonable doubt or even by a preponderance of the evidence. People v. Jones, 123 Cal. 65, 55 P. 698; People v. Dawes, 37 Cal.App. 2d 44, 98 P.2d 787; People v. Kelly, 70 Cal.App. 519, 234 P. 110; People v. Clark, 70 Cal.App. 531, 233 P. 980. The evidence is sufficient to support the verdict.

Judgment and order affirmed.

BARNARD, P. J., and MARKS, J., concur.

**In re MARKHAM'S ESTATE.**

**CHRISTIAN SCIENCE BENEVOLENT ASS'N v. PALMER. ***

**Civ. 14773.**

District Court of Appeal, Second District, Division 3, California.

April 20, 1945.

**Hearing Granted June 18, 1945.**

**1. Wills ⇐684(5), 729**

Under testamentary trust providing that taxes and other administration expenses should first be paid from gross income or principal and that certain annuities to members of family and others should be paid from net income as soon as funds were available, annuitants were entitled to payment in full, even though income for certain years may have been insufficient to cover annuities after payment of taxes and expenses.

**2. Trusts ⇐12**

The primary purpose of a spendthrift trust is to provide security for beneficiary by protecting him against consequences of his mistaken judgment or improvidence.

**3. Wills ⇐684(5), 729**

Under testamentary trust providing that taxes and other administration expenses should first be paid from gross income or principal and that certain annuities to members of family and others should be paid from net income as soon as funds were available, testator intended that members of family and other annuitants would have first claim upon estate, and where estate was sufficiently large so that ample funds were always available, it was duty of executrix to pay annuities in full as they fell due, even though net income in certain years was insufficient for that purpose.

**4. Wills ⇐452**

Any inconsistency in provisions of will as to whether payments for wife's support and annuities should come only from net income should be resolved in favor of provision for support and maintenance for wife, relatives and close friends.

**5. Wills ⇐452**

A construction of will favorable to relatives of the blood will be preferred to one which favors strangers.

**6. Wills ⇐684(6), 729**

Under will providing that certain annuities to members of family and others should be paid from net income and that all bequests were payable as soon after testator's death as funds were available, testator was deemed to have desired annuities to be paid in full in the later as well as earlier stages of administration, even though net income for that purpose was insufficient in some years.

**7. Wills ⇐684(5), 729**

Provisions of will creating testamentary trust and providing that taxes and administration expenses might be paid out of principal if trustee should deem it necessary or advisable, and that surplus income to be accumulated for remaindermen should be income not applicable under other provisions, indicated testator's intention that annuities specified in will should be paid in full even though net income in certain years was insufficient for that purpose.

**8. Trusts ⇐331**

Where claimant filed objection to account of testamentary trustee based on deficiency in annuity payments under trust, and it appeared that no net income was on hand with which claimant could have been paid, order overruling objection was not res judicata of question whether under will annuitants were entitled to be paid in full.

**9. Judgment ⇐562, 731**

A judgment failing to decide matters in issue on the merits does not operate as a bar or estoppel in another action.

**10. Judgment ⇐570(1)**

A judgment of dismissal is not a bar.

**11. Executors and administrators ⇐513(9)**

Orders settling accounts of executrix in years when annuities under testamentary trusts were not paid in full because net income available was insufficient were not res judicata of right to recover deficiencies out of future income, where accounts were not contested and no question as to interpretation of will with respect to annuity payments was presented.

**12. Judgment ⇐735**

An interpretation of will in proceeding where no issue is presented as to its meaning does not bar subsequent decision of questions of interpretation.

* Subsequent opinion 168 P.2d 669.

**13. Limitation of actions ⇐103(2)**

A claim for arrears in annuities under testamentary trust was not barred by limitations in absence of any showing of repudiation of trust, since statute of limitations does not commence to run against beneficiary until there has been a repudiation of trust.

**14. Wills ⇐743**

The right to receive unpaid annuities under testamentary trust was a property right not personal to annuitant and hence was transferable to beneficiary under annuitant's will.

**15. Wills ⇐734(6)**

Where annuities under testamentary trust had not been paid in full as required by proper construction of will, interest was payable on annuity balances from respective dates when they accrued.

Appeal from Superior Court, Los Angeles County; Wm. R. McKay, Judge.

Proceeding in the matter of the estate of William F. Markham for the construction of a testamentary trust, wherein the Christian Science Benevolent Association filed a petition for an order requiring Harlan G. Palmer, Sr., the trustee, to pay installments of an annuity which were in arrears. From a judgment denying the petition, the petitioner appeals.

Judgment reversed.

Lindstrom & Bartlett, of Los Angeles, for appellant.

Harlan G. Palmer, Sr., and Guy S. Pratt, both of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal by the successor in interest of a life beneficiary from a judgment construing a testamentary trust and denying a petition for an order requiring the trustee to pay installments of an annuity which are in arrears.

William F. Markham died testate April 30, 1930. He left the family home and furnishings to his wife during her lifetime, with remainder to the children of Harlan G. Palmer, Sr., and Ethelyn Hunkins Palmer. The balance of his estate was left to his wife, as trustee, the pertinent terms of the trust being as follows:

"From the gross income received or derived from the trust estate, or from the principal thereof, if the Trustee deem that necessary or advisable, there shall first be paid and discharged all taxes, assessments, costs, attorney fees, charges and expenses incurred in the care, administration, distribution and protection of the trust estate and the protection of this trust and its defense against legal or equitable attack by any person, both during and after probate administration upon my estate.

"From the net income of said estate, shall be by said Trustee paid, the following: [(1) To a daughter, Maud L. O'Brien, $250 a month during her natural life; (2) to a son, Leigh H. Markham, $250 a month during his natural life; (3) to a sister, Louise Markham, $100 a month during her natural life; (4) to 'a friend and chum, Ben S. Sprague, now residing with me,' $250 a month during his natural life; (5) to his gardner, Ed Jenkins, the sum of $150 a month while employed by the executrix or trustee; (6) to a niece, Isa Markham, $150 a month during her natural life; (7) to his friend and foreman, E. S. Roe, $150 a month during his natural life.]

"(8) To my wife, Blanche C. Markham, such part of the remaining income as she may desire to use for any or all of the following purposes: for the maintenance, care and protection of the homestead; for her personal pleasure, support, maintenance and enjoyment of the best of clothing, automobiles, travel and luxuries contributing to her happiness and comfort.

"All of the above bequests are payable as soon after my death as funds are available.

"I direct that my said Trustee shall accumulate, during her natural life, any income from trust moneys or trust property not applicable under any of the trusts, powers, or provisions herein contained, by investing the same, and all the resulting income thereof, from time to time, in or upon any such stocks, funds or securities as are hereinbefore authorized for investments, for the benefit of the children of the union of Harlan G. Palmer, Sr., and Ethelyn Hunkins Palmer, share and share alike.

"Upon the death of my wife and Trustee, Blanche C. Markham, I direct that Harlan G. Palmer, Sr., shall succeed her as trustee and that he shall hold of my estate such part as may be approved by court as ample to provide income for the payments directed in subdivisions one (1) to

(7) in this 'Fourth' clause, and shall distribute, free from this trust, the balance of the estate, together with any undistributed net income, to the children of the union of Harlan G. Palmer, Sr., and Ethelyn Hunkins Palmer, share and share alike.

"Upon the completion of all the trusts mentioned in clauses one (1) to eight (8) in this 'Fourth' clause, I direct that the remainder of my estate, together with any undistributed net income thereon, be given free from this trust, to the said Palmer children, share and share alike."

There are four children of the union of Harlan G. Palmer, Sr., and Ethelyn Hunkins Palmer. They are not related to the testator.

Blanche C. Markham served as executrix until her death in August, 1937, when she was succeeded by the public administrator, as administrator with will annexed. He served until the estate was distributed to Harlan G. Palmer, Sr., the present trustee, in 1940. In the years 1933–1936, inclusive, Louise Markham was paid on her annuity $1420 less than she would have received at the rate of $100 per month. She died on or about August 12, 1940. By her will she left her claim against the trustee in said amount to appellant, Christian Science Benevolent Association, and certain individuals, and appellant now owns the claim by virtue of assignments from the other legatees and a decree of distribution in the Louise Markham estate.

Alleging the foregoing facts, appellant filed a petition May 5, 1944, for an order directing the trustee to pay the arrearage of the Louise Markham annuity, with interest. The trustee answered, asserting the following defenses: (1) that the net income in each of the years 1933–1936 was insufficient to pay the annuities in full and that the deficiency in annuity payments for a given year did not carry over as a charge against income received in future years; (2) that he then had no funds of the trust with which to pay the claim or any part thereof; (3) that each of the annual accounts of the executrix in the years when the deficiencies occurred was approved, and constituted an adjudication that Louise Markham had received in each such period all she was entitled to under the terms of the trust; (4) that the issues here presented were tried and determined against the estate of Louise Markham when her executor filed certain objections to the first account of the present trustee; (5) that petitioner's claim is barred by the statute of limitations, and (6) that the trust as to the annuities was a spendthrift trust and that any sums which might have been due or unpaid to Louise Markham were not subject to disposition by will.

After a hearing in the instant proceeding, the court made findings and conclusions sustaining each of the several defenses. There were two conclusions, and findings of the same import, which illustrate the court's understanding of the will. They read: (1) "That all payments of annuities which the will of William F. Markham, Deceased, provided should be made to M. Louise Markham during her lifetime, were made to her, and that there were no sums due, or owing, or unpaid to her at the time of her death." (2) "That by reason of the fact that the Will of said William F. Markham, Deceased, does not make any provision for having any deficiency in annuity payments arising during any current account year made a charge on income subsequently received, future net income from said trust estate cannot be charged with any prior deficiency." The first conclusion is broad enough to include the second. The court was evidently of the opinion that the annuities were payable only out of net income, that the income was to be computed annually, and that the annuities should be reduced if the net income for any year was insufficient to pay them in full, that Louise Markham received in each year her full proportion, and that deficiencies in any year could not be charged against income received in subsequent years.

It is appropriate at this point to state the question which is the real basis of the controversy between the annuitants and the remaindermen, namely, whether it was the intention of the testator that the annuities would be paid in full, in all events, or that they would be paid in part or in full, only from such income as might remain after payment from gross income of "all taxes, assessments, costs, attorney fees, charges and expenses incurred in the care, administration, distribution and protection of the trust estate and the protection of this trust and its defense against legal or equitable attack by any person, both during and after probate administration upon my estate." This question arose at the inception of the administration and it has

been a problem of the executrix, the administrator, and the trustee in every accounting which they have made. It has been directly or indirectly presented for decision upon several former occasions but never decided. There has been need for a comprehensive interpretation of the will by the court ever since the administration was commenced in 1930. No instructions in the matter were ever applied for or given to the executrix, the administrator or the trustee. Ever since 1933 an actual controversy has existed between two of the annuitants, Leigh Markham, a son, and Louise Markham and her estate on the one hand, and the remaindermen on the other. Leigh Markham's claim is not asserted in the instant proceeding but, like the Louise Markham claim, it is for the unpaid balance of an annuity. In the years 1933-1936 the executrix failed to pay the annuitants in full; in some calendar years they were paid 70 percent, in others 50 percent of their respective annuities. The excuse for failure to pay them in full, as reported to the court in the annual accountings, has been that the net income was insufficient to pay any greater portion of the annuities than had been paid. They had been paid in full in the years 1930, 1931 and 1932 and they have been paid in full ever since 1936. During all of this time it has remained an open question whether the several monthly payments could be made only from such income as remained after the payment of taxes and all other expenses and charges enumerated in the paragraph of the will first hereinbefore quoted. As a consequence of the failure to have this question decided in the probate court, the course that has been followed has been illogical and inconsistent, in that in some years the annuities have been paid only in part, while in other years they have been paid in full although it was necessary to pay taxes and other charges out of principal. To illustrate: on the death of Mr. Markham a liability attached for state and federal inheritance and estate taxes and the estate was confronted with the ordinary and, as it developed, extraordinary expenses of administration. These materially reduced the corpus of the estate. The state inheritance tax alone amounted to more than $146,000. A larger sum than this was borrowed upon real estate security for the payment of this tax and other expenses and there still remains unpaid of this debt a balance of some $124,000. The first borrowing was of $150,000. It was paid down to $125,000 but was increased by the public administrator to $150,000 in order to pay the annuities. The trustee has not expressly consented to the uses that have been made of capital nor has he registered objection, although he has considered that he has had grounds for objection. His position was stated to the court in the instant proceeding as follaws: "In other words, the principal of the estate has shrunk a total of $250,000 from date of death, due to expenditures made under the provision of the will for administration, taxes, the protection of the body of the estate, the defense of the will and litigation, and all other expenses, plus the sums which were, I contend, unlawfully paid or at least paid against the provisions of the will as annuities to the annuitants named in the will; * * * the annuitants are owing the estate, if there is any such thing from the standpoint of owing, rather than the estate owing the annuitants. That is the statement of our position without argument on it." This has been his position whenever application has been made to the court for payment of the Louise Markham claim. In the accountings that have been before the court upon these occasions, it has never appeared that there was net income on hand for use in the payment of annuities and for this reason the court in each instance has declined to order the claim paid. It appears to have been assumed during the administration of the executrix that she had a broad discretion in the matter of the payment of annuities—that she could pay them in full out of income or that she could use the income for other purposes, even to the extent of depriving the annuitants of from 30 to 50 percent of their full payments. At times, as we have stated, she paid the annuities in full even though other charges and expenses necessarily had been paid from principal. While the trustee has paid the annuities in full ever since he took control, it has always been with the reservation that such payments were and are discretionary with him until the principal has been restored to its original value and there is enough net income to make annuity payments.

[1-3] We think it is quite clear from the will that Mr. Markham intended that the members of his family and other annuitants would have first claim upon his estate. He made a special provision for payment of the annuities from the com-

mencement of the administration. After listing the annuities, including the provision for his wife, he directed that "All of the above bequests are payable as soon after my death as funds are available." The unmistakable meaning of this provision is that he wished the payment of annuities to be commenced as soon as possible. He had in mind the period for which the estate would be in administration and the direction was intended to apply to that period. He must have known that if inheritance taxes and all of the ordinary and extraordinary expenses of administration should be paid out of income before the annuitants received anything, it might be several years before their payments would commence. This was the very thing he did not intend to have happen and his direction that they should be paid as soon after his death as funds were available meant that they were to be paid by the executrix as soon as she could lawfully pay them. In the eighth paragraph provision was made for the "personal pleasure, support, maintenance and enjoyment" etc. of Blanche C. Markham, wife of the testator, but she was placed in no better position than the other life beneficiaries. Her support, like that of the others, would have been payable out of net income, except for the provision that it was payable as soon as funds were available, and other provisions to be hereafter mentioned. Clearly there was no intention that the widow or the other life beneficiaries should go without support unless it could be provided out of net income. The other annuities also were intended to provide support and maintenance. While these words were not used, the purpose was plainly expressed. The trusts were spendthrift trusts, made so by an unusually comprehensive provision against encumbrance or alienation. The primary purpose of a spendthrift trust is to provide security for the beneficiary by protecting him against the consequences of his mistaken judgment or improvidence. It was said in Estate of DeLano, 1944, 62 Cal.App.2d 808, 814, 145 P.2d 672, 675: "In the absence of any other purpose stated in a will or other instrument creating a spendthrift trust, it is to be presumed that it was created for the maintenance and support and, in some cases, the education of the beneficiaries." The estate was appraised at $1,826,051.42; there was no substantial amount of indebtedness; the first sums received by the executrix could have been paid to the annuitants without preventing the payment of the other obligations of the estate. Mr. Markham wanted the payments to commence as soon as possible, whether the money on hand belonged to principal or to income. Ample funds were always available and it was the duty of the executrix to pay the annuities in full as they fell due. The public administrator paid them in full during his administration, although it is conceded that due to other uses of the income the annuities were sometimes paid, at lease in part, out of principal.

It may be noted in passing that when the estate was distributed to the trustee in 1940, Louise Markham and Leigh Markham sought to have their claims for deficiencies ordered paid; they sought an interpretation of the provision which called for the payment of the annuities as soon after the testator's death as funds were available, and they alleged that there were funds on hand from which the claims could be paid. The trustee answered, denying that there was then any net income, and alleging that sums had been paid from principal which should have been paid from income in an amount of more than $280,000. No interpretation of the annuity provisions of the will was given by the decree of distribution and the petition of Leigh Markham and Louise Markham was denied without prejudice. This could have been done, logically, only on the theory that no funds were shown to be available at that time and that the court could order the sum paid at some future time if funds became available.

Although it was the duty of the executrix to pay the annuities in full in each year, it is necessary to see whether there is anything in the will which would prevent the payment of deficiencies which had occurred in former years. We find nothing which stands in the way of making up arrears. At the trial respondent relied upon Estate of Platt, 1942, 21 Cal.2d 343, 131 P.2d 825, in support of his contention that the income for each year must be considered separately, without any carrying over, and he says in his brief that the case is squarely in point. In Estate of Platt it was held that a deficiency of income payable to the widow in a given year was not payable out of income in future years because the testator intended that each annual accounting period should be treated separately. That was the plan of the Platt trust. The widow was to receive $250 per month from income, then the son

was to receive up to $250 and any sum above $500 was to be equally divided between them. This necessitated periodic computations and divisions of total income. But the scheme of the Markham will is entirely different; the annuities were to be paid monthly and there is no provision for the division of all of the net income periodically or otherwise. The statements in Estate of Platt, supra, upon this point, are not applicable.

There is nothing in the will to prevent the payment of arrears in the annuities. The trustee contends that the annuities, including provision for the wife, were made payable only out of net income, except when he exercises the discretion given him to pay them out of principal. This is undoubtedly a correct construction of one of the provisions but that provision, we think, is not controlling. It has to be construed with the one we have first discussed and which we regard as intended to charge principal, as well as income, with the eight specific bequests to the annuitants and the wife.

[4, 5] If the two provisions should be in conflict the one which provided support and maintenance for the wife, the relatives and close friends should prevail. A construction favorable to relatives of the blood will be preferred to one which favors strangers. Estate of Owens, 1944, 62 Cal. App.2d 772, 775, 145 P.2d 376; Estate of Boyd, 1938, 24 Cal.App.2d 287, 289, 290, 74 P.2d 1049; Estate of Hartson, 1933, 218 Cal. 536, 539, 540, 24 P.2d 171; Estate of Wilson, 1924, 65 Cal.App. 680, 689, 225 P. 283.

[6, 7] The direction to the executrix to commence the payments promptly should be given effect throughout the administration of the trust. Mr. Markham must be deemed to have wished the annuities to be paid in full in the later stages, as well as in the earlier stages, of the administration, unless the will evidences a different intention. We believe the general provisions for administration of the trust tend to prove that he wished the annuitants and his wife to be paid in all events. The only provision in the will for disposition of surplus income reads as follows: "I direct that my said Trustee shall accumulate, during her natural life, any income from trust moneys or trust property not applicable under any of the trusts, powers, or provisions herein contained, by investing the same, and all the resulting income thereof, from time to time, in or upon any such stocks, funds or securities as are hereinbefore authorized for investments, for the benefit of the children of the union of Harlan G. Palmer, Sr., and Ethelyn Hunkins Palmer, share and share alike." This indicates that while Mr. Markham expected that the income would be more than sufficient to pay the annuities in full and to provide amply for his widow, he nevertheless did not intend that income should be accumulated and invested for the benefit of the remaindermen until the annuities had been paid in full. Nor did he intend that any accumulated income, or even principal, should be distributed by the trustee to the remaindermen except, as the will stated, "upon the completion of the trusts mentioned in sections one (1) and eight (8) of this fourth clause" etc. Furthermore, we think the paragraph first quoted in the opinion is significant; taxes, assessments, costs, attorney's fees and other carrying charges and expenses were to be paid out of gross income, but if the trustee should deem it necessary or advisable, he was authorized to pay them out of principal. Charges and expenses such as those enumerated would have to be paid out of the principal if no income was available to meet them. The testator therefore contemplated that the principal would be resorted to if it should be deemed necessary or advisable to do so in the circumstances, even though there was income on hand which could be applied to such payments. It is obvious that he was not giving the trustee authority to pay taxes, etc., out of principal when income was available, in order to preserve the income for the payment of future taxes, etc. It would be "necessary" to pay them out of principal whenever the income was insufficient, and it would become "advisable" to pay them out of principal only in the event the money was needed to pay the annuities and to provide support for the widow. These several provisions indicate that the testator did not intend that the annuitants should suffer by reason of the depletion of income due to the payment of sums which, for the protection of the estate, would have to be paid from principal if the available income should prove insufficient. The last-quoted provision, especially, appears to have been intended to serve as a protection to the annuitants, and with other mentioned provisions, indicates to us that the testator was more concerned that the annuitants should be paid in full than that the princi-

pal should be preserved intact for the benefit of the remaindermen.

Appellant cites Estate of Emerson, 1934, 139 Cal.App. 571, 34 P.2d 800, 801, upon the point of construction as "directly in point and controlling on the case at bar." The terms of the Emerson trust did not resemble those of the Markham trust so closely as to justify the statement that the decision in that case is controlling, but the trusts were substantially the same in important particulars, namely, the annuities were to be paid out of income, were for support and maintenance, and were to be paid during administration of the estate in probate. In the Emerson trust, annuities were to be paid monthly to two beneficiaries and it was provided that like amounts should be paid them by the executors "during the probate of my estate, which allowances are for their maintenance and support." No provision was made in the trust for the payment of annuities out of the corpus, which was devised over without limitation. The income became insufficient to pay the annuities and the annuitants sought payment of the deficiencies out of corpus. In affirming an order directing that the annuities he paid from corpus, the learned author of the opinion said, 139 Cal.App. at pages 574, 575, 34 P.2d at page 802: "It is perfectly manifest from a reading of the will and codicil that it was the main and primary concern of the testatrix to take care of the two annuitants during their respective lives. The share of the remaindermen was postponed until the annuitants had been cared for during their lives. It is clear from a reading of the will and codicil that the testatrix was more solicitous about the welfare of the two annuitants than she was of the remaindermen. Her intent in this connection is plainly indicated by the terms of the codicil, for her executors were directed to pay such annuitants the amounts provided, during the probate of her estate, for their maintenance and support. There is no provision for the enjoyment of the corpus by the remaindermen until after both these preferred annuitants are dead. In short, the entire instrument shows conclusively the intent of the testatrix was that the annuitants should be maintained and supported, regardless of the source from which the funds for that purpose should come. There was no intent indicated to keep the corpus intact for the remaindermen. Comstock v. Herron, 6 Cir., 55 F. 803; Mulcahy v. Johnson, 80 Colo. 499, 252 P. 816." These statements are directly applicable to the provisions of the Markham will. The testator could scarcely have felt the same concern that the large principal of the trust should be kept intact for the remaindermen as that the annuitants should have the security afforded by the modest payments from his estate. We believe his wishes were clearly expressed. No doubt he would have been more explicit if he had suspected that the income would ever be insufficient to pay the annuities. Excluding the provision for the wife, the others amounted annually to less than one percent of the appraised value of the estate. It was not an unproductive estate; it was alleged by appellant, and not denied, that the gross income for 1943 was $111,101.66. We conclude, therefore, that the court was in error in holding that the annuity payments are payable only out of income.

[8] The next point to be discussed is the finding that the questions here in issue were decided adversely to the claims of appellant by an order overruling objections of the executor of the will of Louise Markham to the first account current of the present trustee. That account was filed April 21, 1942. The executor filed objections on behalf of the Louise Markham estate, setting forth the bequest to Louise Markham of $100 per month during her natural life and quoting the provision of the will that "all of the above bequests are payable as soon after my death as funds are available." It alleged a total deficiency of $1420 in payments which fell due in 1933–1936, and that there were funds on hand to pay the amount. The trustee filed an answer, admitting the alleged deficiency and alleging that the net income had been insufficient to pay more than had been paid. The answer set out the first paragraph of the will herein quoted and alleged that the principal had been depleted in a net amount of over $125,000 by payments that should have been made from income. The matter came on for hearing on the account and the objections before Florence M. Bischoff, court commissioner in probate, sitting as a judge pro tempore, and an order was made reciting the fact of the hearing and reading in part: "Objections having been presented the court, after hearing the evidence, overruled said objections, and findings being hereby waived, settles and approves said account in the manner following: [Here an order settling the ac-

count and allowing the trustee $1500 for services rendered]." It is this order which the trustee claims constituted a construction of the will against the present claims of appellant. It is contended that the objections to the account and the answer called for a construction of the will, and that the order was a decision upon the merits. Appellant contends, to the contrary, that the trustee claimed only that the principal had been depleted, that annuities had been paid out of principal and had thereby been overpaid, that in any event there had been no net income in the current year, and that no funds were on hand from which the sum claimed could be properly paid. It is pointed out that no evidence was taken except to prove the account, and that the hearing ended when it developed that the account showed no income on hand; and it is insisted that there was no decision on the merits, that no interpretation of the will was attempted, and that the order amounted to no more than a dismissal of the executor's petition for payment of the claim. The contention that the order did not constitute an interpretation of the will must be sustained. This appears from the order itself and from the testimony that was given as to the proceedings before the judge pro tempore.

Considering first the order itself, it is apparent that if the position of the trustee on the appeal is correct, the order amounted to a decision against the executor of Louise Markham's will as to all of the grounds or reasons which he might have relied upon in support of the validity of his claim and his right to have it paid, and it also would have the effect of a judgment establishing, by implication, all of the grounds and reasons which would have supported a decision in favor of the trustee. So construed, it would be an interpretation of the will which would deny the right of the annuitants to ever receive more than their proportionate shares of the income that remained in a yearly accounting period, after all other charges and expenses had been paid. And since there were no findings, and all intendments are in favor of the correctness of the order, it might even be construed as a decision favorable to the trustee upon the defense of the statute of limitations. We cannot believe that the able and experienced commissioner in probate who sat as judge pro tempore would have stated her decision of matters so important and so involved in the form of a mere recital that the objections had been overruled, nor can we believe that the able counsel on either side would have waived findings if the decision had involved an interpretation of the will. When the order is considered by itself, it is more reasonable to believe that it was intended as a dismissal of the objections than as an interpretation of the will. If there should be doubt about this, the extrinsic evidence which was received would overcome it.

In the trial of the instant proceeding, appellant sought to meet the defense of res judicata by proof that the 1942 hearing resulted in a dismissal, and not a decision on the merits. As the record did not disclose whether there had been a trial and decision of the same issues as those raised in the present proceeding, the court properly received evidence as to the proceedings had upon the former hearing. The attorney, Stanley F. Hahn, who represented the executor of the Louise Markham estate, testified as to his recollection of the proceedings. He testified that prior to the 1942 hearing two applications had been made for payment of the same claim, and that they had been denied without prejudice. He also testified:

"A. To the best of my recollection, the matter took place in Miss Bischoff's office, and I believe Miss Bischoff, Judge Palmer and Mr. Thompson and myself were present. I had filed my petition some time before, as is shown in the file and as Judge Palmer related, and I alleged that there was sufficient income available to pay these deficient annuities. Upon the examination of the account at that time by Miss Bischoff and by Judge Palmer and myself, it was determined that there was not any net income available, there was no net income—I shouldn't say available. There apparently was no net income, and I have no reason, no facts, no evidence of any kind to believe that that wasn't a very proper accounting. It is my recollection that Miss Bischoff therefore took the position that since under the terms of the will annuities were to be paid from net income, that there wasn't money available to pay these and therefore the question wasn't properly raised at that time. That is, in essence, my recollection of her ruling at that time.

"Q. Was that, as you recollect, the sole basis of the decision, Lieutenant? A. My recollection is that Judge Palmer mentioned other facts that were in his petition, which

I do not recall if they were at this time, but that that was the basis, that was the way I understood the basis of the court's ruling.

"Q. Then, will you state whether or not you understood that this denial of your petition was a denial with or without prejudice? A. I took it certainly to be a denial without prejudice, because the merits of the matter, the legal issue of whether our clients were entitled to these delinquent annuities, had never been fully presented to the court, never been presented at all, to my knowledge.

"Q. Will you state whether or not that was the basis and reason for a waiver by you, if there was such a waiver, of written findings? The order recites findings were waived. A. I think that must have been why I waived findings at that time.

"Q. May I ask you, if it had been in your understanding a final and conclusive determination on the merits, would you have waived findings? A. No, I would not have."

Miss Bischoff testified in part:

"When Lieut. Hahn spoke to me, asked me if I remembered it, and I looked at my notes before I knew that there had been an order, I had an idea there had been a stipulation and the order was made by stipulation; that was my first recollection, but of course my notes didn't show that. I looked it up, and I had written down just 'Objections overruled and account settled'; and I have no further recollection than that, except that I know it was a short hearing and there were no briefs presented to me, as far as I know, and I didn't look up any law, because I made the decision right there.

"Q. By the Court: What was the nature of the hearing, Miss Bischoff? A. It was on the hearing of the account; and the objections to the account at the time, as I remember it, were mostly due to the fact that there were no funds available, which there were not, and I think it was practically conceded at the time, and that is the reason I thought it was a stipulated judgment, a stipulated order; but I don't remember, there may have been testimony or law quoted with regard to the matter of the statute of limitations, but I have no recollection of that at all, not at all, and I didn't have any on my little notes. I had destroyed my large notes and only had my little notebook, and it said nothing whatever about that or about any of the testimony that was taken; and, as I said, there have been so many things since then, I am very sorry that I can't recollect anything more than that, except it was a short hearing in the little room.

"Q. By Mr. Bartlett: May I ask, Miss Bischoff, if there was any practice or custom on your part, when sitting as judge in those matters where there was a decision on the merits, to make a notation of that fact in the order? A. I usually did, I usually did on my own.

"Q. By the Court: Notes? A. Notes.

"Q. By Mr. Bartlett: From the absence of that notation in this order, would that suggest anything to you with reference to the merits? A. Of course, we all slip. I couldn't say, because while it is my custom—was always my custom to make notes, probably fuller notes than some of the others did, that may have been a day when I did not. I can't say definitely, because I don't recollect it.

"Mr. Bartlett: Cross examine.

"Examination by the Court: (Q.) In other words, when the matter came before you, Miss Bischoff, it was on a hearing on whether or not you should approve the account? A. Yes.

"Q. And certain objections had been filed to that account? A. Yes; precisely.

"Q. You approved the account and overruled the objections? A. That is all I did. My notes show that.

"Q. Other than that—A. I don't remember anything. The only thing I can say is that if there had been any legal points involved, I wouldn't have made my decision, I know that, I wouldn't have made my decision right then and there, because I always read the law, I always took it under submission and read the cases and looked into it. I would never have made a decision without looking up and reading the cases; that has always been my custom, I am quite certain I would have done that. But I can't say that there was nothing said about it, because I don't know, I don't remember it."

In the trial of the instant proceeding it was stipulated that the trustee had made before the judge pro tempore in the former hearing a statement covering the same information that he gave in the hearing under review as his opening statement. The statement was a narration of the history

of the administration of the estate by the executrix and the trustee and it was stated that when Louise Markham was not paid in full it was because there was insufficient net income during the several periods, and that it was the position of the trustee that even when the annuities were being paid in full by the executrix and by the public administrator, they were paid in violation of the provision of the will that they should be paid from net income. The finding that the order made in the 1942 proceeding is a bar to the present proceeding cannot be sustained. It clearly appears from the extrinsic evidence, which is not inconsistent with the recital in the order, that the inquiry went only far enough to develop the fact, which apparently was shown by the account, that there was no net income on hand which could be ordered paid to the claimant. It did not become necessary for the court to decide whether it would be proper to order the claim paid if it should be shown at some future time that funds were available. The application was made for payment out of a particular fund, it appeared that there was no money in the fund at the time, and the evidence disclosed that the application was denied because it was deemed to have been made prematurely. Approval of the account was only a decision that it correctly reported the receipts, the disbursements and the estate which was on hand, and that the acts of the trustee, as reported, had been performed in accordance with his duties. The account was entirely negative in so far as the claims of the executor of Louise Markham's will were concerned.

[9, 10] A judgment which does not decide the matters in issue on the merits does not operate as a bar or estoppel in another action. Goddard v. Security Title Ins. & Guarantee Co., 1939, 14 Cal.2d 47, 52, 92 P.2d 804; Campanella v. Campanella, 1928, 204 Cal. 515, 269 P. 433; Security Trust & Savings Bank v. Southern Pac. R. Co., 1931, 214 Cal. 81, 87, 3 P.2d 1015; Molen v. Bussi, 1931, 118 Cal.App. 482, 485, 5 P.2d 450. A dismissal is not a bar. Gonsalves v. Bank of America, 1940, 16 Cal.2d 169, 173, 105 P.2d 118; Goddard v. Security Title Ins. & Guar. Co., supra; Estate of Cook, 1928, 205 Cal. 581, 271 P. 1083.

[11, 12] A further defense which the court found to be valid was that the orders settling the several accounts of the executrix in the years when the deficiencies occurred amounted to judgments which barred all future claims for such deficiencies. This finding also is not sustained by the evidence. It is not contended that in any such year Louise Markham contested the account of the executrix or asserted her right to receive the unpaid balance of her annuity. The accounts usually reported that the net income had permitted the payment of the legacies "in part" or had permitted payment of a certain percentage of each of them during the current year and asked credit for the payments that had been made. In no instance was it alleged that payment of less than the full amount constituted payment in full, under the terms of the will, for the period or periods in question. Some of the orders approving accounts contained no specific reference to the annuities paid; the orders that did refer to them merely approved the payments reported. In none of the years during which the deficiencies occurred was a question presented to the court as to the proper interpretation of the will with respect to annuity payments. The court was not asked to decide and did not decide whether the deficiencies were payable out of future income. The orders settling the accounts, so far as annuity payments were concerned, decided only that the net income for the particular period or periods had been sufficient to make such payments and had not been sufficient to pay any greater sums on account of the annuities. It may be noted also that the court approved the accounts when the annuities had been paid in full, and as the trustee contends, out of principal, but the trustee had not objected to the payments and no question of construction of the will was in issue or decided. An interpretation of a will in a proceeding where no issue is presented as to its meaning is not a bar to the decision of questions of interpretation which may arise later.

[13] The defense of the statute of limitations is not sustained by the facts. It appears that the executrix did not question the right of Louise Markham to receive $100 per month out of income when it was available. It is not disclosed by the record that the executrix ever denied Louise Markham's right to receive payment of the amount in arrears whenever, under the former's construction of the will, funds were available. The statute of limitations does not commence to run against a beneficiary until there has been a repudiation

of the trust. 16 Cal.Jur. 427, 428, and cases cited. There was no repudiation of the trust by the executrix or by the administrator with will annexed. Upon the contrary, as the trustee asserts, they even paid the annuities, at least in part, from principal in the years 1937 to 1940. The trustee has acted in good faith. He has disagreed with appellant and its predecessors, as to the proper construction of the will but he has not repudiated the trust. The claim therefore was not barred.

[14, 15] The final contention of respondent is that the trust as to Louise Markham was a spendthrift trust, that the moneys provided for her use were payable to her personally and could not be alienated, and that therefore the claim which she had for the balance of the annuities would not descend by operation of law and could not be disposed of by will. No authority has been cited which tends to support this position and we deem it to be unsound. The right to receive the annuities was a property right, as much so as would have been the right to the money after it had been received, and it was not forfeited by the terms of the will, or by operation of law, upon Louise Markham's death. It is stated in Griswold on Spendthrift Trusts, 1936 Ed., p. 83, that: "In a few cases an issue has been made between the legatees of the beneficiary and his heirs or next of kin. The latter have contended that the inalienability of the interest deprived the beneficiary of power to transfer by will. This contention has, however, been uniformly rejected." The statement is borne out by the authorities. 65 C.J. 558 and cases cited. All of the rights which Louise Markham had to enforce her claim are now vested in appellant. Interest is payable on the annuity balances from the respective dates when they accrued. Estate of Platt, supra, 21 Cal.2d 343, 131 P.2d 825.

The judgment is reversed for further proceedings in accordance with the views herein expressed.

DESMOND, P. J., PARKER WOOD, J., concur.

26 Cal.2d 295

## In re LEE'S ESTATE.

Sac. 5723.

Supreme Court of California.

April 27, 1945.

**1. Appeal and error ⇐458(1)**

The writ of "supersedeas" will lie in aid of an appeal, its function being to maintain the subject matter of the proceeding until the final determination thereof in order that appellant may not lose the fruits of a meritorious appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Supersedeas".

**2. Appeal and error ⇐460(1)**

The perfecting of an appeal, from order appointing public administrator as administrator of the estate of a deceased, automatically stayed any further act by the public administrator until the final determination thereof, and a writ of supersedeas would not issue in the absence of a showing that further proceedings would be attempted. Probate Code, §§ 442, 1233; Code Civ.Proc. § 949.

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In Bank.

Proceeding in the matter of the estate of Sam Lee, deceased. On application of Mark Yee Wo for a writ of supersedeas to stay, pending appeal, all proceedings under an order appointing the public administrator of San Joaquin County as administrator of the estate of deceased.

Petition denied without prejudice.

Robert P. Sullivan, of Stockton, for petitioner.

Foltz & Rendon, of Stockton, for respondent.

PER CURIAM.

This application for a writ of supersedeas seeks to stay, pending appeal, all proceedings under an order appointing the Public Administrator of San Joaquin County as administrator of the estate of the decedent.

On January 26, 1945, Sam Lee died in the county of San Joaquin. On January 31, 1945, the public administrator of that county petitioned the superior court for letters of administration of the estate of the deceased, and the matter was set for hearing on February 13, 1945. On or about February 9, 1945, Mark Yee Wo, who claims to be the sole heir at law of the decedent, filed his petition for appointment as administrator. His petition, though placed in the file with the petition of the public administrator, was set for hearing on February 26, 1945, and then continued to March 5, 1945. On February 13, 1945, the court appointed the public administrator as administrator of the estate of the decedent and held that petitioner was not entitled to rely on section 442 of the Probate Code, which provides that the hearing of petitions for letters in the matter of the same estate shall be heard together.

On March 10, 1945, the petitioner filed his notice of appeal to this court from the order appointing the public administrator; from the order denying the appellant the right to be heard on his petition for appointment as administrator and from the order dismissing the order theretofore issued in said estate restraining the public administrator from disposing of any and all property of the above named decedent.

[1] A writ of supersedeas will lie in aid of an appeal. Its function is to maintain the subject matter of the proceeding until the final determination thereof in order that the appellant may not lose the fruits of a meritorious appeal. Dry Cleaners & Dyers Institute v. Reiss, 5 Cal.2d 306, 54 P.2d 470.

[2] Under section 1233 of the Probate Code, section 949 of the Code of Civil Procedure is applicable to these proceedings. It is there provided that where the orders appealed from do not fall within the provisions of sections 942, 943, 944 and 945 of the Code of Civil Procedure, "the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from." The appeal herein does not fall within the provisions of those sections. The perfecting of the appeal has therefore automatically stayed any further act by the public administrator until the final determination thereof. In re Schedel, 69 Cal. 241, 10 P. 334; Jensen v. Hugh Evans & Co., 13 Cal.2d 401, 90 P.2d 72, and cases cited.

In view of this statutory stay it may not be assumed that further proceedings, pursuant to the orders appealed from, will be attempted. If such an attempt be made this application may be renewed.

The petition is denied without prejudice.

26 Cal.2d 318

## PEOPLE v. DIAZ.

Cr. 4613.

Supreme Court of California.

May 1, 1945.

1. Homicide ⇐253(6)

Evidence that the homicide was committed in an attempt to commit rape justified conviction of murder in the first degree. Pen.Code, § 189.

2. Homicide ⇐28

Where defendant was able to describe the event preceding the crime, the place and manner of killing the girl and the details of the disposal of her body, the court was entitled to conclude that he was legally responsible for the commission of the crime, notwithstanding his statement that he had been drinking excessively on the day of the crime and that he did not know what he was doing. Pen.Code, § 189.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Manuel Nino Diaz was convicted of murder of the first degree, and an appeal was taken under the automatic appeal statute.

Affirmed.

Charles H. Vance, of Stockton, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SHENK, Justice.

The defendant was adjudged guilty of murder of the first degree and was sentenced to suffer the extreme penalty. The appeal in his behalf is under the automatic provisions of section 1239 of the Penal Code.

The defendant, who stated his true name to be Manuel Nino Diaz Camargo, was charged by an information filed by the District Attorney of San Joaquin County with the crimes of kidnapping, rape and murder of Beatrice Martinez, a child about four and a half years of age. The count charging rape was dismissed on the motion of the district attroney on the ground of "insufficiency of the evidence to establish fully the crime as charged." The defendant was represented by counsel appointed by the court. He pleaded guilty to the kidnapping and the murder of the child.

The court took the testimony of the defendant and the autopsy surgeon to determine the degree of the crime.

The defendant stated that he committed the acts to which he entered pleas of guilty, but that when he did it he did not "think he knew exactly what he was doing." He said that he had been drinking on the day of the crime; that "he was so drunk that he felt so funny inside of himself, something desperate, and he was willing to kill somebody, there was nobody else but the girl so he killed the girl and then he carried the girl to the place where he buried her." He testified that he took the girl from her home to his car, which was parked in the back yard, and that that was where he killed her.

The autopsy surgeon testified that the child died from strangulation; that the two lower incisor teeth had been knocked loose; that it was not usual for a child of that age to lose such teeth normally; that there was an ante-mortem puncture of the hymen; that the opening of the vagina was very definitely bruised; that there was a very deep perineal tear and that it must have been done just prior to death. The defendant was not sentenced on the kidnapping count.

[1] First-degree murder is defined by section 189 of the Penal Code as "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; * * *." In this case the court could properly conclude that the homicide was of the first degree in that it was committed in an attempt to commit rape, a crime with which he was not charged. People v. Brown, 22 Cal.2d 752, 755, 141 P.2d 1.

[2] The defendant's statement that he had been drinking excessively on the day of the crime and that he did not know what he was doing was not sufficient to require a different judgment. He was able to describe the events preceding the crime, the place and manner of killing the girl, and the details of his disposal of her body.

The court was entitled to conclude from the evidence that he was legally responsible for the commission of the crime. See People v. Cavazos, 25 Cal.2d 198, 153 P. 2d 177.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




26 Cal.2d 278

## STATE COMPENSATION INS. FUND v. INDUSTRIAL ACC. COMMISSION et al.

S. F. 17134.

Supreme Court of California.

April 20, 1945.

**1. Workmen's compensation ⇐1432**

Evidence that contractor, engaged in constructing a warehouse, shared crane used for such project and rented by it with subcontractor and that subcontractor used same crane crew, although showing that wages were paid separately by contractor and subcontractor according to time crane was being used by each, and that crane crew members were wearing contractor's badge, supported finding that contractor was general employer of crane crew so as to make contractor liable under Workmen's Compensation Act for injuries sustained by member of such crew while crane was being used by subcontractor.

**2. Workmen's compensation ⇐208**

To establish a "general employment" under the Workmen's Compensation Act it is only necessary that there be present the right to control, as distinguished from the exercise of the right.

See Words and Phrases, Permanent Edition, for all other definitions of "General Employment".

**3. Workmen's compensation ⇐206**

Where two employers jointly interested in a project exert some measure of control over workmen engaged in such project, both employers are liable for compensation benefits.

**4. Workmen's compensation ⇐208, 1707**

A "general" and "special employer" relationship is present, within Workmen's Compensation Act, if there exists in each some power, not necessarily complete, of direction and control and whether such power of control exists is a question of fact.

See Words and Phrases, Permanent Edition, for all other definitions of "General Employer".

**5. Workmen's compensation ⇐1195**

Industrial Accident Commission has power on its own motion or on application of any party before it to order the joinder as a defendant of any party against whom the employee may make claim for compensation. St.1937, p. 292, § 5307.

**6. Workmen's compensation ⇐1195**

In proceeding by employee for compensation against special employer and its insurer, Industrial Accident Commission had power on defendant's motion to order joinder of general employer and its insurer as defendants. St.1937, p. 292, § 5307.

**7. Workmen's compensation ⇐1209**

Where employee filed his claim for disability compensation against his special employer before compensation payments made by special employer's insurer ceased, and insurer of general employer was joined as party defendant a few weeks later, although claim against such general employer's insurer was not made within six months from date of injury, claim was not barred by limitations in view of liberal construction required of the compensation act in favor of employee. St.1937, p. 265, § 3202; p. 295, § 5405.

**8. Workmen's compensation ⇐51**

Workmen's Compensation Act enjoins a liberal construction to effect its purpose. St.1937, p. 265, § 3202.

In Bank.

Proceeding under the Workmen's Compensation Act by the State Compensation Insurance Fund, insurance carrier of Carrico & Gautier, employer, for the annulment of an award made by the Industrial Accident Commission to R. E. Rodgers, employee.

Award affirmed.

Prior opinion see 152 P.2d 505.

Donald Gallagher and Edmund J. Thomas, Jr., both of San Francisco, for petitioner.

Everett A. Corten, Dan Murphy, Jr., and Floyd S. Sisk, all of San Francisco, for respondents.

SHENK, Justice.

Petitioner seeks the annulment of an award of compensation against it as the insurer of Carrico & Gautier found to be the general employer of the injured workman. The award also runs against the insurer of a company found to be the special employer. Petitioner contends that the evidence is insufficient to establish the general employment; that it was improperly joined as a party defendant; and that the claim, as to it, is barred by the statute of limitations. Labor Code, § 5405, St.1937, p. 295.

Carrico & Gautier, hereinafter called Carrico, the petitioner's insured, had a general contract to erect a warehouse at Marinship, Sausalito. Among several subcontractors was Arch Rib Truss Company, hereinafter called the Arch Company. In the construction of the warehouse Carrico erected uprights and put in crossbeams, and the Arch Company then furnished trusses and the labor for placing them. Carrico and the Arch Company shared an office at Marinship and the employees of each wore identification badges issued by the shipyard bearing the name of Carrico.

Carrico rented a crane and oral arrangements were made for the Arch Company to share in its use. The same crew operated the crane for both. If uprights were to be moved, the crew moved them for Carrico; if arches, it moved them for the Arch Company. Accurate records were kept of the time the crane and crew were used by each, and the crew was paid separately and proportionally by each. The rental charges were also apportioned.

R. E. Rodgers, the employee claimant, applied for a job through his union and was told to report at Carrico's shipyard office. He reported on May 26, 1942, and was conducted to the foreman of the Arch Company for an interview. The foreman instructed him to report for work the next day, and he was placed in the crane crew. Rodgers testified: "We were working seven days a week but I didn't work on Sunday. I didn't know I was supposed to work. In fact, the timekeeper for Carrico & Gautier told me we weren't supposed to work on Sunday, and when I came back on Monday morning the Arch Rib Truss foreman said we should have worked." He also stated that when the crane was used for uprights the crew worked under a Carrico foreman, and that when it was used for trusses, they worked under an Arch Company foreman.

After about eight days of employment, and on June 4, 1942, while the crane was being used by the Arch Company, a defective prop caused an arch truss to slide down across the shoulders and back of the employee, severely injuring him. First aid was rendered at the shipyard and he was then taken to St. Mary's Hospital which was designated by petitioner, as the insurer of Carrico, for the latter's employees. There he received both medical and surgical treatment. His accrued wages were paid separately by Carrico and the Arch Company according to the time the crane was used by each during his hours of employment. On the day after the accident one of the members of the Carrico firm notified petitioner that the injured man was not a Carrico employee.

After a stay of about a week at St. Mary's Hospital, the employee was moved to the hospital designated by the insurer of the Arch Company and treatment was thereafter given by the physicians named by that company, which also paid compensation to January 21, 1943. On January 12, 1943, the employee filed an application for adjustment of his claim against the Arch Company and its insurer. When the matter came on for hearing before the commission, the Arch Company's insurer asked that Carrico and its insurer be joined as parties defendant. On February 26, 1943, an order was made accordingly.

The commission found Carrico to be the general employer and the Arch Company the special employer of the workman at the time of the injury. It expressly found that the claim against petitioner, as insurer of Carrico, was not barred by the statute of limitations, and rendered a permanent disability award against both insurers.

An application for a rehearing was denied, and this proceeding followed.

[1-3] Petitioner challenges the sufficiency of the evidence to support the finding of general employment. At most, petitioner claims, it shows a concurrent

employment under which the employee worked separately and solely for each company during the hours the crane was used by each, there being no exercise of joint control at any time. We are of the opinion that the evidence is reasonably susceptible to the inference of general employment by Carrico, and is therefore sufficient to support the commission's findings and conclusion. The manner of hiring, the wearing of the Carrico badge, the assignment of hours and place of work, the renting of the crane, the arrangement for its use, the general provision for first aid, and other factors all indicate a right in Carrico to control the workmen with relation to the project. To establish a general employment it is only necessary that there be present the right to control, as distinguished from the exercise of the right, and where two employers jointly interested in the project exert some measure of control, both are liable for compensation benefits.

[4] Reaffirming this rule in a recent case this court said: "It is not only the actual exercise of control, but the right or potential power of control which is important in determining the status of one as an employer. * * * [A] general and special employer relationship is present if there exists in each some power, not necessarily complete, of direction and control, and * * * whether there is such power of control is a question of fact. * * *" National Auto. Ins. Co. v. Industrial Acc. Comm., 23 Cal.2d 215, 219, 143 P.2d 481, 483, and cases there cited. Applying that rule to the facts in the present proceeding the commission's conclusion may not be disturbed.

[5, 6] Petitioner contends that the commission was without power to join it as a party defendant at the request of the other defendant insurer. Relying on the general rule that new parties may be brought in only when their presence is necessary to a full determination of the rights of the parties before the court touching the matter in litigation (Lewis v. Fox, 122 Cal. 244, 250, 54 P. 823; Alpers v. Bliss, 145 Cal. 565, 571, 79 P. 171; 20 Cal.Jur. § 34, p. 536), the petitioner argues that its joinder as a party defendant was not necessary to a full and complete determination of the controversy between the parties then before the commission, for the employee in any event would have received his full award from the other employer. The Labor Code, section 5307, empowers the commission to "(a) Adopt reasonable and proper rules of practice and procedure. * * * (d) Provide for the joinder in the same proceeding of all persons interested therein, whether as employer, insurer, employee, dependent, creditor, or otherwise. * * *" Under this authorization the commission has the power on its own motion or on the application of any party before it to order the joinder as a defendant of any party against whom the employee may make claim for compensation. The case of State Comp. Ins. Fund v. Industrial Acc. Comm., 20 Cal.2d 264, 125 P.2d 42, relied upon by petitioner, is authority only for the proposition that the commission is without jurisdiction to adjudicate a supplemental controversy involving rights of contribution and reimbursement between two insurance carriers jointly and severally responsible for the payment of a compensation award. In the present case the commission did not undertake to determine rights of contribution and reimbursement between the two defendant insurers based upon petitioner's contention that the policy issued by it to Carrico and premium payments thereon did not contemplate coverage for the employees of the Arch Company. In the cited case the distinction between the two types of controversy was discussed and this court gave full recognition to the exclusive jurisdiction of the commission to determine all issues relating to the enforcement of liability against insurance carriers for the payment of compensation to the employee and to make a joint and several award against general and special employers or their insurers.

The cases of American M. Ins. Co. v. Industrial Acc. Comm., 8 Cal.2d 585, 67 P.2d 103, and Hartford A. & I. Co. v. Industrial Acc. Comm., 8 Cal.2d 589, 67 P.2d 105, 106, are to the same effect. Although the opinion in the latter case declares that "one employer cannot object if the injured employee does not proceed against a second employer who is jointly and severally liable with him," the statement is simply a prelude to the declaration that where both employers are brought before the commission and the award erroneously discharges one instead of making a joint and several award against both, "the rule should be different * * * since the relative rights of the employers may well be affected by a determina-

tion that only one of them is responsible for compensation to the employee." There is in those cases no declaration, or even implication, that the commission lacks power to join as parties defendant all those against whom an employee's claim for compensation may run. The implication is, if anything, that it is advisable to establish in the proceeding before the commission the liability of all employers and insurers to the employee, not only for the latter's protection but as a basis for settlement of any subsequent controversy between the defendants over rights of contribution and reimbursement. The broad powers of the commission in the joinder of parties have been upheld in Industrial Ind. Exch. v. Industrial Acc. Comm., 26 Cal.2d 130, 156 P.2d 926, and Independence Ind. Co. v. Industrial Acc. Comm., 2 Cal. 2d 397, 41 P.2d 320. See, also, 1 Campbell on Workmen's Compensation, § 1043, p. 912.

[7] The claim against petitioner is not barred by the statute of limitations. The Labor Code provides a period of limitation of "Six months from the date of injury, or from the date of the last payment of any compensation, or agreement therefor, or the expiration of any period covered by such payment." § 5405(a). The employee filed his claim against the special employer before compensation payments ceased, and petitioner was joined as a party defendant a few weeks later; hence, although the claim against petitioner was not made within six months from the date of injury, it was made well within that period after the last compensation payment.

[8] Petitioner's argument is that since neither Carrico nor its insurer agreed to pay or did pay compensation benefits, the statute was not tolled as against those parties by the payments made by the insurer for the Arch Company, and that the fact that the employee decided to make a claim against the Arch Company and its insurer did not toll the statute as against other parties. In support of this position, petitioner again relies upon a general rule, namely, that the statute of limitations continues to run in favor of parties defendant until they are formally joined in an action. Sherman v. S. K. D. Oil Co., 185 Cal. 534, 548, 197 P. 799; Matteson v. Wagoner, 147 Cal. 739, 746, 82 P. 436; Spaulding v. Howard, 121 Cal. 194, 53 P. 563; 16 Cal.Jur., § 142, p. 545; 34 Am.Jur., § 275, p. 223. The statute enjoins a liberal construction to effect its purposes. § 69(a) Stats.1917, p. 831; Labor Code, § 3202. It is broad in terms and provides a period running from the last payment of any compensation Labor Code, § 5405(a), not from the last payment by the party sought to be joined. The language of the statute has been accorded a liberal construction in similar cases. See United States F. & G. Co. v. Industrial Acc. Comm., 195 Cal. 577, 234 P. 369; Bulger v. Industrial Acc. Comm., 218 Cal. 716, 24 P.2d 796; London G. & A. Co. v. Industrial Acc. Comm., 92 Cal.App. 298, 268 P. 670. It must be so construed here. To do otherwise, and to enforce strictly the general rule in compensation proceedings would be against the policy of the compensation act and contrary to its spirit and intent. It would penalize the employer and the insurance carrier inclined to make payment, and favor the employer and insurer inclined to avoid the performance of an obligation. In fact, it would tend to influence all employers and insurance carriers to refuse voluntary payment of benefits in cases where there is a joint liability.

The cases of Ingram v. Department of Ind. Relations, 208 Cal. 633, 284 P. 212, and Fahey v. Industrial Acc. Comm., 29 Cal.App.2d 570, 84 P.2d 1075, relied on by the petitioner, are not in point. In the Ingram case the employee was injured on April 27, 1926. He filed a claim against one employer on June 9th, 1926, within the six months' period of limitation. An award was made, but was subsequently set aside. Additional hearings were had, during which it was urged that another party defendant should be brought in. An order of joinder was made on September 29, 1927, nearly seventeen months after the injury or a year after expiration of the statutory period. No voluntary payments had been made by anyone and the alternative provision of the limitation section (starting the time from the last payment) was not called into operation. It was held that the claim was barred. In the present case the factual situation is different, for the claim against the new party was filed within the period during which the statute was tolled, that is, within six months from the last payment of compensation.

The Fahey case presents a factual situation comparable with that of the In-

gram case. There the employee was fully advised by the commission of his rights and was urged to name all employers for whom he had worked, but he failed to file against several of them within six months from the date upon which he was found to have sustained the industrial injury. It was held that as against parties subsequently sought to be joined the claim was barred.

The rule relied on by the petitioner is based on the holdings in the Ingram and Fahey cases and is not applicable where as here the claim is made and the new party is brought in within six months after the last voluntary payment of compensation to the employee.

The award is affirmed.

GIBSON, C. J., EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., and PETERS, Justice pro tem., concurred.




**Habib A. BALIAN, Jacob Balian and Kameel Balian, Petitioners, v. SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, and Goodwin J. Knight, Judge of Said Court, and Abraham Balian and Samuel Balian, Executors of the Estate of Alexander Balian, Deceased, Respondents.**

**Civ. 14953.**

District Court of Appeal, Second District, Division 2, California.

May 1, 1945.

Rehearing Denied May 21, 1945.

John C. Miles and Lee J. Myers, both of Los Angeles, for petitioners.

Elbert E. Hensley, of Los Angeles, for respondents Abraham Balian and Samuel Balian, executors of Estate of Alexander Balian.

PER CURIAM.

Petition for writ of mandate is denied.

MOORE, Presiding Justice.

I dissent from the order denying the writ of mandate. See Probate Code, § 382; In re Estate of Green, 25 Cal.2d 535, 154 P.2d 692. The court should have made findings as a basis for its judgment. A contest for the revocation of a will is governed by the Code of Civil Procedure (§ 1230, Probate Code; Estate of Morrison, 125 Cal.App. 504, 507, 14 P.2d 102; O'Day v. Superior Court, 18 Cal.2d 540, 542, 116 P.2d 621; Prothero v. Superior Court, 196 Cal. 439, 238 P. 357) and not by Section 1240, Probate Code. Since no provision is made (Code Civil Proc. § 963) for an appeal from an order awarding a judgment notwithstanding a verdict, it must have been intended that, in granting such a motion, the court would make its written decision to take the place of the jury's findings. Otherwise, judicial error might not be demonstrated. There is no statute to indicate that in any civil contest the judge may base a judgment upon his *order* rather than upon findings. No judgment is sacrosanct because with it the judge has supplanted the verdict of a jury which had been empaneled to determine the facts. In re Estate of Green, supra.




69 Cal.App.2d 69

**ROSENBLATT v. CALIFORNIA STATE BOARD OF PHARMACY, DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS.**

**Civ. 7148.**

District Court of Appeal, Third District, California.

May 1, 1945.

**1. Constitutional law ⇐188**

A statute is not invalid merely because it is retrospective or retroactive, though such a statute may be invalid if it deprives one of vested rights which are bound to be respected by the state, or if it impairs the obligations of a contract.

**2. Constitutional law ⇐88**

Every citizen is entitled to follow any lawful business or profession which is not injurious to the public or a menace to health, safety or welfare of society, free from regulation by exercise of police power of state, except in case of necessity

for such health, safety or welfare, and when state's authority is so interposed on behalf of the public, it must be by means reasonably necessary for accomplishment of such purpose.

**3. Constitutional law ⇐70(3)**

A determination of what is reasonably necessary for the public health, safety or welfare is a legislative function and should not be interfered with except in case of clear abuse.

**4. Constitutional law ⇐81**

A statute which is clearly reasonably necessary for the public health, safety or welfare is not invalid merely because rights of citizens may be affected thereby.

**5. Constitutional law ⇐81**

The police power of state to provide for general welfare of its citizens authorizes it to prescribe all reasonable regulations as in its judgment will secure or tend to secure them against the consequences of ignorance or incapacity in the pursuit of various professions or callings.

**6. Licenses ⇐38**

Holder of a license to engage in a business or profession obtained by complying with statutes relating thereto may not be arbitrarily deprived of such license, but refusal to permit exercise of right under such license because of failure or inability to comply with conditions imposed by state for protection of society is not arbitrary deprivation of such right.

**7. Evidence ⇐29**

Judicial notice may be taken of the evils demanding legislation, the mischief intended to be remedied and the importance of public interests that may be affected thereby.

**8. Druggists ⇐1**

The Legislature has jurisdiction under police power of the state to regulate practice of pharmacy.

**9. Constitutional law ⇐101**
**Licenses ⇐1**

A license from the state issued in exercise of state's police power permitting the doing of that which without the license would be unlawful is not a contract and does not convey a vested right.

**10. Licenses ⇐1**

A "license" has none of the elements of a contract and does not confer an absolute right but a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed.

See Words and Phrases, Permanent Edition, for all other definitions of "License".

**11. Constitutional law ⇐101**
**Licenses ⇐1, 36**

A "license" to engage in a particular calling subject to police power of state to regulate such calling is merely the means fixed by state in exercise of such power to regulate and restrict the pursuit of such calling for the public good, and of itself confers upon licensee neither contractual nor vested rights with the state upon the license so issued.

**12. Licenses ⇐36**

A license to engage in a particular calling subject to police power of state to regulate such calling is subject to paramount right of state at any time that the public good demands to further restrict licensee's activities thereunder, provided such restrictions are reasonably adopted for protection of the public, even though they actually may prohibit licensee from further engaging in an occupation or profession under a license previously granted.

**13. Constitutional law ⇐101**
**Druggists ⇐3**

The statute repealing statutes relating to registration of assistant pharmacists is not unconstitutional as depriving a licensee under repealed statutes of a vested right, even though licensee is thereby prevented from further engaging in practice of pharmacy under a license previously granted, since such license conferred upon licensee no contractual or vested rights. St.1937, p. 1308, §§ 4160–4162; St.1943, p. 2052, § 4135.

ADAMS, P. J., dissenting.

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Proceeding by Richard H. Rosenblatt to compel California State Board of Pharmacy, Department of Professional and Vocational Standards, to issue a renewal of petitioner's license as an assistant pharmacist.

Writ denied.

Ernest C. Crowley, of Fairfield, for petitioner.

Robt. W. Kenny, Atty. Gen., and Carl W. Wynkoop, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Petitioner herein seeks to compel the respondent State Board of Pharmacy to issue to him a renewal of his license as an assistant pharmacist.

By his petition it is alleged he was a duly licensed assistant pharmacist under the laws of this state and in accordance with the provisions of an act entitled "An act to regulate the practice of pharmacy." Stat.1905, Chap. CCCCVI, p. 535. This act was amended from time to time, and in 1937, Sections 4160 to 4162 were added to the Business and Professions Code as a part of the codification thereof, St.1937, p. 1308, and which read:

"4160. Registered assistant pharmacists are persons who were registered as such under Chapter 406 of the Statutes of 1905, relating to pharmacy, and who have paid all moneys due for renewal of registration as required by that statute, and are such other persons as are registered in accordance with the provisions of this article."

"4161. The board shall register as an assistant pharmacist any person who is in any one of the classes provided in this article."

"4162. Registration as an assistant pharmacist, class A, shall be granted to any person at least twenty years of age, who:

"(a) Has passed a written examination to the satisfaction of the board.

"(b) Has had three years of pharmaceutical experience.

"(c) Has satisfactorily completed at least one-half of the course required for graduation in a school or college of pharmacy or a department of pharmacy of a university recognized by the board."

Section 4135 of said code provided in part:

"Registration as a licentiate in pharmacy, class four, shall be granted to any person at least twenty-one years of age, who: * * *

"(d) Has been registered as an assistant pharmacist for a period of two years prior to his application for examination as a licentiate in pharmacy."

By the Statutes of 1943, Chapter 510, page 2052, said section was amended to read as follows: "Registration as a licentiate in pharmacy, class four, shall be granted to any person at least 21 years of age, who has been registered as an assistant pharmacist in this State prior to September 1, 1943, and who has been actively engaged in the practice of pharmacy for the five years immediately preceding."

At the same session, the Legislature repealed said Chapter 9, Article 7, Sections 4160 to 4162, inclusive, relating to assistant pharmacists. Stat.1943, Chap. 508, p. 2050; Chap. 510, p. 2052.

The stipulated statement of facts on file shows that petitioner was duly licensed as an assistant pharmacist on January 14, 1939, under the provisions of Sections 4160 to 4162, inclusive, of Chapter 9, Article 7 of the Business and Professions Code, and that his license was renewed yearly.

On June 9, 1944, approximately nine months after the amendments to Section 4135 and the repeal of Sections 4160 to 4162 became effective, he transmitted his renewal fee to the Board of Pharmacy, and sometime thereafter received a communication from the assistant director of the Department of Professional and Vocational Standards, informing him in part that "* * * Since the registration of assistant Pharmacists was abolished by law, effective September 1, 1943," the fee was refunded and the renewal license denied.

Two contentions are made by petitioner, first, that as the legislation attacked is retrospective and an attempt to deprive him of his previously acquired status as an assistant pharmacist, it is void, and second, that a license issued to one who meets the requirements of the statute, and thereafter it is used by him as a means of gaining his livelihood, said license therefore becomes a vested right, and any attempted deprivation thereof is unconstitutional.

[1] We find no merit in petitioner's first contention. The mere fact that a statute is deemed to be retrospective or retroactive legislation is not fatal to the act. Neither the Federal Constitution nor that of the State of California prohibit the enactment of such laws. 5 Cal.Jur. 747. However, such a law may "be invalid if it deprives one of vested rights which are bound to be respected or protected by the state, or if it impairs the obligations of a contract." American States Water

Service Co. v. Johnson, 31 Cal.App.2d 606, 613, 88 P.2d 770, 774.

This brings us, then, to a consideration of the second issue raised by petitioner. At the time of the oral argument it was agreed by counsel that such contention was the sole question for determination by this court, counsel for respondent stating that if it be determined that the petitioner had acquired a vested right by virtue of the license issued to him in 1939 the writ should issue.

Because in one sense every right is vested (Stohr v. San Francisco Musical Fund Society, 82 Cal. 557, 22 P. 1125), the term "vested right" has had prolific use and discussion. But although it has been used frequently, too often it has been used loosely, both in this state and elsewhere.

Therefore it becomes necessary at the outset of a consideration of the problem herein presented, to distinguish between a right which arises as the result of a contractual obligation and a right acquired by a license granted under the inherent police power of the state.

[2] It is conceded that every citizen has a right to follow any lawful business or profession which is not injurious to the public or a menace to the health, safety or welfare of society, free from regulation by the exercise of the police power of the state except in cases of necessity for such health, safety or welfare, and when its authority is so interposed in behalf of the public it must be by means reasonably necessary for the accomplishment of that purpose.

[3, 4] A determination of what is reasonably necessary for the public health, safety or welfare is a legislative function and should not be interfered with, only in case of clear abuse. Where a statute is clearly such a measure, the fact that rights may be affected does not invalidate the act.

[5] The power of a state to so provide for the general welfare of its citizens authorizes it to prescribe all reasonable regulations as in its judgment will secure or tend to secure them against the consequences of ignorance or incapacity in the pursuit of various professions or callings. Dent v. State of West Virginia, 129 U.S. 114, 9 S.Ct. 231, 233, 32 L.Ed. 623. Illustrative of, and as a means to this end, our legislature has seen fit to demand and exact a certain degree of learning and skill in some score or more businesses and professions, by the enactment of regulatory statutes and the creation of agencies to administer such acts. See generally, Business and Professions Code.

[6] A license obtained by compliance with the statutes relating to any one of the many businesses and professions set forth in said code may become of great value to the possessor and cannot be arbitrarily taken from him any more than his real or personal property can thus be taken. "But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society." Dent v. State of West Virginia, supra. To this might well be added: or inability to comply with such conditions.

[7] Clearly the present act was to protect the health and safety of the people of this state from dangerous, and also what might be the fatal effects of medicines and prescriptions improperly prepared through the inadequate learning and skill of assistant pharmacists. The Supreme Court stated in an early case that judicial notice could be taken of the evils demanding legislation, the mischief intended to be remedied and the importance of public interests thereby. Ex parte Kohler, 74 Cal. 38; 25 R.C.L. 1015.

[8] If, then, the Legislature had the right under the police power of the state to impose restrictions upon assistant pharmacists to practice in the first instance, and it cannot be denied that such a subject is a proper one for legislative regulation (Reetz v. Michigan, 188 U.S. 505, 230 S. Ct. 390, 47 L.Ed. 563; Gray v. Connecticut, 159 U.S. 74, 15 S.Ct. 985, 40 L.Ed. 80; Dent v. State of West Virginia, supra; State v. Hovorka, 100 Minn. 249, 110 N.W. 870, 8 L.R.A.,N.S., 1272, 10 Ann.Cas. 398, it necessarily must follow that the correlative right to impose further restrictions for the same purpose is a necessary consequence of the initial power.

[9] The general rule, established by the great weight of authority, appears to be that a license from the state issued in the exercise of its police power permitting the doing of that which without the license would be unlawful, is not a contract and does not convey a vested right. In re Carlson, 87 Cal.App. 584, 262 P. 792; State v. Hovorka, 100 Minn. 249,

110 N.W. 870, 8 L.R.A.,N.S., 1272, 10 Ann. Cas. 398; Reetz v. Michigan, supra; Hawker v. New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002; State ex rel. Burroughs v. Webster, 150 Ind. 607, 15 N.E. 750, 41 L.R.A. 212; State v. Gazlay, 5 Ohio 14, 15; Simmons v. State, 12 Mo. 268, 49 Am.Dec. 131.

[10] A license has none of the elements of a contract and does not confer an absolute right but a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed.

In accordance with such general rule this court stated in the case of Gregory v. Hecke, 73 Cal.App. 268, 238 P. 787, 793: "No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control under the police powers." Citing Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 292, 28 L.Ed. 232. See 6 R.C.L. Sec. 481, p. 482; 16 C.J.S., Constitutional Law, § 224, p. 647. Again, in the case of People v. McCloskey, 76 Cal.App. 227, 230, 244 P. 930, 931, we stated: "No one can acquire a vested right to continue in possession of that which is a menace to the public safety." In both cases petitions to have the respective causes heard in the Supreme Court were denied.

It is readily apparent if such was not held to be the rule, the right of a Legislature to enact statutes for the public welfare would be meaningless. Surely that was never the contemplation of the framers of our laws or of the courts in their interpretation thereof.

[11-13] In summary and in accordance with the rule herein enunciated it may be said the granting of a license to engage in a particular calling subject to the police power of the state to regulate the same, is merely the means taken by the state in the exercise of that power to regulate and restrict the pursuit of said calling for the public good, and of itself confers upon the licensee neither contractual nor vested rights with the state upon the license so issued. The license received by petitioner as an assistant pharmacist was not for the benefit of himself but for the protection of the public, and was so accepted by him subject at all times to the paramount right of the state at any time that the public good demanded, to further restrict his activities thereunder. If such restrictions and regulations were reasonably adopted for those purposes, they will be upheld even though they actually may prohibit him from further engaging in an occupation or profession under a license previously granted.

The writ is denied.

THOMPSON, J., concurs.

ADAMS, Presiding Justice (dissenting).

I dissent. Petitioner was duly registered as an assistant pharmacist on January 14, 1939, presumably after meeting the requirements of the applicable statutes, to wit, sections 4160–4162 of the Business and Professions Code which had been in effect since 1901. See Stats.1901, p. 299. Those sections required that in order to secure registration as an assistant pharmacist an applicant must have had three years of pharmaceutical experience, completed at least one-half of the course required for graduation in a school or college of pharmacy or a department of pharmacy of a university recognized by the State Board of Pharmacy, and passed an examination to the satisfaction of that board.

Section 4250 of that code, St.1937, p. 1382, required, and still requires, that every person holding a certificate shall renew his registration with the board annually. Petitioner requested renewal of his registration as an assistant pharmacist for the year ending June 30, 1945, but his request was denied by the Assistant Director of respondent board, on the ground that the registration of assistant pharmacists had been abolished by law. It is assumed that this conclusion was based upon the fact that in 1943 the Legislature repealed sections 4160 to 4162, inclusive, of the Business and Professions Code. But it is the contention of petitioner that when he acquired the status of a registered assistant pharmacist by compliance with effective statutes he became vested with a valuable property right of which he may not be deprived by the repeal of the statutes under which he acquired such right.

The first question then is did petitioner, by his compliance with the statutes in effect at the time he secured his right to practice as an assistant pharmacist, acquire a vested right. In Miller v. McKenna, 23 Cal.2d 774, 783, 147 P.2d 531, 536, it was said that "a vested right, as that term is used in relation to constitutional guaranties, implies an interest which

it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice." Also see City of Los Angeles v. Oliver, 102 Cal.App. 299, 310, 283 P. 298.

In Laisne v. California State Board of Optometry, 19 Cal.2d 831, 835, 123 P.2d 457, 460, the Supreme Court definitely stated that "The appellant's right to practice optometry was a vested property right," citing Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315; Suckow v. Alderson, 182 Cal. 247, 187 P. 965. In the Hewitt case, supra, it was said, 148 Cal. at page 592, 84 P. at page 40, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, that "The right to practice medicine is, like the right to practice any other profession, a valuable property right, in which, under the Constitution and laws of the state, one is entitled to be protected and secured"; and this language is quoted in Suckow v. Alderson, supra. In Cavassa v. Off, 206 Cal. 307, at page 314, 274 P. 523, at page 526, where it was sought to revoke the license of a registered pharmacist, the court said: "The right of a person to practice the profession for which he has prepared himself is property of the very highest character." It also said, 206 Cal. at page 315, 274 P. at page 526: "Due to the severe and exacting tests now generally required before a person can legally follow a profession at the present day, this right can only be acquired after years of arduous effort and closest application. It is generally the only means of the holder thereof whereby he may support himself and family, and it usually affords such holder the best opportunity to become a useful and sustaining member of the community in which he resides. This right should not be taken from one who has thus acquired it, except upon clear proof that he has forfeited the same, and then only in strict conformity to the statute authorizing its forfeiture."

In Klein v. Board of Education, 1 Cal.2d 706, 708, 37 P.2d 74, it was held that petitioner's tenure as a vice-principal teacher was not affected by repeal of section 1793 of the Political Code in effect when she was elected a vice-principal and for a period of some ten years while she served as such vice-principal. The court said, 1 Cal. 2d at page 708, 37 P.2d at page 75: "Of course, any tenure previously acquired by respondent was a vested right and remained unaffected by such repeal," citing Gastineau v. Meyer, 131 Cal.App. 611, at page 616, 22 P.2d 31, decided by this court, where permanent tenure acquired by a teacher was held to be a vested right of which the school board could not deprive him.

In view of the foregoing decisions it seems to me that if the rights of physicians, optometrists and pharamacists to practice their respective professions, and the rights of teachers in tenure once acquired, are valuable property rights which, when acquired, become vested, the conclusion is inevitable that assistant pharmacists who have complied with the statutes creating assistant pharmacists and have been registered as such, have, likewise, acquired valuable vested property rights which, in the language in Miller v. McKenna, supra, "it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily without injustice."

Assuming, then, that petitioner had acquired vested property rights prior to the repeal of sections 4160–4162, supra, the next question is whether the repealing statute properly may be given retroactive application, so as to deprive him of same.

In Higgins v. Bear River, etc., Mining Co., 27 Cal. 153, 159, the court said that a "statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, is to be deemed retrospective"; and that it "is a rule never to apply a statute retrospectively by mere construction."

In Estate of Taitmeyer, 60 Cal.App.2d 699, 709, 141 P.2d 504, the opinion states that while neither the Federal Constitution nor the Constitution of California prohibits the enactment of retrospective laws, a retrospective act may not be given effect to deprive one of a completely vested property right, citing 5 Cal.Jur. pp. 728, 729, and pp. 751, 752. The latter authority states at page 751 that "The power of the legislature to impair such vested rights as are protected by constitutional guaranties has been repeatedly denied by the courts. The right of acquiring and possessing property, as has been already mentioned, is one of the inalienable rights of each citizen, which has been guaranteed to him by the constitution."

In American States Water Service Co. v. Johnson, 31 Cal.App.2d 606, 613, 88 P.2d 770, this court, also, said that while our Constitution does not prohibit the enactment of retrospective statutes, a statute may be invalid if it deprives one of vested rights which are bound to be respected or protected by the state; also that statutes will be construed to operate prospectively rather than retrospectively unless the contrary intention clearly appears; and it defined "vested rights" as they are defined in Miller v. McKenna, supra, and in 5 Cal. Jur., sec. 143, p. 748.

My associates, in the majority opinion in this case, apparently take the position that since the business or profession of a pharmacist or an assistant pharmacist is a proper one for regulation under the police power of the state, such power to regulate includes the power to destroy. This, however, is not consonant with holdings of our courts. In Riley v. Chambers, 181 Cal. 589, at pages 592, 593, 185 P. 855, at page 856, 8 A.L.R. 418, our Supreme Court said: "Nor can it be controverted that the right to engage in a lawful and useful occupation cannot, in effect, be taken away under the guise of regulation." Also see Hart v. City of Beverly Hills, 11 Cal.2d 343, 350, 79 P.2d 1080, citing Riley v. Chambers and other cases. Also see In re Jones, 56 Cal.App. 2d 658, 664, 133 P.2d 418; Mattei v. Hecke, 99 Cal.App. 747, 751, 279 P. 470.

In Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, at page 122, 47 P.2d 716, at page 717, it is declared that the question of constitutionality of a statute may be determined upon settled principles; that "The retrospective application of a statute may be unconstitutional if it is ex post facto, that is, applying to criminal matters; or if it deprives a person of a vested right; or if it impairs the obligation of a contract." Also see Buck v. Canty, 162 Cal. 226, 234, 121 P. 924.

Conceding the power of the legislature to regulate the practice of law, medicine, pharmacy, or any other such profession, and conceding that acquired rights to practice such professions may, after notice and hearing, be suspended or revoked for good cause shown, the Legislature, by repealing sections 4160–4162 of the Business and Professions Code, did not purport to regulate the practice or activities of assistant pharmacists; it merely wiped out the statutes under which the registration of assistant pharmacists was authorized. Whether this was done because of some notion that assistant pharmacists, who had been permitted registration for a period of over forty years, had become a menace to the public health and welfare, or for some other reason, does not appear. But the question before us is whether, by the repeal of such sections, assistant pharmacists previously qualified may be deprived of the rights theretofore conferred, or whether the repealing statute shall be held to have only prospective operation, that is, prohibit the registration thereafter of assistant pharmacists, while assistant pharmacists previously registered shall be permitted to continue to be registered as such, subject, of course, to reasonable regulation. By refusing to comply with petitioner's request for his registration for 1944–1945, the Assistant Director of the Department of Professional and Vocational Standards has elected to give the repealing statute retroactive operation the effect of which is to deprive petitioner of his vested property right to practice as an assistant pharmacist.

It is my view that under the decisions hereinabove cited the repealing statute may not be given such retrospective application so as to deprive petitioner of the right to renewal of his registration as an assistant pharmacist for whatever value such registration may have (which is all he asks) so long as he continues to comply with statutes regulating the activities of assistant pharmacists, which regulatory enactments are not under attack in this proceeding.

No demurrer or answer to the petition filed herein was filed by respondent, and at the hearing counsel appearing for it stated that he believed that the petition was good. He said: "You might say this: If we had the classification of assistant lawyers, those practicing as assistant lawyers for five years would be entitled to practice in the state of California as attorneys at law, but those who had practiced on that particular date four years and eleven months would be chopped off and there would be no further classification of assistant lawyers." And in reply to the inquiry: "And they would thereby be deprived of a vested right which they had acquired by virtue of the fact that they had fully complied with the requirements?" he stated: "That is true."

The writ prayed for should be granted.

69 Cal.App.2d 116

## BLAND v. KELLEY.

Civ. 3175.

District Court of Appeal, Fourth District, California.

May 4, 1945.

Hearing Denied July 2, 1945.

**Deeds ⇐210, 211(1, 2)**

In action to cancel contract, together with deed and bill of sale conveying rent-producing dwelling and furnishings to defendant, evidence supported findings that aged grantor was weak physically and mentally and that there was a mutual mistake as well as failure of consideration, warranting cancellation, where defendant furnished only 15 days' care and then had grantor sent to county hospital.

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Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by Alyce A. Bland, by her guardian ad litem, W. A. Piper, against Edna D. Kelley. From a judgment canceling a contract, deed, and bill of sale, defendant appeals.

Affirmed.

W. C. Tupper and Gerald H. Catania, both of Fresno, for appellant.

Edmond A. Chevalier and Martin C. Thuesen, both of Fresno, for respondent.

MARKS, Justice.

This is an appeal by defendant from a judgment cancelling a contract, deed and bill of sale, executed by plaintiff on August 26, 1943, and allowing defendant $60 per month for services rendered to plaintiff for one year prior to July 8, 1944, the date of the judgment.

Plaintiff was an elderly woman. She was ill and confined to her bed and, as found by the trial court, "that on or about the 26th day of August, 1943, and for a long time before, the said Alyce A. Bland was an incompetent person, of feeble understanding, in ill health, and was living alone, remote from friends or relatives and in a state of great mental depression and despondency."

Defendant described herself as a minister and practitioner of the Universal Educational Religious Society of Divine Science. Defendant became acquainted with plaintiff and made frequent calls upon her, read from the Bible to her and otherwise administered to her spiritual and physical welfare. When defendant called on plaintiff the two were always alone and behind closed doors.

Plaintiff owned a dwelling at 1041 "T" Street in Fresno. It was rented to various tenants and produced a monthly income of more than $235 per month. In August, 1943, the property had a market value of $9,000 and was encumbered with a deed of trust upon which there was an unpaid balance of $3766.01, payable in instalments of $50 per month. Plaintiff owed a local bank $69.

On August 26, 1943, plaintiff signed a deed conveying the real property to defendant, and a bill of sale transferring the household furnishings to her. The two parties also executed a contract which recited that plaintiff was "very ill and almost helpless and confined to her bed most of the time" and needed some one to care for her and her property; that the deed and bill of sale were executed in consideration for the past services of defendant to plaintiff "and further on the understanding and agreement between them that the said party of the second part (defendant) will, in the future, and during the life of the said party of the second part, continue to take care of the party of the first part, giving her every possible care and attention; also looking after the household and tenants and in every way making her life more pleasant and endurable."

Immediately after the execution of these documents defendant had plaintiff moved to a rest home, defendant paying $65. As plaintiff remained there only five days, $54 was refunded to defendant who had plaintiff removed to defendant's home where she remained ten days. Defendant employed a woman to care for plaintiff and paid her $60 for this service, besides furnishing plaintiff with a room and meals. On September 10, 1943, defendant had plaintiff moved to the Fresno County Hospital where she has remained ever since at public expense. Defendant has neither paid nor offered to pay any part of the cost of maintaining plaintiff in the County Hospital.

There is ample evidence in the record to support the finding of the physical and mental weakness of plaintiff. Several of her friends testified to such facts. Dr. Max

Levisohn examined her first about September 10, 1943, and diagnosed her disease as "Paralysis agitans, Parkinson Syndrome". He described it as an "Arteriosclerotic change inside of the skull * * * with a slow down in physical and mental activities". He testified that patients suffering from that disease are "quite suggestible", that is, easily influenced to follow the suggestions of others.

The trial court found that the documents in question were executed under mutual mistake of both parties. This finding is fully supported by the testimony of plaintiff and defendant. Plaintiff testified that she did not read the documents because she did not have glasses; that they were not read to her; that she was led to believe that she was signing instruments giving defendant security for any money expended in the care of plaintiff; that she did not know she was conveying her property to defendant and would not have signed the documents had she known their true import.

Defendant testified that she did not understand she was personally obligated to provide care for plaintiff beyond the income provided by the property; that her understanding was that she could use the income to pay the instalments on the encumbrance and to provide plaintiff with such care as defendant thought necessary.

It is clear there was no meeting of the minds of the parties and that the documents did not carry out the intention of either of them.

The evidence is sufficient to sustain the finding of mutual mistake of fact under the holding in the case of Moore v. Copp, 119 Cal. 429, 51 P. 630.

The trial court also found a failure of consideration. The evidence we have already outlined clearly supports this finding. Defendant only cared for plaintiff for fifteen days and then had her sent to the County Hospital where she remained as a public charge. The judgment makes ample provision for repayment to defendant of all money spent by her and ample payment for any services rendered to plaintiff.

The evidence supports the findings and the findings support the judgment.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

68 Cal.App.2d 843

## BALL v. STEPHENS.

Civ. 14602.

District Court of Appeal, Second District, Division 3, California.

April 24, 1945.

**1. Public lands ⇐64**

Under federal statute authorizing establishment of highways over public lands not reserved for public uses while they remained in ownership of government, it is necessary, in order that a road become a public highway, that it be established in accordance with law of state in which it is located. 43 U.S.C.A. § 932.

**2. Public lands ⇐64**

Road running to a quicksilver mine over federal public lands and which was not laid out by the public became a highway, if at all, by dedication. Pol.Code, § 2618; 43 U.S.C.A. § 932.

**3. Public lands ⇐64**

The federal statute enacted in 1866 pertaining to highways was an offer of rights of way in general and operated as a grant of specific rights of way upon selection of routes and establishment of roads over public lands, acceptance of which offer could be manifested and dedication could be effected by selection of a route and its establishment as a highway by public authority, or by the laying out of a road and its use by public sufficient in law to constitute an acceptance by public of an offer of dedication. 43 U.S.C.A. § 932.

**4. Public lands ⇐64**

In action to declare the existence of a public highway across defendant's land and running to a quicksilver mine, evidence of user of mine road while land over which it ran was still public land was properly received for purpose of determining whether there had been sufficient use to prove acceptance by public of government's offer of dedication. Pol.Code, § 2618; 43 U.S.C.A. § 932.

**5. Public lands ⇐64**

Period in which offer of federal government to dedicate government land for highway purposes could be accepted by public use of a road ended when patent covering land in question was issued. 43 U.S.C.A. § 932.

**6. Public lands ⇐114(1)**

Where a highway validly exists over land covered by land patent at time patent is issued, patentee takes title subject to right of way for highway. 43 U.S.C.A. § 932.

**7. Highways ⇐17**

In action to declare the existence of a public highway over lands which defendant acquired from government by patent in 1928, testimony of witnesses of development of route over such lands from a trail to a road suitable for automobiles and trucks over a period of years, its use since 1928, maps made both before and after 1928 and aerial photographs taken in 1939 which showed gradual extension of roads, including one in question, farther back into mountain country were competent to prove that route followed by road was route used by public before defendant received his patent. Pol.Code, § 2618; 43 U.S.C.A. § 932.

**8. Public lands ⇐114(1)**

Where a public highway existed across land at time patent covering land was issued, in action to declare existence of such highway, the extent of public use of highway after patent was issued, or whether it was used at all, is immaterial so long as highway was not legally abandoned. Pol. Code, § 2618; 43 U.S.C.A. § 932.

**9. Dedication ⇐44**

Evidence that road over public land came into existence by its use as a road by hunters, vacationists, miners and oil operators before defendant secured a patent to land over which road ran established a public use of a substantial amount considering the locality and was sufficient to prove public acceptance of government's offer of a right of way and to constitute road a highway by dedication under state laws. Pol.Code, § 2618; 43 U.S.C.A. § 932.

**10. Public lands ⇐114(1)**

Where road across public land became a public highway by dedication prior to defendant's acquisition of title to land by patent, defendant's title was subject to highway right of way as it existed when patent was issued and no act of defendant could divest right which public had acquired. Pol.Code, § 2618; 43 U.S.C.A. § 932.

**11. Judgment ⇐585(3)**

Cause of action to have road over defendant's land declared a private right of way belonging to plaintiff which was decided adversely to plaintiff was not the same as cause alleged in subsequent action to declare same road to be a public highway, so as to authorize defense of res judicata, notwithstanding that incidental relief by way of injunction and damages sought in both actions was identical.

**12. Judgment ⇐585(1), 713(2)**

A judgment operates as a bar to a second action where the causes of action are the same, and in such a case it will be deemed that all matters were adjudicated in first action that might have been adjudicated, such as all grounds which would support plaintiff's right or title and all defenses which would defeat it, including those which were not placed in issue or tried.

**13. Judgment ⇐720, 725(1)**

Where second action is upon a different cause of action than that stated in first action, that only is deemed to have been adjudicated in first action which was actually tried and determined or which was necessarily involved in the adjudication made.

**14. Highways ⇐160(2)**

Evidence that interest in quicksilver mine owned by plaintiff had a reasonable rental value of $50 per month, that defendant placed gates across public highway, which ran over defendant's land and which was only road to which mine was accessible, and threatened to shoot plaintiff if plaintiff crossed the land authorized award of $500 damages for plaintiff's exclusion for a period of 10 or 12 months.

**15. Highways ⇐160(1)**

Where defendant threatened to shoot plaintiff if plaintiff crossed defendant's land on a public highway to mine owned by both plaintiff and defendant and defendant did not withdraw the threat or offer to permit the road to be used if plaintiff found a lessee for mine, defendant could not claim as a defense to plaintiff's action to recover reasonable rental value of plaintiff's interest in mine that mine could not have been leased.

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Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by David L. Ball against M. H. Stephens for a judgment declaring the

existence of a public road across defendant's land and to recover the reasonable rental value of plaintiff's interest in a quicksilver mine owned by plaintiff and defendant during time plaintiff was prevented by defendant from using road and working mine. Judgment for plaintiff, and defendant appeals.

Affirmed.

C. P. Kaetzel and M. A. Fitzgerald, both of San Luis Obispo, for appellant.

Nelson & Castro, of San Luis Obispo, for respondent.

SHINN, Justice.

The judgment in this case declared, "that for more than 30 years immediately preceding the commencement of the above entitled action there has been and still is a public road and highway situated in the County of San Luis Obispo, State of California, described as follows, to wit: [description] * * * to the Deer Trail Quicksilver Mine, and being the present existing road traversing said sections and being 20 feet in width." Defendant was ordered to remove a fence with a locked gate which he had placed across the road where it enters his land and to pay plaintiff $500 damages as the reasonable rental value of plaintiff's interest in a quicksilver mine owned by plaintiff and defendant during the time he was prevented by defendant from using the road and working the mine. For some 900 feet the described road crosses a corner of a parcel of land which defendant homesteaded and which was patented to him in 1928. Defendant seeks a reversal of the judgment upon the following grounds: (1) the evidence was insufficient to prove the existence of a public road; (2) the issues of the present action were determined adversely to plaintiff and in favor of defendant in a former action tried shortly before the present one was commenced; (3) there was insufficient evidence to sustain the finding of damages.

[1] For proof of the existence of the road, plaintiff relies upon section 2477, U. S. Revised Statutes, 43 U.S.C.A. § 932, which was enacted in the year 1866 and reads as follows: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted" and upon evidence of public use of the described route as a roadway. Under this act highways could be established over public lands not reserved for public uses while they remained in the ownership of the government. Congress did not specify or limit the methods to be followed in the establishment of such highways. It was necessary therefore, in order that a road should become a public highway, that it be established in accordance with the laws of the state in which it was located. Sutton v. Nicolaisen, 1896, 5 Cal. Unrep. 348, 44 P. 805; Hartley v. Vermillion, 1903, 141 Cal. 339, 348, 74 P.2d 987; People v. Power, 1918, 38 Cal.App. 181, 175 P. 803.

[2-4] The laws relating to roads and highways that were in force prior to 1883 need not be examined. Section 2618 of the Political Code as re-enacted in 1883, and which was in force until 1935, declared the law with respect to what constituted public highways and antedated the earliest travel over the route by vehicle. As re-enacted it read as follows: "In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property." The highway in question was not laid out by the public. It became a highway, if at all, by dedication. The act of 1866 was an offer of rights of way in general, and it operated as a grant of specific rights of way upon the selection of routes and the establishment of roads over public land. Acceptance of the offer of the government could be manifested and dedication could be effected by the selection of a route and its establishment as a highway by public authority. In the present case no action was taken by the legislature or the board of supervisors to declare the route a highway and it was never improved or maintained by the county. Dedication could also be effected without action by the state or county, by the laying out of a road and its use by the public sufficient in law to constitute an acceptance by the public of an offer of dedication. Evidence of user was properly received for the purpose of determining whether there had been sufficient use to prove acceptance of an offer of dedication. The law was stated in the early case of Harding v. Jasper, 1860, 14 Cal. 642, 647, 648, as follows: "The vital principle of the dedication is the intention to dedicate; and whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has

been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete—precluding the owner and all claiming in his right, from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact, to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being, whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway." In Smith v. San Luis Obispo, 1892, 95 Cal. 463, 30 P. 591, the court quoted from Harding v. Jasper, saying that the case had been cited and approved by the court down to that time and accords with the best considered cases in many other states, and it was said at page 470 of 95 Cal., at page 593 of 30 P.: "* * * we think the use of the street by the public for a reasonable length of time, where the intention of the owner to dedicate is clearly shown, is sufficient, without any specific action by the municipal authorities, either by resolution or by repairs or improvements." In People v. Power, supra, 38 Cal.App. 181, at page 185, 175 P. 803, at page 804, after reviewing section 2618 and other Political Code sections, the court said: "Notwithstanding the statutory provisions above noted, it does not appear that a formal declaration by the board of supervisors has ever been held to be under all circumstances essential to the creation of a public highway." It was said in Venice v. Short Line Beach Land Co., 1919, 180 Cal. 447, 450, 181 P. 658, 660, "It is not necessary that the acceptance by the public be manifested by any direct action, ordinance or declaration of the public authorities. 'Such acceptance may be shown by mere user without any formal action in relation thereto by the municipal authorities.' Monterey v. Malarin, 99 Cal. [290], 293, 33 P. 840."

[5-8] Since a valid dedication may be shown by proof of an intention to dedicate and of subsequent public use of the land in the manner intended by the owner, the question remains whether there was evidence to show sufficient public use. The period in which the offer of the government could be accepted by use of the route ended in 1928 when the patent was issued. If a highway then existed defendant took title subject to the right of way. If it did not exist then, there is no public right of way; there was not sufficient evidence to show a later dedication, by defendant, either express or implied. The properties which the road crosses are located in a mountainous region, the land being useful mainly as a cattle range. The route was used first as a trail, later by horse-drawn vehicles, and went through a gradual process of occasional improvement and use until it became a road suitable for automobiles and trucks. This process was extended over a long period of years, but, as we shall point out, there was evidence that the road was well defined and had been made so by public use prior to 1928. Numerous witnesses testified for plaintiff as to the transition of the route from a trail to a road suitable for the use of automobiles and trucks. Maps made both before and after 1928 were placed in evidence, as well as aerial photographs taken in 1939, which showed the gradual extension of roads, including the one in question, farther back into the mountain country. These were useful principally to prove that the route now followed by the road is the one that was used by the public before defendant received his patent. The same may be said of the evidence as to the use of the road subsequent to 1928. If there was a public road across the land at the time the patent was issued, it is not important how extensively it was used, or whether it was used at all, by the public after that time so long as it was not legally abandoned.

[9, 10] The strongest evidence as to the extent of the travel was the fact that the road did come into existence through public use. In other words, it came to be a road by means of being used as a road and in the same fashion that many other mountain roads have come into existence. The earliest travel was by hunters, miners and vacationists. About 1905 numerous mining claims were located above the land defendant homesteaded and the locality attracted the attention of oil operators. A derrick was erected and work was done on a well which was located more than a mile from the land in question and considerably above it. Materials and supplies were hauled to the well by a route which followed another canyon, but the trail leading down from the vicinity of the well toward defendant's land was made into a road over which a two-horse wagon could pass. This part of the road was approximately a mile and a

quarter long and it was used by employees of the oil company in hauling wood up to the location of the well. Whether the road was then used as far down as defendant's present land was not made clear. However, the portion of defendant's land crossed by the road in question is somewhat flat and vehicles could be and were driven across it without the necessity of road construction. There was travel from the location of the well down across the land which defendant later acquired and out through the canyon below to the main highway. There was travel along the road by horse and wagon and other vehicles well beyond defendant's land as early as 1910 and it had become by that time a distinct road through use by the people working at the well and by others, who drove up the road in buckboards. About 1917 or 1918 another oil development was undertaken. Starting at about that time and continuing thereafter, automobiles were driven over the road and during the oil activity there was almost daily travel by motor vehicles and by wagon. For some five years before defendant's patent was issued miners traveled over the road by automobile to and from their mining claims. In answer to questions by the court, defendant testified that he lived upon other property in the vicinity and that when he homesteaded the land he knew that the road went through it and on up to the mine, although he stated his opinion that the upper part of the road, "the wood road," which had been used by the oil companies, had been abandoned. The travel over the road prior to 1928 was irregular but that was due to the nature of the country and to the fact that only a limited number of people had occasion to go that way. However, many people used the road for different purposes. The use of the route by hunters, vacationists, miners and oil operators which brought the road into existence was a public use. Travel was not merely occasional; it was in our opinion substantial and sufficient to prove acceptance of the offer of the government of the right of way and to constitute it a highway by dedication under the state laws. A good deal of the evidence related to the period subsequent to 1928. Defendant erected a fence at the lower end of his land in 1931 for the purpose of confining grazing cattle. There was a gate in the fence where it crossed the road. It appears that but slight use was made of the land for grazing purposes, and from 1931 to 1941 travel over the road continued, although at times defendant kept the gate locked. However, this practice seems to have been intermittent and even when the gate was locked keys were furnished to people who had occasion to use the road. The evidence which related to this period had no direct bearing upon the question whether the road had been established while title to the land remained in the government. The implied finding was that the road was so established and it is supported by the evidence. Defendant's title acquired by patent was subject to the right of way as it then existed. McRose v. Bottyer, 1889, 81 Cal. 122, 126, 22 P. 393; Town of Red Bluff v. Walbridge, 1911, 15 Cal.App. 770, 116 P. 77; Schwerdtle v. County of Placer, 1895, 108 Cal. 589, 41 P. 448. No act of defendant could divest the right which the public had acquired. People v. Eel River & E. R. R. Co., 1893, 98 Cal. 665, 33 P. 728; Koshland v. Cherry, 1910, 13 Cal.App. 440, 110 P. 143.

[11] Under his defense of res judicata, defendant pleaded a judgment rendered in September, 1942, in his favor in an action brought by plaintiff, alleging that it was upon the same causes of action alleged in the complaint herein. The finding was contrary to this allegation. The complaint in the former action alleged that plaintiff was the owner of a three-fourths part of the Deer Trail Quicksilver Mine and "that plaintiff is now and was at all times herein mentioned the owner of, as appurtenant to the aforesaid real property, a private right of way approximately 20 feet wide, being 10 feet on each side of the following center line, to wit:" (here follows a description of the road involved herein). In the present action there was a cause of action which we have not heretofore mentioned, which alleged that plaintiff purchased an interest in the mine from one Arebalo; that defendant and said Arebalo represented to plaintiff that said Arebalo had a right of way appurtenant to the mining property to pass over defendant's land; that plaintiff purchased an interest in the mine and the right of way from Arebalo with defendant's knowledge and because of the representation, and that defendant was estopped to deny the validity of the right of way. There were no findings upon this cause of action, findings and judgment being rested solely upon the second cause of action, which alleged that for more than 30 years prior to the commencement of the

action there had been a public road along the route in question. In the first complaint, as in the present one, it was alleged that defendant had erected a fence and gate across the road and had thereby excluded plaintiff from the use thereof in traveling to and from the mine; it was sought to enjoin the maintenance of said fence and locked gate and to recover damages.

The cause of action upon which plaintiff prevailed herein upon a finding that the road is a public highway was not the same cause of action as the one in the former action which alleged his ownership of a private right of way. The proof that would have established one cause of action would not have established the other. The causes of action were in fact inconsistent, since defendant could not have sold, and plaintiff could not have purchased, a private right of way over a public road. Moreover, a different title was involved in each case, the first a private title, the other a title vested in the public. Defendant insists that "the parties being the same and the relief being the same, the doctrine of res judicata applies." He states in his opening brief that the cause of action in the present suit was different from the one stated in the former action but still maintains that the judgment operates as an estoppel because damages and an injunction were sought in each case. His argument, however, fails to recognize the significance of the fact that the causes of action in the two actions were different, although the same injunctive relief was sought in each case. The remedy that was sought was not the cause of action. The cause of action in each case consisted of the right or title alleged and defendant's violation of it. McKee v. Dodd, 1908, 152 Cal. 637, 93 P. 854, 14 L.R.A.,N.S., 780, 125 Am.St.Rep. 82. The relief sought by way of injunction and damages was merely incidental. Corporation of America v. Bank of America, 1935, 7 Cal.App.2d 470, 46 P.2d 262; Fritz v. Superior Court, 1936, 18 Cal.App.2d 232, 63 P.2d 872.

[12, 13] A judgment operates as a bar to a second action where the causes of action are the same, and in such a case it will be deemed that all matters were adjudicated in the first action that might have been adjudicated, namely, all grounds which would support plaintiff's right or title and all defenses which would defeat it, including those which were not placed in issue or tried. Where the later action is upon a different cause of action, that only is deemed to have been adjudicated which was actually tried and determined or which was necessarily involved in the adjudication made. Todhunter v. Smith, 1934, 219 Cal. 690, 28 P.2d 916. The question of the public character of the road was not in issue in the first case and the issue was not tried. A decision either way as to the private right claimed would not have determined any question as to the public right. The plea of res judicata was properly denied.

[14, 15] Defendant's final contention is that no damages should have been awarded. The evidence which plaintiff relies upon to support the award of damages was that access to the mine could be had only by the road in question, that operation of the mine was prevented by the closing of the road, and that his interest in the mine had a reasonable rental value of $50 per month. Plaintiff testified that the mine had been under lease upon two occasions since 1939 for combined periods of about 18 months and that his share of the cash rental was considerably more than $50 per month. Defendant's reply is that he had allowed the lessees to pass over the road and that it was not shown that he had refused the right to any one else who wished to lease it. However, plaintiff testified that defendant had threatened to shoot him if he crossed the land and that he would some day exclude other persons whom plaintiff was taking to the mine, and it was not shown that defendant had ever withdrawn this threat or had offered to allow the road to be used if plaintiff should find a new lease. The evidence did not disclose that plaintiff had an opportunity to lease the mine but under the circumstances he was excusable if he made no effort to do so. Defendant was not in a position to claim that the mine could not have been leased when his conduct had been such as to discourage any further leasing. The award of $500 damages for plaintiff's exclusion from the property for a period of ten or twelve months was justified by the evidence.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

69 Cal.App.2d 80

**PEOPLE v. THOMPSON.**
**Cr. 1889.**

District Court of Appeal, Third District, California.

May 1, 1945.

**1. Criminal law ⇐1159(2, 4)**

Credibility of witnesses and weight of evidence are questions for jury with which appellate court will not interfere if there is substantial evidence to support jury's conclusions.

**2. Abortion ⇐11**

Evidence supported conviction of abortion. Pen. Code, § 274.

**3. Criminal law ⇐1178**

Assigned error which is neither argued nor supported by authorities on appeal is abandoned.

**4. Abortion ⇐11**
**Criminal law ⇐510**

A defendant may not be convicted of abortion on uncorroborated testimony of woman upon whom alleged crime is committed or by uncorroborated testimony of an accomplice. Pen. Code, §§ 274, 1108, 1111.

**5. Criminal law ⇐409, 535(1)**

The corpus delicti of an abortion must be proved by evidence independently of extrajudicial admissions or confessions of defendant. Pen. Code, §§ 274, 1108, 1111.

**6. Abortion ⇐9**
**Criminal law ⇐508(1)**

The testimony of female upon whom alleged abortion is committed, or testimony of an accomplice, may be considered in proof of the corpus delicti, provided such evidence is adequately corroborated by competent facts, circumstances or reasonable inferences to be drawn from the evidence. Pen. Code, §§ 274, 1108, 1111.

**7. Abortion ⇐11**

Although essential elements of abortion must be corroborated, it is necessary only to supply sufficient proof thereof to entitle cause to be submitted to jury for determination. Pen. Code, §§ 274, 1108, 1111.

**8. Criminal law ⇐511(1)**

Evidence corroborating an accomplice creating more than a suspicion of guilt is sufficient to authorize conviction, notwithstanding it be slight, and, when standing by itself, entitled to but little consideration. Pen. Code, §§ 1108, 1111.

**9. Criminal law ⇐535(2)**

In abortion prosecution, where testimony of prosecutrix was clear and convincing upon every necessary element of the offense, and her testimony was adequately corroborated both by woman who allegedly accompanied her to defendant's office and by defendant's extrajudicial statement, the corpus delicti was established. Pen. Code, §§ 274, 1108, 1111.

**10. Criminal law ⇐1168(2)**

In abortion prosecution, where electrical device and machine by which abortion was allegedly procured was received in evidence, failure to formally introduce in evidence necessary parts of machine which had been marked for identification, and which were exhibited to jury, was harmless. Pen. Code, § 274.

**11. Criminal law ⇐404(3)**

In abortion prosecution, vaginal speculum was sufficiently identified by prosecutrix to be admissible in evidence for all purposes, where prosecutrix testified that she saw an instrument resembling one sought to be introduced in evidence in defendant's hand when he treated her. Pen. Code, § 274.

**12. Abortion ⇐9**

In abortion prosecution, where prosecutrix testified that urethral olive pad was used in performance of abortion, testimony regarding such pad was competent, even though pad was not formally introduced in evidence. Pen. Code, § 274.

**13. Witnesses ⇐277(3)**

In abortion prosecution, trial court did not err in permitting limited cross-examination of defendant, when he testified on examination in chief, that he did not admit in his extrajudicial statement which was received in evidence that he had "treated the girl twice". Pen. Code, §§ 274, 1323; Code Civ. Proc. § 2051.

**14. Witnesses ⇐277(3)**

In abortion prosecution, where defendant denied that he had ever treated the prosecutrix at any time for any purpose whatever, prosecution could show on cross-examination, if possible, conduct of defendant inconsistent with his denial. Pen. Code, §§ 274, 1323; Code Civ. Proc. § 2051.

15. Abortion ⇐9

In abortion prosecution, trial court did not err in sustaining objection to defendant's question propounded to prosecutrix in regard to her taking black pills, where it appeared that prosecutrix took pills about three months before her miscarriage, and that pills did not contribute to the miscarriage. Pen. Code, § 274.

16. Witnesses ⇐274(2)

On cross-examination of a character witness, it is proper to ask him in good faith if he had not heard current report regarding defendant's conduct prior to alleged charge which may tend to indicate specific traits of character which are involved in crime for which defendant is being tried for purpose of testing witness' credibility and to refute asserted public opinion regarding defendant's general reputation.

17. Witnesses ⇐274(2)

Where character witness testified that defendant's general reputation as a law-abiding citizen was good, it was competent to ask witness on cross-examination if he had not heard that defendant was not a law-abiding citizen and on the contrary that it was reported that defendant had been living in adultery.

18. Criminal law ⇐1170½(2)

Cross-examination of defendant's character witness as to whether witness had heard that defendant had been living in adultery was not prejudicial, in view of witness' negative answer.

19. Witnesses ⇐274(2)

In abortion prosecution, cross-examination of defendant's character witness who testified that defendant's general reputation as a law-abiding citizen was good with reference to report of defendant's general reputation with regard to practice of procuring abortions was competent to test witness' credibility and refute assertion that defendant had reputation of being a law-abiding citizen. Pen. Code, § 274.

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Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

M. A. Thompson was convicted of abortion, and he appeals.

Affirmed.

Wallace Shepard, R. C. Fleming, E. R. Vaughn, and John L. Brannely, all of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., James O. Reavis, Deputy Atty. Gen., John Quincy Brown, Dist. Atty., of Sacramento, and Albert H. Mundt, Chief Deputy Dist. Atty., of Represa, for respondent.

PER CURIAM.

The defendant was convicted of abortion under the provisions of Section 274 of the Penal Code. From the judgment of conviction, and from the order denying his motion for a new trial, he has appealed.

The appellant has assigned as grounds for reversal of the judgment: That there was a failure to adequately prove the corpus delicti; that the court erred in admitting prejudicial evidence with relation to four exhibits which were merely marked for identification without having been formally admitted in evidence for all purposes; that the court erred in permitting the cross-examination of the defendant upon matters not testified to in his examination in chief; and that the court erred in overruling objections to questions propounded on cross-examination to a character witness tending to indicate that he might be guilty of other offenses.

The judgment is adequately supported by the evidence. The record shows that the defendant was a licensed chiropractor who maintained offices in Sacramento, and that a seventeen-year old girl who was pregnant went to his office. She testified that she visited the office of the defendant and told him she had been pregnant six months and wanted to procure an abortion, and that he agreed to handle the case for the sum of $100, that, in the company of a lady friend, she returned, by appointment, for treatment on the 29th of May, 1944, and that she paid the defendant $100 before he treated her. The doctor directed her to enter a room where she saw an operating table equipped with stirrups, an electrical machine and attachments, a cabinet, sink and other furnishings. She was instructed to disrobe and to recline on the table. After doing so the doctor entered and covered her with a sheet. She saw "a black pad" attached to "a little black cord". That pad was evidently the urethral olive electrode set which was connected with the electrical machine and used in the operation. The doctor placed that electrical pad over the

patient's stomach and inserted in her vagina a metal speculum, which she afterward saw in his hands, with which he distended the walls, and then switched on the machine. The patient testified that she heard "a sort of clicking of metal against metal" and that "the machine was turned on before I heard the metal and then afterwards it buzzed and clicked and went off." She declared that she felt the sensation of "a tingling from the pad". After the first treatment was completed the patient left with her friend in a cab. That treatment did not result in a miscarriage. Several days later she called the defendant on the telephone and told him "there had been no results" and made an appointment for another treatment at his office on June 5th. She said, "I had another treatment the same as before". As a result of that second treatment she said "I had labor pains all day. * * * After work, about 4:30, * * * the water broke." That night she left her home and spent the night at the apartment of her lady friend. About ten o'clock that night she called Dr. Thompson and told him of her condition. He called, and after examining her, he told her she "should have a baby that night or the next day". He said he would call again the next morning. He also warned her "not to mention anything" about the treatment. The doctor called the next morning and found her suffering severe labor pains, and arranged for her accommodation at a local hospital. She went to the hospital and told them, at his suggestion, that Dr. Thompson had sent her there, and that she had fallen off a motorcycle. Dr. Ross M. Grimm, a duly licensed physician, examined her and testified that "she was pregnant and having contractions;" that she had been pregnant about six months, and that she was about to prematurely abort the foetus; that the girl was healthy and did not require an abortion to preserve her life or health. Dr. Grimm procured the delivery of the child which was born alive but lived only about twelve hours when it died.

Following the delivery of the child, the patient's grandmother, having secured the name and address of Dr. Thompson, called him on the telephone to locate her granddaughter and to inquire regarding the cause for sending her to a hospital. The family did not know that the girl was pregnant. The doctor told the grandmother that the girl was "in a terrible nervous condition" and that he had to send her to the hospital. He admitted that he had "talked the girl out" of telling her mother she was going to a hospital. When the grandmother informed him she had told the girl's mother that her daughter had been sent to the hospital the doctor replied, "Now you have gone and spoiled everything; she will go out there and spoil things. * * * You damned women talk too much; * * * You know I am not a physician."

Doctor H. P. Huppert, a licensed physician who had experienced many years in the practice of obstetrics, testified in detail regarding the use of the electrical machine, equipment, speculum and urethral olive pad which were identified as the articles taken from the defendant's office and which were used in his treatment of the patient. Doctor Huppert stated that the urethral olive pad was used in connection with the electrical machine. He asserted that an abortion could be procured by means of that equipment used in the manner related by the patient.

Verna Shermer, who was employed in Dr. Thompson's office as a nurse for several months prior to the middle of March, 1944, testified that she saw the doctor performing a few vaginal treatments. She identified exhibit number 1, the black electrical machine number 2, and the urethral olive electrode set, which she said was a part of the electrical machine equipment and which she had seen used in his office "a couple of times". She said that the pad was placed on the stomach, just as the patient testified that it was used in this case.

Upon the foregoing evidence, together with other corroborating circumstances, the defendant was convicted of abortion upon two counts of the information.

[1, 2] The support of the judgment depends largely upon the veracity of the chief participants in the alleged crime. The defendant positively denied that he ever treated the prosecutrix at any time for any purpose. There is evidence of conduct on his part which refutes that statement. The girl's story of the abortion appears to have been adequately corroborated. The credibility of witnesses and the weight of the evidence were questions for the determination of the jury with which we may not interfere since there is substantial evidence to support its conclusions. We are satisfied that the verdict and judgment are supported by the evidence.

[3] In his closing brief, for the first time, the appellant argues that the corpus delicti was not established. It is the settled rule that when an assigned error is neither argued nor supported by authorities on appeal, it will be deemed to have been abandoned. People v. Mott, 211 Cal. 744, 297 P. 23; People v. Epstein, 21 Cal.App.2d 488, 69 P.2d 454; 8 Cal.Jur. 546, sec. 550; 24 C.J.S., Criminal Law, p. 642, § 1813. It is apparent that the urging of alleged error for the first time in appellant's closing brief affords the prosecution no opportunity to reply to that contention. We shall however dispose of that issue on its merits.

[4-8] We are satisfied the corpus delicti was adequately established in this case. It is true that a defendant may not be convicted of abortion on the uncorroborated testimony of the woman upon whom the alleged crime is committed (Penal Code, sec. 1108), or by the uncorroborated testimony of an accomplice. Penal Code, sec. 1111. It is also true that the corpus delicti must be proved by evidence independently of extrajudicial admissions or confessions of the defendant. People v. Cornett, 61 Cal.App.2d 98, 105, 141 P.2d 916; 8 Cal. Jur. 167, sec. 248; 1 Cal.Jur. 113, sec. 11; 127 A.L.R. 1131, note. But the testimony of the female upon whom the alleged abortion is committed, or the testimony of an accomplice, may be considered in support of proof of the corpus delicti, provided such evidence is adequately corroborated by competent facts, circumstances or reasonable inferences to be drawn from the evidence. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720; People v. Hoyt, 20 Cal.2d 306, 314, 125 P.2d 29; People v. Richardson, 161 Cal. 552, 563, 120 P. 20; People v. Siderius, 29 Cal.App.2d 361, 84 P.2d 545; People v. Frazer, 80 Cal.App. 464, 252 P. 633; 8 Cal.Jur. 167, sec. 248. While it is true that the essential elements of the crime must be corroborated, it is necessary only to supply sufficient proof thereof to entitle the cause to be submitted to the jury for determination. People v. King, 213 Cal. 89, 107, 1 P.2d 15; 1 Cal.Jur. 113, sec. 11. It is the province of the jury to pass upon the weight of evidence and to determine, on the merits of the cause, whether the essential elements of the crime have been proved beyond a reasonable doubt. Regarding the sufficiency of corroborating evidence to meet the requirements of Sections 1108 and 1111 of the Penal Code, the Supreme Court said in the Wilson case, supra, 25 Cal.2d at page 347, 153 P.2d at page 723: "So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it 'be slight and, when standing by itself, entitled to but little consideration.' People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356; People v. Dorrance, 65 Cal.App.2d 125, 130, 150 P.2d 10; People v. Shaw, supra, 17 Cal.2d [778] at page 802, 112 P.2d 241. It may consist of testimony of the defendant and inferences therefrom as well as inferences from the circumstances surrounding the criminal transaction. [Citing authorities.]"

[9] The extrajudicial statement of the defendant was admitted in this case without objection. The testimony of the prosecutrix is clear and convincing upon every necessary element of the offense. It is adequately corroborated. Her lady friend loaned her $100 which she testified she paid to the defendant to perform the abortion. That friend also said that she accompanied the girl to the office of the defendant twice about the time of the treatments. Dr. Grimm testified that the girl came to the hospital pregnant and in severe labor pains; that she delivered a six-months-old child which lived but twelve hours and then died. Dr. Huppert testified that the instruments coming from the defendant's office, which were exhibited to him, could be used to procure an abortion in the manner disclosed by the evidence. The defendant took the witness stand and denied that he ever treated the girl in any manner at any time, although he admitted that she came to his office twice to procure an abortion. He also admitted, as a witness, that he visited the apartment the day following the last alleged treatment, and found her suffering severe labor pains, and that he then sent her to a hospital. That admission is inconsistent with his claim that she was not his patient. The reasonable inference is that she was his patient and that he had previously treated her. The foregoing evidence furnishes adequate proof of the corpus delicti, and sufficient corroboration to meet the requirements of Sections 1108 and 1111 of the Penal Code.

[10] The appellant charges prejudicial error in receiving evidence regarding the use of certain instruments which were seized from defendant's office by means of search warrants and claimed to have been used by him in performing the alleged abortion, without having first introduced them in evidence. There were ten exhibits

which were brought into court. Each was marked for identification. They consisted of a vaginal speculum, an electrical machine together with electric cords, containers and pads, on electrode olive pad and set, an operating table, a page from the doctor's appointment book and an extrajudicial statement of the defendant. Each of said instruments and attachments was duly received in evidence and marked as an exhibit, including the principal electrical machine and the operating table. The appellant does not challenge the evidence with respect to any of the exhibits except four which were numbered 1, 4, 8 and 9 "for identification". The first one was formally and properly received in evidence "for all purposes" as we shall hereafter indicate. The other three consisted of the electrode olive pad and set and an electric cord and pads with their containers which were designated, explained and marked for identification, but which the prosecuting officer neglected to formally offer in evidence for all purposes.

We think that omission was harmless. People v. Owen, 68 Cal.App.2d 617, 157 P. 2d 432. Those articles were apparently a necessary part of the electrical device and machine which was received in evidence, by means of which the abortion was procured.

[11] The first challenged exhibit number 1 is a vaginal speculum. It was sufficiently identified by the prosecutrix. She testified that she saw an instrument "resembling * * * that, * * * in Dr. Thompson's hand", in his office immediately after his first treatment. She also testified that he used some instrument in the course of his treatment in the same manner that Dr. Huppert subsequently testified the speculum could be used in such an operation. It was first marked Exhibit 1 for identification. The use of that instrument was testified to without objection. The attorney for the defendant fully interrogated the doctor on cross-examination regarding the use of that instrument. Much later, in the course of the trial, after Melvin Reese, a Deputy Sheriff, had testified that he took that instrument and the other exhibits from the defendant's office by means of a search warrant, the speculum was offered "for all purposes", and we think it was actually received in evidence. This colloquy occurred in that regard:

"Mr. Mundt: At this time I want to introduce this speculum, People's Exhibit 1 for identification, *for all purposes.*

"Mr. Shepard: To which we object, * * *; no proper foundation laid.

"The Court: I don't think you have proven that sufficiently.

"Mr. Mundt: We have the testimony of the girl that an instrument similar to that * * * was used in the abortion.

"The Court: Did she say that?

"Mr. Mundt: [An instrument] similar to this [was seen] in his hand, * * *.

"The Court: Very well. Proceed."

After refreshing the court's mind regarding the evidence in that respect, the court clearly overruled the objection and admitted the vaginal speculum in evidence for all purposes. There certainly was no error in receiving that instrument in evidence.

There was no prejudicial error in failing to finally ask for the admission in evidence of exhibits numbers 8 and 9 for identification. They consisted of an electric cord and pad together with containers. They had not been referred to until defendant's cross-examination of Mr. Reese, the Deputy Sheriff, regarding the seizure of the several instruments under search warrant. He was asked by defendant's attorney if he had mentioned all articles that he seized under that warrant. He replied that he also took the electric cords and the containers and pad. At the request of the District Attorney they were then marked for identification, without objection on the part of the defendant. We are directed to no evidence that the electric cords, containers and pad were again referred to or displayed before the jury. We are unable to perceive how the failure to formally introduce them in evidence could have prejudiced the defendant. If they were a necessary part of the electrical machine which was used in the performance of the abortion we are of the opinion they may be considered to have been received in evidence when that machine was received and formally marked as an exhibit for all purposes. If they were not a part thereof it was harmless that they were not formally received in evidence.

[12] The appellant chiefly urges the alleged erroneous rulings of the court permitting the urethral olive pad and electric cord to be marked exhibit 4 for identifica-

tion, and in admitting testimony regarding its use. Mr. Reese, the officer, testified that he obtained it from the office of the defendant. He said that he first asked the defendant if he had that equipment, and that he replied "No." The girl upon whom the abortion was committed sufficiently identified it as a part of the electrical apparatus which was used in the performance of the abortion. She testified there was an operating table and an electrical machine in the office room where the treatments were administered; that the machine was placed against the wall about three feet from the table upon which she reclined; that the doctor placed "on my stomach", beneath a sheet with which her body was covered, a "black pad" attached to "a little black cord" which extended toward the electric machine. She said "he inserted something into my vagina that spread it," and that he "turned on some machinery". She added, "The machine was turned on before I heard the metal and then afterwards it buzzed and clicked and went off." In response to the question, "Did you feel any sensation?" she replied, "A tingling from the pad." Upon that testimony the electric pad was properly marked for identification. The jury was warranted in assuming it was a device which was attached to the electric machine and which was used to transmit an electric shock for the purpose of causing an abortion.

Subsequently Dr. H. P. Huppert, a licensed physician who was experienced in obstetrics, was fully examined and cross-examined regarding the use and effect of that electric pad device. After explaining in elaborate detail the instruments exhibited to him, he testified that "any method, electrical or mechanical, used on the cervix, as described, during the period of gestation, could cause an abortion." This, *together with the olives* depicted here could be used as a dilator and introduced into the cervix, thereby interfering with the natural plug in the uterus following which Nature will take over and abort the patient." That evidence confirms the testimony of the patient. An abortion actually occurred within a few hours after a second similar treatment. The patient gave birth to a six-month child, which lived but a few hours and died. The evidence appears to be very conclusive that the abortion was procured as a direct result of the use of the electrical devices as related by the witnesses. While the prosecuting officer overlooked formally offering the urethral olive pad and cord in evidence for all purposes, that omission was harmless. The testimony regarding that device was competent and persuasive evidence of guilt even if the electrical pad had not been produced in court.

In the case of People v. Darby, 64 Cal. App.2d 25, 148 P.2d 28, 31, upon which the appellant relies, the facts are radically different from those of the present case. In that case the defendant was convicted of abortion, and the judgment was reversed. The court criticized the evidence adduced in that case to the effect that the defendant had previously committed abortions upon two other women by the use of "certain surgical instruments". But there was absolutely no evidence that the defendant had used any surgical instrument whatever upon the patient involved in the abortion for which he was then being tried. The court says in that regard: "But we have no such situation here. No testimony was given by Mrs. Sylvia or by defendant Darby that any instrument was used. On the other hand, according to the testimony of defendant, the treatment given by him to Mrs. Sylvia was such as is customarily and frequently given to female patients."

Clearly the evidence of other crimes of abortions committed by means entirely different from Darby's treatment of the patient involved in that case was incompetent and prejudicial because there was no similarity in the method employed which would tend to show the intent of the defendant to unlawfully commit the offense for which he was being tried. No such objectionable evidence was adduced in the present case. The principle upon which the Darby case was reversed is not involved in this case. It is not authority in support of the appellant's contention in that regard.

In the case of People v. Clapp, 67 Cal. App.2d 197, 153 P.2d 758, the judgment of conviction of abortion was affirmed. In that case the evidence showed that the defendant caused an abortion of another woman by similar means of administering "caroid solution" and also by use of a speculum. In the Clapp case the evidence showed that the defendant used a speculum and also administered a "brown liquid".

In the case of People v. Wilson, supra, the judgment of conviction of an abortion was affirmed. In that case the woman upon whom the abortion was committed testified that she could not see whether the defendant used an instrument; that she merely felt something and heard metallic sounds.

In spite of that fact the judgment was affirmed on the theory that there was adequate evidence of the use of a surgical instrument. In the present case there was much more definite evidence of the use of a surgical instrument and of the electrical device including the urethral olive pad and attachments.

[13] We are of the opinion the court did not err in permitting a limited cross-examination of the defendant, directed toward his credibility and inconsistent conduct when he testified on examination in chief, in effect, that he did not admit, in his extrajudicial statement which was received in evidence, that he had "treated the girl twice". On examination in chief, having first read that portion of his extrajudicial statement with reference to the treatment of patients by means of "short-wave infra red" electric vibrations, in which he was asked, "Did you give any such treatment" to the prosecutrix, he replied, "Twice", the defendant testified as a witness that he did not recall that statement, but added that if he did so state it was because he understood the question to be an inquiry as to how many times the girl had visited his office. On cross-examination, to test the veracity of the defendant's virtual denial that he had admitted treating the patient twice, and to show inconsistent conduct on his part, the prosecution was permitted, over objections, to ask him if, as a matter of fact, he did not actually administer some treatments to her, which he consistently denied.

It is true that the cross-examination of a defendant is confined to "all matters about which he was examined in chief." Penal Code, sec. 1323. But when a defendant, charged with abortion, takes the witness stand and denies a previous extrajudicial statement in evidence, in which he admits treating the woman involved therein, it is competent, on cross-examination, to prove that his conduct refutes that denial. People v. Creeks, 170 Cal. 368, 379, 149 P. 821, 825. A witness may be impeached "by contradictory evidence." Code of Civ. Proc., sec. 2051. In the Creeks case, supra, it is said in that regard: "The statute places no limitation or restriction upon the extent or character of his cross-examination 'as to all matters upon which he was examined in chief,' and upon these matters he may be cross-examined as fully as any other witness. 'Any question which would have the tendency to elicit from him the whole truth about any matter upon which he had been examined in chief, or which would explain, or qualify, *or destroy the force of his direct testimony,* * * * or to show by his own admissions that he had made contrary statements, *or that his conduct had been inconsistent with the statements given in his direct testimony,* and thus throw discredit upon them, would be legitimate cross-examination.'" (Italics added.)

Quoting with approval from People v. Dole, 122 Cal. 486, 491, 55 P. 581, 68 Am. St.Rep. 50, the court further says, in the Creeks opinion, that: "'Any fact may be called out on cross-examination which a jury might deem inconsistent with the direct testimony of a witness, and a defendant testifying in his own behalf is in this respect put upon the same plane with other witnesses.'"

[14] In a portion of the defendant's extrajudicial statement, which he did not deny on the witness stand, he admitted that he sometimes treated patients by means of "short-wave infra red" transmitted through an electrical pad placed over the abdomen. Having, in effect, denied that he had ever treated the girl who is involved in this case at any time for any purpose whatever, it was competent for the prosecution to show on cross-examination, if possible, conduct of the defendant inconsistent with his denial. It was inconsistent with the defendant's denial of treatments of the girl to have responded to her call and to have visited her apartment the morning after the last alleged treatment and to have arranged for her to go to a hospital for delivery of the child, if she was not his patient. He had never met her until the day before the alleged first treatment. The court limited the cross-examination to the sole question as to whether the defendant had in fact treated the girl. That evidence was competent to rebut the denial of treatment by conduct inconsistent therewith. The court did not err in its rulings in that regard.

[15] The court did not err in sustaining an objection to defendant's question propounded to the prosecuting witness as follows: "How did you come to know anything about black pills?" She had been previously asked if she had done anything to induce a miscarriage, to which she replied "Yes". She testified that she got the black pills at a drugstore and took several

of them, but that they made her sick and she stopped taking them. It appeared that she took the pills in February, about three months before her miscarriage. It seems apparent that the pills did not contribute to the miscarriage. That evidence was too remote. But the defendant's attorney was not precluded by the court from fully inquiring into that subject. He made no attempt to prove when the pills were taken, what drug or properties they contained, or what resulted from her taking them. Evidently he knew that circumstance was too remote to have affected the miscarriage, and he abandoned the subject. The ruling was harmless.

[16] Finally it is contended the court erred in overruling defendant's objections to questions propounded to a character witness on cross-examination. J. J. Litton testified that the general reputation of the defendant for truth, honesty, integrity and "as a law-abiding citizen" was good. On cross-examination, over objections of the defendant, he was permitted to answer questions as to whether he had heard that the defendant "had lived in a state of adultery" and whether he had heard that the defendant "has been engaged in abortion activities" prior to the time of the alleged crime for which he was being tried. To each of those questions the witness replied that he had not heard of those reports.

The court did not err in those rulings. It is proper, on cross-examination of a character witness, to ask him in good faith if he had not heard current reports regarding the conduct of the defendant prior to the alleged charge which may tend to indicate specific traits of character which are involved in the crime for which he is being tried, for the purpose of testing the credibility of the witness and to refute the asserted public opinion regarding the general reputation of the defendant. People v. Sieber, 201 Cal. 341, 349, 257 P. 64; People v. Creeks, supra; People v. Haley, 46 Cal. App.2d 618, 625, 116 P.2d 498; People v. Buchanan, 119 Cal.App. 523, 6 P.2d 538; Underhill's Criminal Evidence, 4th Ed., 303, sec. 172. The Sieber case, supra, was similar in principle to the present case. The defendant in that case was charged with homicide. A character witness had testified to his good reputation "as a peaceable law-abiding citizen." [201 Cal. 341, 257 P. 68] The Supreme Court held that it was proper cross-examination for the prosecution to ask the witness if he did not know that "Sieber had lived with a woman who was not his wife, and had held her out to be his wife"? to which he replied "No". The court said, 201 Cal. at page 349, 257 P. at page 68, concerning that evidence: "The first question asked was admissible under the rule that a character witness may be cross-examined as to his knowledge of reports of particular and specific charges of the commission of acts inconsistent with the trait or character (in this case that the appellant was a law-abiding citizen) which the witness was called upon to prove. People v. Hightower, 65 Cal.App. 331, 340, 224 P. 110. Furthermore, no prejudice resulted to the defendant, because the question was answered in the negative."

[17, 18] In the present case the character witness was asked to testify to the general reputation of the defendant "as a law-abiding citizen". He said his reputation was good in that regard. The effect of that evidence was to give the jury the impression that his reputation *as a law-abiding citizen* was so good that he would not be likely to violate the law by deliberately committing an abortion. That opened the door for evidence on cross-examination that his general reputation in that community as a law-abiding citizen was not good. For that purpose it was competent to ask the witness if he had not heard that he was not a law-abiding citizen, and on the contrary that it was reported he had been living in adultery. At least, it may be said, as the court stated in the Sieber case, it was not prejudicial since the witness replied in the negative.

[19] The other challenged rulings on cross-examination of the same character witness had reference to reports of defendant's general reputation with regard to the practice of procuring abortions. Those questions were clearly competent to test the witness' credibility and to refute the assertion that he had the reputation of being a law-abiding citizen. There is no indication that the District Attorney was not in good faith in propounding those questions.

There does not appear to have been a miscarriage of justice in this case.

The judgment and the order denying a new trial are affirmed.

69 Cal.App.2d 60

## CORBIN et al. v. BEDEL et al.

No. 12694.

District Court of Appeal, First District, Division 1, California.

May 1, 1945.

Hearing Denied June 28, 1945.

**1. Appeal and error ⇐1064(1)**

Instruction that, if jury should find that plaintiff violated local ordinance prohibiting double parking and such violation was a proximate cause of his being struck by defendant's bus, he would be barred from recovery for his injuries sustained if erroneous on ground that ordinance was invalid because state vehicle law contained provisions prohibiting double parking and instruction should have been based thereon, was harmless to plaintiff, where provisions relating to double parking in state law and ordinance were substantially the same. Vehicle Code, § 458, St.1935 p. 164; § 586, St.1941, p. 2724; § 588, St.1939, p. 1504.

**2. Automobiles ⇐246(58)**

In action for injuries sustained by plaintiff when he was struck by defendant's bus under evidence that plaintiff heedlessly stepped back out of the left door of his double-parked automobile into the highway and against the side of defendant's bus, instruction on the law against double parking, and submitting issue to jury whether such double parking was a proximate cause of the accident, was not error. Vehicle Code, § 458, St.1935, p. 164; § 586, St.1941, p. 2724; § 588, St.1939, p. 1504.

**3. Automobiles ⇐226(2)**

In action for personal injuries sustained by plaintiff when he was struck by defendant's bus when he stepped from his double-parked automobile, where it was shown that a series of plaintiff's negligent acts culminated in his injury, no one of those acts could be isolated from the others in determining whether plaintiff's negligence was a proximate cause of the accident.

**4. Automobiles ⇐246(39)**

In action for injuries sustained by plaintiff when he was struck by defendant's bus while alighting from his double-parked automobile, under evidence that bus driver had to swerve bus because there were a number of double-parked automobiles, instruction that, if jury should find that bus driver was confronted with a sudden peril requiring action, he was required to use only that degree of care which ordinarily prudent persons would use under same circumstances, was proper, notwithstanding bus driver stated he did not see plaintiff prior to accident.

**5. Automobiles ⇐246(58)**

Where plaintiff's automobile was double parked within 11 feet of the center of a well-travelled highway, and plaintiff was struck by defendant's northbound bus while stepping back from his automobile on the left side of his automobile nearest the center of highway and in pathway of northbound traffic, instruction that plaintiff could not be charged with contributory negligence merely because he stepped back from his automobile was properly refused.

**6. Trial ⇐260(1)**

Where requested instruction was fully covered by other instructions which court gave, refusal to give requested instruction was not error.

**7. Automobiles ⇐246(60)**
**Trial ⇐260(8)**

Instructions in effect that plaintiff, who was struck by defendant's bus and in a position to be seen, could rely on the presumption that operators of motor vehicle would obey the law, but omitting "only if plaintiff was free from negligence", were properly refused but refusal was not prejudicial in any event where the substance of refused instructions was given.

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Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Joseph C. Corbin, Jr., a minor, by Joseph J. Corbin, his guardian ad litem, and another, against M. Max Bedel and others for personal injuries sustained when named plaintiff was struck by a bus. From an adverse judgment, plaintiffs appeal.

Affirmed.

Millington, Grover, Comaich & Baumgarten, Wayne R. Millington, and John F. O'Sullivan, all of San Francisco, for appellants.

Bronson, Bronson & McKinnon, of San Francisco, for respondents.

KNIGHT, Justice.

After trial on the merits a jury returned a verdict for defendants, and from the judgment entered thereon plaintiffs have appealed. The action is one to recover damages for personal injuries sustained by the plaintiff Joseph J. Corbin, Jr., as the result of an accident which occurred about 5:30 o'clock in the afternoon in front of an automobile junk yard on San Bruno Avenue near Alemany Boulevard in San Francisco. He was 19 years of age at the time of the accident and less than 21 when the complaint was filed; and he therefore brought the action through his guardian ad litem in which his father joined as party plaintiff. It was alleged in the complaint that the injuries were caused by the negligent operation of a bus owned by the defendant company and driven by the defendant Bedel. The defendants denied the allegations of negligence and charged that the injuries sustained by Corbin, Jr., resulted from his own carelessness and negligence; and as stated the jury after hearing the evidence brought in a verdict for defendants.

There is no contention made that the verdict is not supported by the evidence, nor do plaintiffs complain of any rulings made during the course of the trial. They assign as error the giving of two instructions and the refusal to give certain others. The points urged in this behalf do not constitute grounds for reversal.

The following are the facts to be considered in connection with the foregoing assignments of error: Corbin, Jr. (hereinafter referred to as plaintiff), worked as a truck driver, and on the day of the accident, after finishing his work, he drove his own car, a stripped down 1930 Ford roadster, from his home to the junk yard to purchase a dashboard. The junk yard was located on the east side of San Bruno Avenue, and upon arriving there he requested a friend named Welch to drive the Ford to Welch's home to get a crescent wrench. After Welch left plaintiff proceeded to detach the dashboard from a wrecked car in the junk yard, and when Welch returned with the wrench he double parked the Ford, facing north, in front of the junk yard on the east side of San Bruno Avenue in violation of a municipal ordinance and a state law. At that point San Bruno Avenue was 51 feet wide between curbs, and plaintiff's car was parked out on the easterly half thereof with its left wheels 13 or 14 feet from the curb and about 11 feet from the center of the street. There was a number of other cars double parked on the same side of the street at or near the point where the accident occurred. After detaching the dashboard and paying for it, plaintiff carried it out of the junk yard, placed it in the rear of the Ford, and almost immediately afterwards he was injured by a northbound bus as it passed plaintiff's double parked car on the left side.

The evidence is conflicting as to plaintiff's movements and position at the precise time of the accident. Resolving such conflicts in favor of the verdict, he stepped backward out of the left side of his car into the right side of the bus just as the bus was passing his car. The testimony establishing these facts was given by two of the bus passengers. They testified that when the bus was about 50 feet distant from plaintiff's car it swerved sharply to the left toward the center of the street; that they looked through the windshield to see what was happening, and that just as the bus was about to pass the Ford they saw plaintiff step backward out of the left door of the Ford onto the running board and then down onto the street; that instantly they heard a "thump" or "thud" on that side of the bus; that looking back they saw that something had happened on the highway and that one of them said to the driver of the bus, "I think we hit someone"; that the driver brought the bus to a stop within two bus lengths, and going back found that plaintiff had been injured. The driver was not a witness at the trial. His deposition had been taken by plaintiffs and at the trial they introduced it in evidence and read it to the jury; but for some reason the deposition was not incorporated in the reporter's transcript nor attached thereto. However, according to the statements made in the briefs the driver stated that when he saw the double parked cars on the right hand side of the highway he swerved to the left to pass them; but that he did not see plaintiff and did not know that anything had happened until he was so informed by the passenger.

The substance of the testimony offered by plaintiffs in support of their case was that after plaintiff placed the dashboard in the rear of his car he stood for a moment in the highway on the left side of his

car, facing north, putting some money in his wallet; and that while standing in that position he was struck by the bus.

[1] At the opening of defendants' case the pertinent provisions of the local ordinance prohibiting double parking were read to the jury without objection and afterwards those provisions were given to the jury in the form of an instruction, the concluding portion thereof being that if the jury found that plaintiff violated such provisions of the ordinance and that such violation was a proximate cause of the accident, then he was not entitled to any damages. Plaintiff's first contention is that those portions of the local ordinance prohibiting double parking were invalid for the reason that the state vehicle law also contained like provisions prohibiting double parking (Vehicle Code, sec. 586, St.1941, p. 2724, and § 588, St.1939, p. 1504), and that therefore the giving of an instruction based on the local ordinance was error, citing Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, 147 A.L.R. 515, decided in May, 1942. That was a case involving pedestrian traffic regulations at crosswalks wherein the trial court gave two instructions, one based on the state law and the other on a local ordinance. On appeal it wtas held that in view of the declaration of intention set forth in section 458 of the Vehicle Code, St. 1935, p. 164, it was necessary to hold that the regulation of pedestrian traffic at crosswalks was a field intended to be occupied fully by the state Legislature and that therefore the provisions of the local ordinance were invalid. The court then went on to point out that the provisions of the two laws were conflicting, and it was held therefore that the giving of the instruction based on the provisions of the local ordinance constituted prejudicial error. The present case, however, is essentially different from the Pipoly case. Here plaintiffs admit that the provisions of the ordinance and those of the state law were substantially the same. Both prohibit double parking, and admittedly plaintiff's car was double parked, which constituted negligence per se under either law. Even conceding, therefore, that the trial court should have based its instruction on the state Vehicle Code instead of the local ordinance, it is manifest that the failure so to do did not constitute prejudicial error. The situation in the present case is in principle no different from the one presented in Bencich v. Market Street R. Co., 29 Cal.App.2d 641, 85 P.2d 556, wherein the court read to the jury a section of the Vehicle Code not in force at the time of the accident, but which was substantially the same as the one that was in force at the time of the accident; and it was held that no prejudicial error resulted. In the cases cited by plaintiffs wherein it was held that it was reversible error to give the jury an instruction based on an ordinance which was invalid, the ordinances were not substantially the same as the provisions of the Vehicle Code on the same subject matter, but embodied additional or different regulations; therefore those cases are not controlling here.

Incidentally it should be here noted that in 1943 the Legislature added section 459.1 to the Vehicle Code, St.1943, p. 2172, declaring that the provisions of the code regulating pedestrian traffic "shall not be deemed to prevent local authorities, by ordinance, from adopting ordinances prohibiting pedestrians from crossing roadways at other than crosswalks."

[2, 3] Plaintiffs make the further contention that there was no evidence to support the inference that the position of plaintiff's double parked car contributed in any way to the happening of the accident, and that therefore it was prejudicial error to give any instruction on double parking. There is no merit in the contention. As already pointed out, plaintiff's car was double parked in violation of law, and such violation constituted negligence per se. Therefore the question of whether such negligence was a proximate cause of the accident was essentially one of fact to be submitted to the determination of the jury under proper instructions. Moreover, the evidence supporting the verdict shows that after the car had been double parked in violation of law plaintiff heedlessly stepped back out of the left door thereof into the highway and against the side of the passing bus. It is evident, therefore, that the double parking of the car was but one of a series of acts which culminated in his injury; and that being so, no one of those acts may be isolated from the others in determining the question of proximate cause. Harrison v. Gamatero, 52 Cal.App.2d 178, 125 P.2d 904.

The next instruction complained of was one given on the doctrine of imminent peril. It reads: "I instruct you that a person who, without negligence on his part is faced with a sudden peril or danger where immediate action is necessary, is not re-

quired to exercise that presence of mind and care which is justly expected of a person under ordinary circumstances. Accordingly, in this case, *if you find* that the defendant, M. Max Bedel, at and immediately before this accident was confronted with a sudden peril or danger requiring immediate action, in that case he is not required to exercise all of that presence of mind and care which would be required of him under ordinary circumstances but on the contrary he is required only to use that degree of care which the ordinarily prudent person would use under the same circumstances of sudden peril." (Italics ours)

[4] Plaintiffs do not claim that the instruction does not contain a correct statement of law, but they argue that there was no evidence to justify the giving of such an instruction, because the bus driver stated that he did not see plaintiff prior to the accident. There is no merit in the point. According to the testimony of the driver, as it is set forth in respondents' brief, he was confronted with a number of double parked cars as he approached the scene of the accident. They were of all types and sizes, and some were parked at angles. Furthermore, there were people standing on both sides of the highway and in order to "get by" the double parked Corbin car it was necessary to swerve the bus sharply to the left. In that state of the evidence it cannot be said that the giving of the instruction on imminent peril was not justified. Moreover, as will be noted, the jury was instructed that *if it found* that the bus driver was confronted with a sudden peril or danger requiring action, he was required to use only that degree of care which the ordinarily prudent person would use under the same circumstances. In other words, the jury was told in effect that the instruction was to be disregarded unless it found a condition of imminent danger arising without negligence on the part of the bus driver. Since, therefore, the instruction was given in that qualified form, no error was committed. Hawkinson v. Scholz, 13 Cal.App.2d 687, 57 P.2d 945; White v. Barker Bros., 12 Cal.App.2d 164, 55 P.2d 248.

One of the proposed instructions on contributory negligence which the trial court refused to give was the following: "You are instructed that plaintiff, Joseph J. Corbin, Jr., is not to be charged with contributory negligence merely because he stepped back from his automobile, if you should find such to be the fact. I instruct you that the standard of care required of plaintiff, Joseph J. Corbin, Jr., is ordinary care as defined by these instructions, and, in the exercise of ordinary care he had the right to assume that operators of motor vehicles would exercise ordinary care in the operation of their vehicles at the time and place in question."

[5, 6] It is obvious that the first sentence of the instruction did not declare a correct principle of law because the question of whether a person may be charged with negligence merely because he stepped back from his car would depend on whether in so doing he was exercising ordinary care. In other words, whether the mere stepping back from an automobile would constitue negligence would necessarily depend on surrounding circumstances, among them being the location of the automobile, and whether the person stepped back on a street or highway over and along which there was fast moving traffic. Here the admitted facts are that at the time of the accident plaintiff's car was double parked within 11 feet of the center of a well travelled highway, and the impact occurred while plaintiff was on the left side of his car nearest the center of the highway, and in the pathway of northbound traffic. Therefore, in view of those admitted facts the instruction in the form submitted was properly refused. The second sentence of the proposed instruction was fully covered by other instructions which the court gave, one of them being in language almost identical with the one in question.

[7] The next instruction plaintiffs contend should have been given was to the effect that if the jury found that plaintiff was standing in a place of safety and in a position where he could be seen by operators of vehicles exercising ordinary care and he failed to look for approaching vehicles, he was not guilty of contributory negligence as a matter of law; that under such circumstances plaintiff "had the right to assume that operators of motor vehicles would exercise ordinary care in the operation of their vehicles and, in the exercise of such ordinary care, would see him and so operate their vehicles as to avoid striking him." And the third instruction refused was to the effect that if the jury found that plaintiff was standing in the street, in a place of safety and

in a position where he could be seen by anyone exercising ordinary care, and there was ample space to permit vehicles to pass without striking him, he was under no duty to keep a constant lookout for the approach of automobiles, "but had the right to assume" that the operators of vehicles would exercise ordinary care and would see him and would so operate their vehicles as to avoid striking him.

Each of the foregoing instructions omitted the important element that "it is only a person who is free from negligence who may rely on the presumption that another will not violate the law." Fietz v. Hubbard, 59 Cal.App.2d 124, 138 P.2d 315, 318; see also Doyle v. Loyd, 45 Cal.App.2d 493, 114 P.2d 398; Crabbe v. Rhoades, 101 Cal.App. 503, 282 P. 10; Poe v. Lawrence, 60 Cal. App.2d 125, 140 P.2d 136, 140. As said by the court in the case last cited: "One may not close his eyes to threatening danger and blindly rely upon the assumption that the other party will use reasonable care and prudence and obey the traffic laws. Only when there is nothing in the situation to warn him of impending danger is he not guilty of negligence in relying upon such assumption. Simonsen v. L. J. Christopher Co., 186 Cal. 786, 788, 200 P. 615; Edlund v. Los Angeles R. Co., 14 Cal.App.2d 673, 675, 58 P.2d 928." It would seem, therefore, that because of such omission the trial court was warranted in refusing to give the proposed instructions. However, in no event can it be said that such refusal operated to plaintiffs' prejudice for the reason that the court did give an instruction fully covering the subject matter of those refused. It was as follows: "I instruct you that a person lawfully and carefully using a street has the right to assume that all other persons using the street will also use ordinary care and caution. This rule allows persons so using the street to assume, until the contrary reasonably appears, that the drivers of motor vehicles will obey and abide by the traffic laws and regulations." The situation here presented is essentially different from those involved in the cases cited by plaintiffs wherein pedestrians were injured while walking along the highway, in places where they had a right to be. For that reason we do not deem those cases in point.

After having given full consideration to all of the points urged by plaintiffs with respect to the instructions given and refused, it is our conclusion that no ground for reversal has been shown, and that the verdict of the jury has not resulted in a miscarriage of justice.

The judgment is therefore affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.






68 Cal.App.2d 853

**PEOPLE v. NOBLE et al.**

**Cr. 1816.**

District Court of Appeal, Third District, California.

April 24, 1945.

**Hearing Denied May 24, 1945.**

**1. Criminal law ⇐1023(12)**

An order denying a motion in arrest of judgment is not appealable, but order may be reviewed only on appeal from judgment.

**2. Criminal law ⇐561(2)**

In prosecution for violating the Subversive Organization Registration Act, the people must prove beyond reasonable doubt, not only that there was a governing body for alleged organization, but also that the defendants were members of it, as charged in indictment. St.1941, pp. 1236, 1239, §§ 1, 2, 12.

**3. Criminal law ⇐1159(2)**

In prosecution for violation of the Subversive Organization Registration Act, if there was any evidence from which it could reasonably be inferred that defendants were members of governing body of alleged organization, implied finding of jury on that issue was required to be sustained. St.1941, pp. 1236, 1239, §§ 1, 2, 12.

**4. Insurrection and sedition ⇐2**

In prosecution for violation of the Subversive Organization Registration Act, evidence was sufficient to sustain implied finding that two defendants were members of governing body of alleged organization but was insufficient to sustain implied finding that other defendants were members of governing body. St.1941, pp. 1236, 1239, §§ 1, 2, 12.

**5. Insurrection and sedition ⇐2**

The Subversive Organization Registration Act is penal in its nature and must be construed in a strict and accurate sense. St.1941, pp. 1236, 1239, §§ 1, 2, 12.

**6. Statutes ⇐241(1)**

Penal statutes must be construed to reach no further than their words, and no person can be made subject to them by implication.

**7. Insurrection and sedition ⇐2**

Provision of the Subversive Organization Registration Act requiring proof of advocacy of overthrow of government of the United States by force and violence is not satisfied by mere proof that defendants indulged in intemperate, unreasoning, sinister, and iniquitous criticism of government, officials, allies, or praised a different form of government. St.1941, pp. 1236, 1239, §§ 1, 2, 12.

**8. Insurrection and sedition ⇐2**

In prosecution for violation of Subversive Organization Registration Act, evidence was insufficient to show that organization, governing body of which defendants were charged with being members, advocated or advised the overthrow of the government by force and violence. St. 1941, pp. 1236, 1239, §§ 1, 2, 12.

**9. Insurrection and sedition ⇐2**

In prosecution for violation of Subversive Organization Registration Act, evidence was insufficient to establish that organization, governing body of which defendants were charged with being members, was subject to foreign control or that its policies were determined by or in collaboration with foreign government or an agency or instrumentality of a foreign government or foreign political party. St. 1941, pp. 1236, 1239, §§ 1, 2, 12.

**10. Constitutional law ⇐46(1)**

Constitutionality of Subversive Organization Registration Act was not required to be considered where convictions were required to be reversed because of insufficiency of evidence. St.1941, pp. 1236, 1239, §§ 1, 2, 12; 18 U.S.C.A. §§ 14–17; 22 U.S.C.A. §§ 601, 611–616; U.S.C.A. Const. art. 4, cl. 2.

**11. Insurrection and sedition ⇐2**

Evidence was insufficient to sustain convictions for violation of Subversive Organization Registration Act. St.1941, pp. 1236, 1239, §§ 1, 2, 12.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Robert Noble, alias Robert Coker, who answers his true name to be Robert Noble, Ellis O. Jones, F. K. Ferenz, Leone Menier, alias Leone Lee, who answers her true name to be Leone Menier, James M. McBride, Joan McBride, Daniel Van Meter, Baron Van Meter, and Genevieve Kerrigan were convicted of violating the Subversive Organization Registration Act, and they appeal.

Reversed.

Robert Noble, in pro. per.

Ellis O. Jones, in pro. per.

F. K. Ferenz, in pro per. and E. W. Miller, of Los Angeles, for F. E. Ferenz.

Roy Daily, of Sacramento, for appellants Leone Menier and Genevieve Kerrigan.

J. M. Inman, of Sacramento, for appellants James McBride, Daniel Van Meter, and Baron Van Meter.

A. L. Wirin, of Los Angeles, amicus curiae.

Robert W. Kenny, Atty. Gen., and Sherrill Halbert, Deputy Atty. Gen., for respondent.

PER CURIAM.

In 1941 the Legislature of California adopted an act known as the Subversive Organization Registration Act, Stats.1941, ch. 183 p. 1236, requiring the registration with the Secretary of State of "every corporation, association, society, camp, group, bund, political party, assembly, and * * * every other body or organization composed of two or more persons or members, which:

"(a) Directly or indirectly advocates, advises, teaches, or practices, the duty, necessity or propriety of controlling, conducting, seizing, or overthrowing the Government of the United States, or of this State or of any political subdivision thereof by force or violence; or

"(b) Is subject to foreign control" in that "(1) it solicits or accepts financial contributions, loans or support of any kind, directly or indirectly, from, or is affiliated directly or indirectly with, a foreign government or a political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization, or (2) its policies, or any of them, are determined by or at the sugges-

tion of, or in collaboration with, a foreign government or political subdivision thereof, or an agent, agency, or instrumentality of a foreign government or a political subdivision thereof, or a political party in a foreign country, or an international political organization."

The act required every existing organigation of the type hereinabove referred to to file with the Secretary of State, within thirty days after the effective date of the act, and every new organization of such type, within ten days after its organization, a detailed statement giving the address of all its branches, the names, addresses and nationalities of its officers, the qualifications required for membership, the assets owned by it, contributions received by it, and similar information not necessary to detail here. It imposed heavy fines on any organization which violated its provisions and also provided that:

"Any officer of a corporation, association, or organization to which this act applies and every member of the board of directors, board of trustees, executive committee, or other similar governing body, who violates any provision of this act or permits or acquiesces in the violation of any provision of this act by such corporation, association, or organization shall be guilty of a felony and punishable by a fine of not less than five hundred dollars ($500) and not more than five thousand dollars ($5,000) or by imprisonment in the State prison for not less than six months and not more than five years, or by both such fine and imprisonment." Section 12.

The act further provided that any member of such an organization who remained a member thereof with knowledge that the organization had violated any of the provisions of the act was guilty of a misdemeanor. Labor unions, religious, fraternal and patriotic organizations, societies or associations whose objectives and aims do not contemplate the overthrow of the Government of the United States or of the State or of any political subdivision thereof by force and violence are specifically exempted from the act.

The appellants, Robert Noble, Ellis O. Jones, F. K. Ferenz, Leone Menier, James M. McBride, Joan McBride, Daniel Van Meter, Baron Van Meter and Genevieve Kerrigan were charged by an amended indictment presented by the Grand Jury of Sacramento County with violating said Subversive Organization Registration Act.

The trial by jury was commenced on August 3, 1942, and on October 22, 1942, all of the appellants were found guilty as charged in the amended indictment. A motion for a new trial was made by each and all of said appellants, which motions were denied by the trial court. A motion for arrest in judgment on behalf of the appellants Leone Menier and Genevieve Kerrigan was denied by the court. Applications for probation on behalf of appellants Daniel Van Meter, Baron Van Meter, Leone Menier and Genevieve Kerrigan were submitted to the court and said applications for probation were denied, whereupon judgments were pronounced, sentencing the appellants Menier, Kerrigan and Joan McBride to be imprisoned in the California prison for women for the term prescribed by law, and sentencing the appellants Noble, Jones, Ferenz, Baron Van Meter, Daniel Van Meter and James McBride to the State Prison for the period prescribed by law. The court further ordered that the term of imprisonment as to the appellants Robert Noble and Ellis O. Jones commence at the termination of the term of imprisonment imposed by the judgment of the United States District Court for the Southern District of California, wherein the said appellants Robert Noble and Ellis O. Jones were sentenced for conspiracy to violate the Sedition Act.

[1] All appellants have filed notices of appeal from the judgments and from the orders denying a new trial, and the appellants Leone Menier and Genevieve Kerrigan, in addition thereto, have filed notices of appeal from the order denying their motion in arrest of judgment. There is no appeal from the order denying the motion in arrest of judgment, as such order may be reviewed only upon appeal from the judgment. People v. Dallas, 42 Cal.App.2d 596, 109 P.2d 409.

An opening brief was filed on behalf of appellant F. K. Ferenz but no opening brief was filed on behalf of any other appellant. However, the reply brief filed by counsel for appellant Ferenz was also on behalf of all appellants. Appellants Ferenz, Noble and Jones have each filed with this court short typewritten statements setting forth a number of contentions and containing numerous statements outside of the record, but in view of the fact that the relevant contentions contained in said separate statements are fully and more clearly covered in the brief filed by counsel on behalf of appellants, it will not be necessary to refer

specifically to said separate statements filed by said appellants.

The briefs filed by and on behalf of the appellants set forth the following grounds for a reversal of the judgments:

"I. That the California Subversive Organization Registration Act is unconstitutional under both federal and state Constitutions in that the act relates to matters covered by federal legislation; it violates the due process clauses of both state and federal constitutions.

"II. That no governing body of the alleged organization, Friends of Progress, was proved by clear and convincing evidence and that, therefore, the prosecution's case against the defendants failed.

"III. That the evidence is insufficient to sustain the verdict on the question of the overthrow of the government by force and violence and affiliation of the Friends of Progress with a foreign agent.

"IV. That the verdict against all of the defendants was the result of the prosecution's appeal to passion and prejudice throughout the trial and in the closing address to the jury.

"V. That the court erred in denying the motion to advise the jury to acquit each and all of the defendants.

"VI. That the court erred in denying the motion of all defendants for a new trial.

"VII. That the court erred in denying the motion of arrest of judgment.

"VIII. That the judgment of conviction is erroneous and contrary to both the evidence and the law.

"IX. That the court erred in denying the motion of all defendants for a mistrial because of the alleged misconduct of the prosecution in making alleged misstatements of the evidence to the jury in the closing argument.

"X. That the judgment should be reversed for errors at this trial."

A brief was filed by the American Civil Liberties Union as amicus curiae, which brief seeks a reversal of the judgments upon the grounds that the California Subversive Organization Registration Act is unconstitutional under both the federal and state constitutions in that the act relates to matters covered by federal legislation; that it violates the due process clauses of both state and federal constitutions and that it is vague, indefinite and uncertain and imposes criminal guilt without setting up any reasonably ascertainable standard of guilt.

Before proceeding to discuss the contentions of appellants, it is necessary that we summarize the factual situation as shown by the record. Although the record is voluminous, consisting of more than 6000 pages of testimony and a large number of exhibits, there is surprisingly little conflict between the parties as to the basic facts upon which respondent relies in support of the sufficiency of the evidence. The principal disagreement between the parties is as to the inferences and deductions that may properly be drawn from such facts.

The amended indictment charged that appellants, *as members of the governing body* (italics ours) of an association, society, group, bund, assembly and political party known as the "Friends of Progress," which directly and indirectly advocated, advised, taught and practiced the duty, necessity, and propriety of controlling, conducting, seizing and overthrowing the government of the United States of America, and of the State of California, by force and violence, and which said association, society, group, bund, assembly and political party was then and there subject to foreign control, in that said association, society, group, bund, assembly and political party solicited and accepted, both directly and indirectly, financial contributions, loans and support from, and was affiliated, both directly and indirectly, with a foreign government and political subdivision thereof, and an agent, agency, or instrumentality of a foreign government and a political subdivision thereof, and a political party in a foreign country and an international political organization; and in that the policies of said association, society, group, bund, assembly and political party, or some of them, were then and there determined by, at the suggestion of and in collaboration with, a foreign government, and a political subdivision thereof, and an agent, agency and instrumentality of a foreign government and political subdivision thereof, and a political party in a foreign country and an international political organization, did wilfully and unlawfully and feloniously fail to file the information and documents, or any part thereof, as required by Subdivisions (a), (b), (c) and (d), of Section 2, of the said Subversive Organization Registration Act.

In setting forth the evidence which respondent contends is sufficient to sustain the verdict of the jury we shall follow the order in which same was introduced at the trial.

It appears that Adolf Hitler came into power in Germany in 1933 and that he immediately began preparations for a war to conquer not only Central Europe but also to make Germany the dominant military power in the world. Shortly thereafter Germany withdrew from the League of Nations and, according to the record, Dr. Herman Rauschning, former president of the Free City of Danzig during 1933 and 1934 and former member of the German National Socialist Party (usually referred to as the Nazi party) between 1931 and 1934, went from Geneva to Berlin to confer with Hitler concerning Germany's action in withdrawing from the League of Nations, particularly as to the effect it would have on the status of Danzig which was dependent on the one hand on the policy of Germany and on the other hand on the policy of Poland. He advised Hitler that the diplomats in Geneva feared that Germany's action would bring on war and he expressed to Hitler his fear that the beginning of war would draw Great Britain and France into it, and eventually the United States. Hitler replied that there was no reason for any fear; that neither Great Britain nor America would be able to go into a new war with Germany; that to overthrow Poland and perhaps Czechoslovakia would be an easy task. Dr. Rauschning again stated his fear that Great Britain and France would go to war against Germany if Germany should violate the Treaty of Versailles, and that if Great Britain took part in a European war it would not be long until the United States would enter the war on the side of Great Britain. At this point Hitler laughed and said that the United States would never enter a European war against Germany because it had its hands full with its own internal affairs. He further told Dr. Rauschning that if the United States evidenced any intent to get into a new war with Germany and participate in the politics of Europe he had a command over many centers to accelerate the outbreak of a revolution in the United States and destroy it. He then proceeded to detail the methods that he would use to break down the morale and disintegrate the unity of the American people, saying that he would play one race against the other, one social group against the other. He stated further that Germany had many friends in every country and that it would be very easy to obtain adherents to his cause, and that to carry out his purpose in keeping the United States from entering upon a European war he would rely chiefly upon former Germans —American citizens of German origin who would take over the leadership of such movements in the United States.

The record also shows methods used by the Nazi party to gain complete domination in Germany and the oppressive methods used to restrict the Jews and other groups. These methods and measures are so well known to well informed persons that it is unnecessary to detail them here.

In the United States, sometime in 1933, there came into existence an organization known as the Friends of New Germany, devoted to the advancement of the interests of Germany. In 1936, by an edict issued in Germany, the name of the organization was changed to the German-American Bund. There was no change in the officers of the organization. The national headquarters of the German-American Bund were in New York and the local headquarters in Los Angeles at 634 West Fifteenth Street, at a place known as the "Deutsches Haus." The German-American Bund membership cards were similar to the Friends of New Germany membership cards and were sent from the national headquarters to the local Bund leaders who would then distribute them to the members. The members of the German-American Bund retained the same numbers on their new membership cards as they had on the membership cards of the Friends of New Germany. The "Weckruf" was the official newspaper of the Friends of New Germany and the German-American Bund. In the transition from the Friends of New Germany to the German-American Bund there appeared to be no change in policy or program.

The German-American Bund was an organization of the people in the United States who were sympathetic to Hitler, the control of which came from Germany. Its aims in general were to promote the interest of the Third Reich in America and to bring about a closer appreciation of German culture by the people of America, particularly in connection with the new culture of the New Germany developed by the Third Reich and that particular culture which Adolf Hitler expounded, to

foster and develop the sympathies of the people of this country for Hitler and his regime.

It appears from the record that one Hermann Schwinn was the leader of the Western Division of the Friends of New Germany and the German-American Bund and was known as the Fuehrer. According to the testimony of the witness Ness who joined the German-American Bund in June, 1936, and was inducted at a closed meeting of the organization, applicants for membership were told by Schwinn that they were gathered there on that occasion for a more serious and far-reaching purpose than they realized; that they should pledge themselves to give all of their aid to the Third Reich; that they would only be called upon at that time to give moral and financial aid, but there would come a time in the future when they would be called upon to give even more freely to the cause of the New Germany, that is, to give their life's blood in the cause of the Third Reich. Schwinn then extended his right hand in the Nazi salute and said, "Heil Hitler," to which the applicants responded in the same manner. Schwinn then shook their hands and welcomed them as members of the Bund.

It appears further from the record that propaganda literature and material was being received regularly from the Nazi party in Germany by way of German boats arriving at the port of San Pedro, and that Schwinn would board these German vessels and meet and confer with the captains thereof and make an exchange of envelopes and packages. He would return with these to the Deutsches Haus and open the packages, and the witness observed that it was propaganda material, printed in Germany, bearing the official stamp of the Nazi party described as an eagle over an encircled swastika. The material printed in German was translated and that which was printed in English was typed and the original material was destroyed. The material was then published in the Bund's official newspaper and also used for propaganda purposes at the Deutsches Haus. Subsequently a change was made in this procedure so that instead of contacting the captains of the boats to obtain the propaganda material, Schwinn dealt directly with a representative of the Nazi party in Germany who had been assigned to each of the boats. Schwinn was in direct connection and communication with the Nazi officials in Germany, and at one time he told the members of the Bund that the Nazi party in Germany was dissatisfied with the rate of growth of the German-American Bund in the United States and wanted it to grow faster. Schwinn further stated that the Nazi officials were anxious to impose the German culture as much as they possibly could on the American scene; that they wanted to spread information of the good Adolf Hitler had done for Germany and how the people of the United States could also benefit by following the same line of political reasoning.

At some of the meetings of a select group conducted by Schwinn in 1936 and attended by the witness Ness, discussions were had of the possibility of armed conflict between Germany and the United States, and the activities that the members might engage in that would be beneficial to Germany if Germany were at war with the United States. Various methods of sabotaging any war effort by the destruction of municipal water works, industrial water systems and other things were discussed.

It appears from the record that appellant F. K. Ferenz joined the Friends of New Germany in September, 1933, and that he became a member of the German-American Bund automatically when said Bund succeeded the Friends of New Germany. Although he denied becoming a member of the German-American Bund, the record amply supports the conclusion that he paid dues into the organization and was a member. Ferenz, who was a German-born American citizen, was very active in seeking to build up, in Los Angeles and vicinity, a favorable opinion of Adolf Hitler and the Nazi policies. To use his own phrase, he was interested in seeing that the "truth about Hitler" was presented to the people of Los Angeles. He published a book entitled "Hitler," and spoke upon the subject of Hitler before various service clubs, schools and churches. He wrote many letters for the correspondence columns of newspapers upon conditions in the Third Reich and the "truth" about Hitler in reply to letters which he felt were not truthful. The subject of one of his addresses was "Why I am in favor of Hitler."

There were introduced in evidence letters received by Ferenz from his sister-in-law in Vienna, which letters indicated that the sister-in-law was a member of the Nazi

underground movement in Vienna, and indicated that Ferenz was keeping very closely in touch with the progress and activities of the Nazi movement in Germany. Letters were also introduced in evidence which indicated quite clearly that Ferenz had communicated with Nazi officials in Germany seeking propaganda material for use in promoting the German cause in the United States. It also appears from the record that Ferenz conducted a book store in Los Angeles and also operated a motion picture theatre. Inside of his book store a plaque of Adolf Hitler hung on the wall, in a black velvet shrine background. As people entered the store, they saluted the plaque by raising their right arms toward the plaque. There were German books relating to the National Socialist Labor Party known as the Nazi party, and abbreviated as "N.S.D.A.P." Among the books were "Life of Horst Wessel"; a book the cover of which bore a swastika and the letters "S.A." containing Storm Troopers' poems, all of which the witness, Dr. Malbone Graham, Professor of Political Science at the University of California at Los Angeles, had seen in the Nazi party book stores in Germany. There was also a book of documents regarding the first four-year plan of Adolf Hitler, with a foreword by Reich Minister Dr. Joseph Goebbels, an official publication of the Nazi party. Dr. Graham testified that when he was in Germany he endeavored to purchase from an official Nazi party book store the book with the swastika entitled "S.A." hereinbefore referred to, but was not permitted to do so, a sign in the store reading, "Only permitted for members of the party." There were also on sale in the book store of Ferenz various publications which must be considered as violently anti-Jewish, and publications criticising the British government; and Ferenz admitted selling copies of Hitler's book, "Mein Kampf."

In his motion picture theatre Ferenz exhibited German films, which films were produced under the control of Dr. Goebbels, the Propaganda Minister of the Third Reich. In fact, the evidence shows that after the establishment of the Third Reich no film could be produced or distributed in Germany without the approval of the Propaganda Minister. Among the films shown were pictures showing the rise of Naziism in Germany, the entry of the German forces into Austria in March, 1938, and the entry of the German armed forces into Czechoslovakia. These pictures had frequent scenes purporting to show the enthusiasm with which the German people hailed Hitler, and great demonstrations by the people in support of Hitler. There was testimony that during 1937, at the Continental Theatre operated by Ferenz, patrons coming into the lobby customarily gave Ferenz the Hitler salute and Ferenz would return the salute in like manner. On the wall of the lobby in the Continental theatre was a bronze plaque of Hitler, and there was testimony to the effect that when the picture of Hitler was thrown on the screen some members of the audience arose and extended their arms in the Hitler salute and said "Heil Hitler" and "Sieg Heil." "Sieg Heil," which means "Hail Victory," was heard throughout the audience which applauded vigorously.

Without going into further detail as to the activities of Ferenz, it is apparent from the record that Ferenz was a member of the Friends of New Germany and later of the German-American Bund; that he was in sympathy with the aims and ideals of the Nazi party in Germany, and that he was seeking, by means of speeches, letters, sales of literature and the exhibiting of German-produced films, to create in the United States a public sentiment favorable to Germany and against the entry of the United States into any war against Germany.

It appears also from the evidence that the appellants James McBride, Joan McBride, Daniel Van Meter and Baron Van Meter frequently attended the closed meetings of the German-American Bund, and that James McBride joined the Bund as a sympathizer and paid the same dues as a member. The treasurer of the Bund did not recall whether appellant Joan McBride was a member, but he did recall that she paid dues. James McBride wore a Storm Trooper's uniform upon several occasions.

On February 22, 1939, in celebration of Washington's Birthday the German-American Bund conducted a meeting in Los Angeles called for propaganda purposes. Among those in attendance were the appellants Daniel and Baron Van Meter, James and Joan McBride, Hermann Schwinn and Hans Diebel, the owner of the Aryan Book Store at the German House. The Storm Troopers were present at this meeting. In the back of the hall was a table containing much subversive literature. Daniel and Baron Van Meter were distributing anti-Semitic circulars entitled "On-

ward Jewish Soldiers," which circulars were passed out by them on other occasions also.

At a closed meeting of the Bund in October, 1940, at which James and Joan McBride, Daniel and Baron Van Meter were present, an order was read from the German-American Bund headquarters at New York, under the signature of Wilhelm Kunze, the national leader, advising the members that the draft law was unconstitutional, and admonishing them to voice their protest.

The record also shows another closed meeting of the German-American Bund in May, 1941, at which the same appellants were present and at which Kunze, the national leader, spoke. On October 18, 1941, a meeting was held at the German-American Bund headquarters in Los Angeles at which Wilhelm Kunze, the national leader, Hermann Schwinn, the Western leader, and Hein, San Francisco Bund leader, were present; and, at the same meeting, appellants Daniel and Baron Van Meter, James and Joan McBride, and appellant Robert Noble were also present. At this meeting Kunze made a speech in which he stated that the Tenney Committee was instigated by the Jews, that the members of the Bund should give all possible support to the America First Committee, without, however, neglecting their membership in the Bund; that the German-American Bund was being attacked all over and from everywhere and that they should try to do something to counteract these attacks.

It appears from the record that if appellants Daniel and Baron Van Meter were not actually members of the German-American Bund they were at least cooperating in its activities. A witness testified that in May of 1941 she observed Daniel and Baron Van Meter having their pictures taken in dark coats, Sam Browne belts and German helmets, with swastikas on their coat sleeves and on their chests. Baron and Daniel Van Meter frequently wore a ring with the emblem of a swastika. They also wore an "I am a copperhead" pin on the lapels of their coats. They continually greeted witness with the "Heil Hitler" salute. The witness had a conversation with Daniel Van Meter in September, 1940, in which he told her that she should write to the Congressman to try to kill the draft law, and also expressed the opinion that the United States had no business in the Hawaiian Islands as the Japanese had developed the Hawaiian Islands and they belonged to the Japanese anyway.

A gardener who was employed at the library across the street from the Van Meter home testified that in 1939 they invited him to attend Bund meetings at least a half dozen times, and that on one occasion he noticed that Baron Van Meter wore a swastika. This same witness also testified that on one occasion Baron and Daniel Van Meter gave him cartoons for distribution entitled "Onward Jewish Soldiers," and that they gave him other anti-Semitic literature and literature relating to the Bund, and said that they were interested in the German cause and that they would like to have him disseminate the literature for them. The witness testified that because of these activities on the part of the Van Meters he finally refused to give them any more grass cuttings, whereupon Baron Van Meter stated that when Germany took over, things would be changed and they would be able to get grass from the library. The witness testified further that whenever he met the Van Meters they would extend their arms in Hitler salute fashion, click their heels and say, "Heil Hitler."

The witness Young testified that shortly after May, 1941, he asked the appellant James McBride if he had contributed his share of the assessment for the defense fund in New York on behalf of Fritz Kuhn, which had been requested of the members at a Bund meeting. In reply thereto McBride exhibited his button which bore the emblem of a swastika with a beam of light, the same emblem appearing on the German-American Bund's membership cards. The button was only given to those who had paid the full amount of their contribution toward the defense fund. In September, 1941, appellant James McBride distributed little stickers upon which was the Jewish star, and underneath the star were the words "Ve Vant Var," and the witness testified that stickers bearing the same emblem and words were on one occasion on the desk of Hermann Schwinn at the Deutsches Haus. Similar stickers and a cut for the printing of the same were found in the home of appellants Robert Noble and Ellis Jones in April, 1942.

It appears from the record that the appellant Ellis O. Jones was the founder of

the "National Copperheads." The purposes of this organization are shown by its publication.[1]

The so-called Friends of Progress began to hold meetings presided over by appellant Noble during the latter part of August, 1941. All of the appellants attended a majority of its meetings and participated in at least some of its activities. Prior to December 11, 1941, its meetings were held in the Embassy Auditorium, but the meeting on that date and all subsequent meetings were held in the Convention Hall of the Embassy Auditorium which is located between Eighth and Ninth Streets on Grand Avenue in the city of Los Angeles.

At a meeting held on November 8, 1941, appellant Ellis O. Jones was in the back of the hall selling the paper "Publicity" and there were also some persons selling "Lindy" buttons. There were approximately 270 persons present. The principal speaker of the evening was one James Dorsey Murray. Just prior to Murray's assuming the platform, a few persons in the audience greeted him with a salute described as the right hand extended from the shoulder and palm down in an elevated position. Murray returned the salute and said to the audience: "You were probably surprised to observe me greeting a few of my friends in the audience with this signal. * * * Now, this is not the so-called Nazi salute, but, rather, it is a form of greeting which was devised by the old Romans." But he again extended the salute and most of the persons in the audience responded. Murray then launched into a denunciation of the English government, Winston Churchill, the Jews, the international bankers and the President of the United States. He praised Benito Mussolini as a poor and hard-working boy who had become the great leader of Italy, and he also praised Adolf Hitler as a poor Austrian boy who had finally emerged as the great leader of Germany. Appellant Robert Noble was present on the platform, and appellant Ellis Jones was in the foyer selling "Publicity." Daniel Van Meter and Baron Van Meter were either at this meeting or at a meeting of November 15, 1941.

Robert Noble then followed Murray and stated that Murray had given a magnificent speech and that he agreed with and endorsed all of Murray's statements. Noble then announced that an impeachment proceeding would be held and that Ellis O. Jones would act as Chief Justice and that Noble was going to be the prosecutor of the President of the United States. Noble stated that there would be four meetings held to conduct the impeachment of the President. He then announced that the Friends of Progress had obtained headquarters at 4328 Anaheim-Telegraph Road on the east side of the city, and gave the telephone number.

The next meeting was on November 15, 1941, and there were about four hundred

1 "National Copperheads.

"The National Copperheads have chosen as a slogan what was intended as an insulting opprobrious epithet hurled at Colonel Lindbergh and his patriotic sympathizers by a peevish power-mad Roosevelt —a fighting slogan around which to rally and organize in support of the unpolluted Americanism, the straight-forward realism and those sound enduring principles so ably and staunchly enunciated over and over by that most popular of all Americans, our beloved Lindy.

"Events since launching this rapidly expanding organization prove more and more the need of a solid front to combat the sneer-smear campaign of subversive groups against Lindbergh and his followers and nothing has proved this more emphatically than the reaction of certain politicians, editors and other hypocrites to Lindbergh's epoch-marking Des Moines speech in which at long last, after months of patient restraint, he fixed the blame for the warmongering precisely where it belongs.

"We need new leadership in the United States, leaders who will think clearly and courageously. Charles A. Lindbergh has proved himself outstanding as such a leader. Thus, unlike practically all other anti-war organizations, the National Copperheads is by no means a passing fancy, but is designed to carry on to further practical accomplishment after the war menace is removed and we are able once more to concentrate upon our own problems. We are for America first, not as an abstract proposition, but concretely by building an organization of true and intelligent patriots in order to eliminate from power those democracy-wreckers who now sit so arrogantly in the seats of the mighty.

"For this purpose we need the active cooperation of similar-minded patriots everywhere. Won't you get in touch with us and tell us"—There a filing stamp or other stamp has made it difficult to see something here—"and tell us you will help. Get our literature. Show your colors by wearing 'I'm a Copperhead' pins. Distribute the above speech. Give us suggestions. —Ellis O. Jones, Founder."

persons present, including appellants Noble, Ferenz and Jones. Noble opened the meeting by introducing one Frank King, who as he started speaking turned his lapel and showed a silver swastika, stating that it was a swastika to show his opposition to those who wore the "V." He stated that the reason for the war was the grasping of the international bankers; that they were the real aggressors in the war, and that the aims of the Friends of Progress were to place before the audience the true facts relative to the conditions of today. King was followed by Noble who spoke and stated that he had a copy of the book "Mein Kampf"; that he had read it many times and thought it was one of the great books of today. He then read a few passages from "Mein Kampf" and elaborated on those passages by relating the fine housing conditions in Germany and the excellent economic conditions that had been brought about by Hitler. At this point appellant Ferenz passed a note to Noble while he was speaking, and Noble, after reading the note, stated that Mr. Ferenz had sent him a note which had some good information in it which he would pass on to the audience. The note read as follows:

"In Germany when two young persons desire to be married, they file their intentions with the government and fill in some form and they are granted a loan of five hundred dollars. This gives them an opportunity to get started, to buy their furniture and the other necessities that are necessary at the beginning of marital life. And in contrast to the system in America here two young persons getting married proceed to some furniture store and buy a few hundred dollars worth of furniture, paying a dollar down and a dollar a week, and they immediately start out in debt; spend most of their life trying to get out."

Noble then went on to state that there was no unemployment in Germany and that everyone had a job and everyone received a reasonable wage so that they could really live. He then announced that on the following week the impeachment proceedings would start in the main auditorium.

On November 22, 1941, the Friends of Progress conducted an impeachment proceeding at the Embassy Auditorium in the large auditorium upstairs. There was a crowd of about 1800 persons. Scattered throughout the audience were signs reading "Senate" and "House of Representatives." Appellant Jones opened the meeting and his opening remarks were to this effect: "Search the pages of American history and you will not find a blacker criminal than Franklin Delano Roosevelt;" that Franklin Roosevelt was a disgrace and should be kicked out of office, and that English and Americans were in league together to run both countries through perdition. Jones turned the meeting over to one Frank King who announced the playing of the Star Spangled Banner and requested the audience to stand and salute the flag. After that he announced that a chaplain would read the invocation, whereupon appellant James McBride took the stand and muttered from a slip of paper what was supposed to be a prayer. Then King took charge of the meeting again and set forth the purposes of the impeachment and asked for a resolution from the floor. Appellant Noble was then introduced as a new member from California, came down the aisle and took a place on the platform at the speaker's table. He spoke about forty-five minutes against the British, the Jews, the New Dealers and the Bank of England, and ridiculed America as the home of the free. He referred to President Roosevelt's mention of the four freedoms and said that we didn't have four freedoms or two freedoms or one freedom; that there was no freedom at all left in America; that the last stronghold of real freedom in the world was Germany. He denounced England, praised Germany and Hitler, and then proceeded to speak upon the subject of Franklin Roosevelt's broken promises in his election speeches. A vote was then taken on the impeachment question, and out of the large audience only three voted against the impeachment. Then little envelopes with a place for the name and address were passed around through the audience. Several of the Van Meter brothers—among them the appellant Daniel Van Meter—and appellants Leone Menier and Ellis O. Jones were all active in passing the boxes to the monitors to be passed through the audience for donations and to place their names and addresses on the envelopes for mailing purposes. The collection boxes appeared to be shoe boxes taped up with gummed paper, with a slot cut in the end. These boxes were up on the stage behind one of the drapes and Daniel Van Meter went to the stage and brought them down to the front where they were handed out to monitors who passed them through

the audience. Later, Daniel Van Meter helped collect them, walked up to the front of the room and set them on the stage.

A printer by the name of Rathbone, whose address was given as 4328 Telegraph Road, was given recognition by Noble and announced that there would be a pot-luck luncheon held the following Wednesday on Telegraph Road, and urged the audience to attend and bring with them old clothes, magazines, bottles, etc., so that they could be used for peace. Announcement was also made that the impeachment meetings would continue and would be held at the following meeting at the same time and place. During this meeting some person took the platform and attempted to defend President Roosevelt, but was not allowed to speak, as the audience was impatient and started saying, "We don't want to hear that."

On November 26, 1941, in the Anaheim-Telegraph Road headquarters of the Friends of Progress, there were about forty persons present. Among them were appellants Noble, Jones, Ferenz, and Daniel and Baron Van Meter. This place was a combination of four old railroad cars placed together to form one unit. One of the rooms was set up as a printing room with a place for a press, and Noble stated that they were unable to bring the press over that day but that they would bring it over in the next few days and that as soon as the press got there they would print their notices.

Impeachment proceedings were again held on November 29, 1941, at the Embassy Auditorium. Inside the doorway appellant Jones was seated at a little table selling the newspaper "Publicity." After some musical entertainment Noble came onto the platform and again introduced Frank King who asked that the Star Spangled Banner be played. The audience stood up to salute the flag. King then took the part of Vice President Wallace as President of the Senate, opened the meeting by calling for new business, and stated that resolutions were in order. Then Noble approached the stage with a man and woman who were acting as chairmen of the committee, and after conferring with them made the announcement that the President had been impeached by the House. He offered a resolution which called for the Chief Justice to be brought in. Appellant Jones, acting as Chief Justice, appeared in a black mortar-board cap and robe and asked that the prisoner be brought forth, whereupon a life-size effigy of the President was brought onto the stage by Frank King and another man. Noble then launched into a denunciation of the Jews, of Secretary Hull, of the British and of the President, and sought to justify Germany's recent action in taking Poland and Czechoslovakia. While a collection was being taken Noble urged the audience to come to the Telegraph Road address and bring all of their old junk, newspapers, bottles, etc.

After the meeting of November 29, 1941, adjourned the appellants James McBride and Joan McBride went to the Deutsches Haus. They were first observed on the outside of that building. Later the appellant Jones arrived and then the appellants Van Meter, carrying a couple of shoe boxes similar to the kind in which they had taken up the collection at the meeting of the Friends of Progress. When Jones came up to the front of the Deutsches Haus he was accompanied by several people and when they arrived there they stood at attention and gave the Hitler salute and said "Heil Hitler." Jones asked if the Van Meter boys had come yet, and when the Van Meter boys arrived they all went into the Deutsches Haus. They likewise gave the Hitler salute.

The meeting of the Friends of Progress on December 6, 1941, was attended by a very large audience. Ellis O. Jones, acting the part of the Chief Justice, began by saying that impeachment proceedings were to be continued and that the same personnel as on the previous week were present. Noble was then introduced and spoke about different personalities, and again denounced the President and declared that the emergency powers granted to the President should be taken away from him at once. He said that the United States was actually dying on its feet. A number of purported witnesses were then called. The first was a man with a placard around his neck to indicate he was a farmer. He gave an account of how the farmers in general had been maltreated by the Roosevelt administration. The next witness was the appellant Genevieve Kerrigan who wore a placard representing the mothers of America. She made many denunciatory and derogatory statements concerning the President and the President's family. The next witness was a young man who was represented as "Blighted Youth." He informed the audience that he saw no future

either for himself or for any other young man in this country, that there were about twelve million unemployed and that he, himself, could get no work and had had none since he left college. When "Blighted Youth" concluded these remarks, he walked by the effigy of President Roosevelt which was then on the stage and thumbed his nose at it. Present at this meeting were appellants Jones, Noble, Daniel and Baron Van Meter, Leone Menier, Genevieve Kerrigan and Mrs. McBride. During this meeting Noble referred to Japan as "this glorious nation," and referred to Hitler as "our brother, Adolph Hitler." He also stated: "There is no reason why the Bund shouldn't meet." Noble then directed everyone to go to the Deutsches Haus the following Sunday and attend a meeting or show, saying that there were going to be some pictures there and some entertainment. Either Noble or Jones invited a "Life" photographer who was present at the meeting to attend the Deutsches Haus the following Sunday to view some film which was to be shown, and Noble introduced Miss Menier to the Life photographer as his secretary. After the witnesses had finished their stories Noble talked to the audience while a collection was being taken. He said recently a building had been erected on Pershing Square and his information was that this building had been put up by Standard Oil Company for the purpose of selling defense bonds; that he personally wouldn't give a thin dime for defense bonds and he couldn't recommend that anyone in the audience buy any either. He went on to say that after the Saturday show it was customary for himself, his friends and his colleagues to go on to the German House. He said there they would see many interesting and instructive things and would learn the truth about Germany and what had been done by the Germans.

On December 8, 1941, the day after the infamous attack on Pearl Harbor, appellants Noble, Menier, Jones, Ferenz, Daniel Van Meter and two other persons met at Clifton's Cafeteria in Los Angeles where a discussion was held as to whether or not the Friends of Progress would hold any more meetings. Noble said that he would have to think it over; that he wanted to finish up the impeachment proceedings as quickly as possible if there was to be a next meeting. He also stated that if the meetings were to continue, that it was his idea for the next meeting to have a Peoples Congress. As those present were leaving the luncheon meeting Noble informed one of them to obtain crepe paper for the purpose of dressing up delegates, and also told them that if they didn't hear from him they would have the meeting.

The next meeting of the Friends of Progress was held on December 11, 1941, in the lower auditorium. It was opened by Noble, and Jones was on the platform. The audience was much smaller than it had been in the upper auditorium, there being about four hundred persons present. Noble spoke about the attack on Pearl Harbor, saying that the United States had not been attacked by the Japanese, that Hawaii had never been recognized as a part of the United States and that, therefore, the Americans had not been attacked at all. He stated: "Why should not the United States mind its own business and keep out of the Pacific?" He again praised Hitler and said he was doing a much better job in Europe than the Americans were doing here. Noble said he was not in this war; that he had made his stand in 1917 and he kept to that. He then introduced Jones as the next speaker and Jones stated among other things that the United States had no right whatever in Hawaii or in the Philippines, and that Americans should stay in America and mind their own business; that he personally was a pacifist and did not approve of war, but that if it were a question of taking sides, he would much rather be on the side of Germany than on the side of Great Britain. A collection was then taken up and while it was being taken up Noble went on talking and asked the people present to give generously and also to buy the newspaper "Publicity" because that was real defense of the country.

With regard to the impeachment trial, Noble said that this had been sincere and that they would now take a vote on the resolution for the impeachment of the President. The vote was to be taken two ways—by raising hands and afterwards by standing. The vote was taken and the resolution was for the impeachment of the President by a large majority.

Noble then asked the audience to make sure to come out to an address on Telegraph Road where they would be sure to have a good time and get together and get to know each other, and that there was plenty of business to be done in the way of collection for their funds. He stated

toward the end of the meeting that there were some people in the audience who were there for the purpose of spying on them, but that these would be dealt with by the Bureau of Investigation of the Friends of Progress, their own organization. He said that he didn't care at all whether some people called what occurred at the meetings treason; that it didn't matter to him; he would continue to say what was in his mind, in spite of anything anybody might do.

The next meeting took place January 7, 1942. There were no flags or decorations and there was so singing or salute to the flag. Noble took the platform and said that the F.B.I. had been unfair to him and that he had been arrested and they had placed his bail at $25,000, which he thought was ridiculous. He related his experience in jail and told about the others who had been arrested with him. They were seated on the platform and he named them—Ferenz, Jones, Leone Menier and Rathbone, and a Mrs. Norman. Noble stated further that in order to show they had no fear of the F.B.I., Leone Menier had made it a point to pass out to each F.B.I. man present all of the literature that they had. Leone Menier was then introduced by Noble who said that she had worked as his secretary for nearly two years without any pay, and that in the beginning she had paid for the rental of the hall out of her own pocket, at great sacrifice to herself, in order to help the Friends of Progress to become organized. She urged everyone in the meeting to attend the meetings regularly and to give Noble their wholehearted support because, she said, he was working for them all the time. Noble then spoke of the horrible conditions that prevailed in our jails. He also spoke of the marvelous job that the Japs had done in Manchukuo—that they had transformed it from a barren infested country into a well-controlled territory. Ellis O. Jones and Rathbone were then introduced, and each spoke briefly. A collection was then taken up and Noble, Ferenz, Menier and Jones passed through the audience making a special appeal for dollar bills.

The next meeting took place on January 14, 1942, at the same time and place, and it was announced that the music and phonograph equipment were furnished by Ferenz. Both German and Italian music was played that evening. Noble opened the meeting and said he was glad that they could still hold their freedom meeting and that he could say anything he wanted, anywhere he wanted. He referred to the F.B.I. as the "Futile Bureau of Intimidation," and stated that the Friends of Progress had organized their own F.B.I. called the "Friends Bureau of Investigation." He stated that next week he was going to tell a story that would be so shocking that they would scarcely believe it, and that he was going to tell about the so-called Jap war. He added that it had not been proved that anything Lindbergh had said was untrue and we should have listened to him four years ago and done what he said in regard to protecting our own shores; that America was not legally at war, as he would show them next week. The collection was then taken up and Ferenz was introduced. Ferenz began by relating his experience when he was arrested, and how he had been mistreated. During the collection Noble announced that he was in great need of $150 and that in order to raise this sum he would hand out booklets which he had written, called "The Miracle of Happiness," to anyone who would give $1. Noble, Jones and Ferenz assisted in the distribution and sale of this booklet throughout the audience.

The meeting of January 21, 1942, was opened by Ferenz. He started speaking about Robert Noble and the wonderful work he was carrying on "in bringing freedom to us all." After some preliminary remarks Ferenz demanded of the audience, "Why should we continue protecting the wealthy class? Why should we take all the risks?" and then went on to say that the common people would not go on fighting for the capitalistic gangs and that an end would come to that soon. Noble then took the platform and stated that the United States had stolen the Hawaiian Islands in the most despicable manner. He said that if the people really knew what was being done they would stop paying taxes and make it impossible for the Marine Corps to continue running all over the world sticking their noses in other people's business instead of staying home and guarding our own shores. He then read a statement which he attributed to Daniel Webster, which was to the point that conscription was illegal and had no place under the Constitution of the United States. He also said that there never was a legal declaration of war in this so-called war and that we are not at war. He criticised various

public officials, including the Secretary of the Navy and the Secretary of War, and said: "You don't find such men as those at the head of the Army and Navy of Germany and Japan and they are winning battles, and not talking about what is going to happen in 1993." After some more remarks along the same line Noble announced that he would be available and would be out at the Anaheim-Telegraph Road house on Saturday afternoon and evening and invited anyone to come out and talk things over with him. He also announced that Ferenz would speak on the following Sunday, giving virtually the same speech that he had made at the Friends of Progress meeting. He stated that for what he said and did on December 11th he fully expected to go to prison and remain there for the duration of the war or longer, but he was willing to make that sacrifice if that was necessary to be free.

The meeting of January 28, 1942, was opened by appellant Jones. He spoke for about ten minutes, principally in denunciation of England, her Prime Minister and her policies. Noble then spoke and stated how very valuable Mr. Jones' help was to the Friends of Progress, and how he appreciated and was grateful for the contact. He then proposed that Jones be elected an associate director of the Friends of Progress association and asked for a show of hands by all of those in favor. There was a unanimous showing of hands. Noble then read from an editorial in the Los Angeles Examiner dealing chiefly with the mistakes that England had made during the war, and then indulged in a further harangue about the United States never having legally acquired the Hawaiian Islands, and in denunciation of the President and our national government generally. Noble further stated that the time was fast approaching when the impeachment trial would be resumed. He then made a strong appeal for contributions, and Ferenz and several others took up a collection. Appellant Genevieve Kerrigan was introduced by Noble as one who had been of real service, a dear friend. She spoke briefly about the work that was being done by the Friends of Progress cooperative store on Telegraph Road, and made an appeal to all those present to bring their cast-off things, clothes, tinfoil, newspapers, magazines, etc.

The next meeting took place on February 4, 1942, in the Convention Hall of the Embassy. Noble made a statement regarding a young lady commonly referred to as Miss Lee, and said that she was Leone Menier; that he had asked her to be present that evening and sit on the platform and take notes, acting as secretary for the Friends of Progress. Noble then referred to a newspaper article which stated that forty-four percent of the people were not converting their savings stamps into bonds but were cashing them in for money, and cited this as proof of the fact that the people of the country were not united. Jones was then introduced by Noble. He read a letter which he said he had received from a United States Senator, which letter commended Noble and Jones for the fine work they were doing and criticised the manner in which national affairs were being conducted in Washington. However, he did not mention the name of the Senator but said that the man was an old school chum. During the time the collection was being taken up the entry way was filled with men, and one of them walked to the platform and handed Noble and Jones a summons. Noble announced that the man in charge was Jack Tenney, chairman of the legislative committee investigating subversive activities. There was considerable confusion and a number of people stood up and tried to get out of the various entrances. Ferenz was also handed a summons. Leone Menier came out onto the sidewalk with a notebook in her hand and said to some of the persons who had left: "What's the matter, are you afraid? This is America. Come on back in. Come on in, the meeting is still on." Noble continued speaking on the platform, but Jones went across the street with Jack Tenney and the committee members to a hotel and took the collection boxes with him. Ferenz, who was in the audience, asked to speak and came upon the stage, waved the summons with which he had been served, and criticised what he called the Gestapo-like actions of the committee. Noble again took the platform and said that because of the action of the Tenney committee he would not make the astonishing statement that he had come prepared to make. He then indulged in an attack upon General MacArthur and the American financiers who he said were backing the war. He closed by saying: "You know, I have been accused of being an Axis sympathizer." He hesitated a moment and then said, "Well, I am and I'll tell you why. Because they are the great liberators in this world today."

The meeting of February 18, 1942, was opened by Noble who complimented those present on their courage in coming out to the meeting. He said that neither Jack Tenney nor the Tenney Committee nor anyone else could stop him from saying what he pleased and when he pleased on any subject that he pleased to talk about; that the meetings would continue and he would continue his fight for freedom for everybody; that he had always been opposed to the draft and conscription in any form, and that in his opinion the draft was illegal and had no place under the Constitution. He criticised President Roosevelt, Mrs. Roosevelt, Mayor La Guardia of New York, Prime Minister Churchill, the British Empire and the war effort generally, then introduced Jones who talked much along the same line.

The next meeting of the Friends of Progress was on February 25, 1942. There was an admission charge of ten cents. They were collecting newspapers that night, and bundles of clothing and other things were brought in. Mrs. Kerrigan assisted with the bundles. Present at this meeting were appellants Noble, Ferenz, Leone Menier, Joan McBride, Genevieve Kerrigan and Daniel Van Meter, and Mrs. Norman and Mr. Rathbone. Ferenz furnished phonographic music. Noble opened the meeting by telling about the glorious experience he had had testifying before the Tenney Committee. He then stated that Jones was not present because about two hours before the meeting convened he had been arrested and taken to jail and his bail fixed at $50. He asked that everyone who could, give a dollar bill, until they had collected $50, so that Leona Menier and some man who was to drive her would go to the jail and bail Mr. Jones out and bring him to the meeting. Noble then continued with quotations from speeches by Adolph Hitler and Dr. Fricke, told about incidents in the Philippines, and criticised war-mongers and our national administration in general. He referred to Lindbergh and said that a majority of the people were isolationists and that we shouldn't forget Lindbergh and Nye and Wheeler. During the taking of the collection Noble started talking about a speech that President Roosevelt had just made and said that the President's speech was timed in order to help Churchill finish his job in England. He announced his topic for the following week's meeting as "The truth about the Jews in Germany today," and said there would be a charge of twenty-five cents. He urged everyone to go to the Anaheim-Telegraph Road on Saturday, as that was an open house day, and asked them to bring papers, junk and old clothes, and come and share in coffee and cookies and general discussion. He announced that some extra copies of the Friends of Progress Weekly Bulletins were on sale at the entrance and Mrs. Kerrigan was there selling them.

At the meeting of March 4, 1942, Noble spoke at length about the Jewish problem in Germany and sought to justify the actions of Hitler and the Nazi party in their anti-Jewish measures. He then discussed the National Socialist program in Germany and the things which he claimed that program was accomplishing for the young people, the workers and the people generally.

The meeting of the Friends of Progress on March 18, 1942, was opened by Noble, and after some remarks he introduced Jones who delivered his usual harangue in criticism of the policy of the United States in the Hawaiian Islands and the Philippines, and in criticism of the British Empire and its policies. During the course of his remarks Jones asked, "Why do we have to send our good boys around the world for the Standard Oil Company and other interests?" After Jones concluded, Noble again made a rather long speech criticising the President, the Jews, General MacArthur, Secretary Hull and our national administration and war effort generally. He also asserted that Chiang Kai-shek was a traitor to his own people of the Orient. He then made a plea to the audience to help raise funds and said that the contributions were not for Robert Noble or Ellis Jones but for "you."

A meeting of March 25, 1942, was likewise opened by Noble, who introduced Jones to the audience as the co-founder of the Friends of Progress. Both Noble and Jones spoke in criticism of our government and the government of Great Britain, and of the conduct of the war, and again praised the manner in which Hitler did things in Germany. Noble spoke of the fine work done by the Japanese in Korea and Manchukuo, and again ridiculed General MacArthur and his efforts in the Philippines.

On April 1, 1942, an investigator for the American Legion attended the meeting place of the Friends of Progress. This

was the day of the arrest of Noble and Jones by the F.B.I. There were many people around the meeting hall, but no meeting or scheduled program was being conducted at the time he arrived. While he was conversing with the manager of the Embassy Auditorium, appellant Ferenz came up to the manager and said he would like to take charge of the meeting; that he had been present when Noble and Jones had been apprehended by the F.B.I. and that he had their authority to take charge of the meeting; that he would like to go down to the meeting place and tell the members of the organization what had happened and explain why Noble and Jones were not there. Ferenz then went in and spoke to the gathering, once from the platform and once from the floor. During the meeting appellant Genevieve Kerrigan also spoke to the audience from the floor.

Written leases on the rooms occupied at the Embassy Auditorium by the Friends of Progress were always taken in the name of appellant Robert Noble. Eleven of the leases introduced in evidence were signed by appellant Robert Noble personally, five were signed by Leone Menier, one by Jones and one by appellant Genevieve Kerrigan.

An investigator testified that on December 11, 1941, he overheard a conversation among the appellants Menier, Noble and Jones prior to the regular meeting in the Convention Hall, in which said appellants mentioned that they had gotten together previously upstairs with a number of others discussing ways and means of conducting future meetings. The conclusion was reached that they should carry on. The same witness testified that after a meeting of the Friends of Progress of January 17, 1942, he went with Noble and Jones to a restaurant where they met Ferenz and Miss Menier, and overheard a general conversation about the meeting in the course of which Ferenz told Jones that he had heard about the Schwinns being picked up. The same witness testified that in the latter part of January he took Ferenz home after a meeting and that when they got close to Ferenz' house Ferenz asked the witness to drive around to be sure there weren't any officers looking for him; that Ferenz also stated that the Van Meter boys were mad at him because he had told them to quit wearing the buttons. Several meetings later this same witness assisted Ferenz in taking back the records and a victrola which had been furnished at the meetings of the Friends of Progress. Ferenz also told the witness of his life in Germany and stated that he felt he was better grounded in the Nazi party than Hitler. The witness also testified that at one of the meetings of the Friends of Progress subsequent to December 7, 1941, Noble announced from the platform that appellants Menier and Kerrigan would be selling the "Ve Vant Var" stickers after the meeting and that everyone should buy a package; and that said appellants sold these stickers after the meeting at ten cents a package.

The prosecution introduced in evidence fifteen copies of a mimeographed bulletin headed "Friends of Progress." These bulletins may be generally described as announcements of future meetings of the Friends of Progress and summaries of what had transpired at previous meetings. The first of the bulletins introduced was dated December 3, 1941, and bore the title "Friends of Progress. Box 51-Hollywood. Robert Noble, Director." Commencing with the bulletin of February 9, 1942, the title read: "Friends of Progress. Box 51-Hollywood. Director Robert Noble. Associate Ellis O. Jones." These bulletins usually consisted of two legal-sized mimeographed pages and contained generally statements similar to those made at the various meetings, which statements it is not necesary to detail further.

The testimony of Robert Noble given at the hearing of the Tenney Committee was introduced in evidence. In this testimony Noble stated that he was giving lectures at the meetings of the Friends of Progress held at the Embassy, directed exclusively toward the end of trying to keep this country out of war, and that he organized the group known as the Friends of Progress. He was asked if he had made the following statement at a meeting of the previous night:

"I say that I am for Germany and for Hitler. [Held up his hand in the Hitler salute and said, 'Heil Hitler.'] I do not know why people should be so shocked when we say we are for Germany and for Hitler. You know as I told you Germany has won this war and we might as well recognize the New Order and the United States of Europe."

Noble answered, "I substantially made that statement, I don't know if I said 'Heil, Hitler,' but I am perfectly willing to." He

then proceeded in his testimony before the Tenney Committee to praise Hitler and Mein Kampf and to criticise the Jewish people.

Ben S. Beery, an attorney of Los Angeles, who was Chairman of the Americanism Committee of the American Legion, testified that on October 20, 1941, appellants Daniel Van Meter and James McBride came to his office and requested copies of the American Legion report which had previously been offered in evidence before the Legislative Committee. James McBride stated that the report had charged him with being a Storm Trooper and a member of the Bund, and asserted that it was not true. Daniel Van Meter also stated that it was not true and asked for the source of the information. James McBride then brought into Mr. Beery's office Mrs. Joan McBride and a person whom he introduced as Baron Van Meter but who Mr. Beery later learned was William Van Meter. James McBride stated that he and the person whom he called Baron Van Meter were in favor of Hitler and wanted Hitler to win the war, and stated that the publicity which he had received by reason of the said Legion report would enable him to enter Germany at any time. All four stated that they were in favor of the Nazis, and James McBride stated that he thought Hitler was a very fine man. As James McBride went to the door of the office, he turned, faced Mr. Beery, stood at attention, raised his right hand and gave the Nazi salute and said "Heil Hitler." Mr. Beery testified that he had previously seen Baron Van Meter and James McBride picketing the Willkie meeting held at the Hollywood Bowl in July, 1941, and that he also had seen Joan McBride there.

On or about April 1, 1942, investigators from the District Attorney's office of Los Angeles County went to a residence on Farmdale Avenue in the city of Los Angeles occupied by appellants Noble and Jones who at that time had been arrested by the F.B.I. Among the material and documents found at this residence were a cartoon entitled "Onward Jewish Soldiers," which is identical with the cartoon distributed by the appellants Van Meter; "Ve Vant Var" stickers and a block for the printing of the same; and two or three hundred pamphlets printed by one D. H. Rathbone which were violently critical of the President of the United States and of the Congress and in which were stated some of the purposes of the Friends of Progress, and which stated that "Germany's policy is to rule for the cause of right by telling you what is the right—the just—the wise thing to do—if, because of prejudice or hate of them, you do the opposite, you just ruin yourself, by your foolishness." There was also found a copy of a letter written by appellant Robert Noble to the German Library of Information in New York, criticising the course of our national government and thanking the Library of Information for data and literature which had been sent by it.

Subsequent to their visit at the Noble and Jones residence, the officers from the District Attorney's office went to 4328 Anaheim-Telegraph Road where they found D. H. Rathbone operating a printing press and printing pamphlets of which five or ten thousand had already been printed, which read as follows:

"The Meanest Joke the Germans Ever Played on the U. S. A.? This drop of ink should make a billion people think. Was when they saved F. D. Roosevelt from dying with infantile paralysis enabling him to double cross the American people into slavery to the British and Jewish criminals.

"The one positive proof of insanity is when the diseased mind turns against its friends and clings to its enemies.

"If it was right—and kindness to the American People, for the Germans to save Roosevelt, then are we not acting in an insane manner to be making war on Germany now?

"It is a beastly betrayal of confidence—an act of no less than treason against the whole world—for the government of the U. S.A. to let the British bunko the rest of the world into thinking that they, the British, are fighting for the same principles of Liberty and Justice that we, the American people, are fighting for. When they are in fact fighting the opposite! * * *"

Rathbone informed the officers that he was printing this pamphlet for Mr. Noble and Mr. Jones.

The foregoing recital does not contain all of the testimony adduced at the trial, but does include the main evidence relied upon by respondent to support the verdict of the jury.

[2] We shall now discuss the contentions of appellants as to the sufficiency of the evidence to support the judgments of conviction. The first of these contentions

is that the evidence fails to show that there was in fact a governing body of the Friends of Progress or that appellants were members of it. It was of course necessary for the People to prove beyond a reasonable doubt not only that there was such a governing body, but also that appellants were members of it.

The trial court instructed the jury that: "A governing body of an organization or group means the body or group which in fact controls the action or conduct of the main organization or group, either by established rules, by arbitrary will or in any other manner; in other words, the governing body is composed of the persons in an organization or group who direct, control, rule or regulate the main organization or group, either by actual or assumed authority."

[3, 4] Assuming but not deciding that the so-called Friends of Progress constituted such a group, body or organization as is within the contemplation of the California statute, and that it was not within the exemption mentioned therein, it is quite clear from the record that appellant Noble was the person who directed its activities. He presided at its meetings made announcements as to future meetings and other activities, introduced the various speakers who spoke at the meetings, and appeared to have general control over it. It does not appear that any other person or persons had any power to interfere with Noble's control over the Friends of Progress or to overrule any decision he might make as to its activities. So far as control is concerned, it must be stated that the Friends of Progress was as nearly a one-man organization as would be possible to imagine. As shown in the statement of facts hereinbefore set forth, all of the appellants participated in the meetings and activities of the Friends of Progress to a greater or less extent, but with the exception of appellants Noble and Jones there is nothing in the record to support any inference or conclusion that any of such other appellants were members of any governing body. In fact, it is extremely doubtful if there is any evidence in the record to justify a conclusion that there was in fact a governing body; but there is some basis for inferring that Noble and Jones were directing the Friends of Progress. The bulletins of Friends of Progress, which were introduced in evidence, at first were headed "Robert Noble—Director." Later, after Noble had announced in open meeting that Jones had become associate director, the bulletins were headed

| "Director | Associate |
|---|---|
| Robert Noble | Ellis O. Jones" |

So having in mind the familiar rule that the jury is the judge of the facts and that if there is any evidence from which it could reasonably be inferred that appellants Noble and Jones were members of the governing body of the Friends of Progress, we must sustain the implied finding of the jury upon that issue, we conclude that there is sufficient evidence in the record that appellants Noble and Jones were members of the governing body.

However, as to the appellants F. K. Ferenz, Leone Menier, James M. McBride, Joan McBride, Daniel Van Meter, Baron Van Meter and Genevieve Kerrigan, we are unable to find any support in the evidence for any conclusion that any of said appellants were members of a governing body.

[5, 6] It must be borne in mind that we are here concerned with a statute which is penal in its nature and that such a statute must be construed in a strict and accurate sense. As was said by our Supreme Court in Re Twing, 188 Cal. 261, at page 265, 204 P. 1082, at page 1084: "Penal statutes must be construed to reach no further than their words; no person can be made subject to them by implication." (Citing People v. Tisdale, 57 Cal. 104, 107; Ex parte Kohler, 74 Cal. 38, 15 P. 436; H. Hackfeld & Co. v. United States, 197 U.S. 442, 25 S.Ct. 456, 49 L.Ed. 826.) As was said by Chief Justice Marshall in the case of United States v. Wiltberger, 5 Wheat. 76, 95, 5 L.Ed. 37, 42, quoted in H. Hackfeld & Co. v. United States, supra [197 U.S. 442, 25 S.Ct. 459]:

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment."

The very most that the record shows as to these appellants is that they did participate in various ways in the meetings and activities of the Friends of Progress; but these activities, as shown by the record and as hereinbefore set forth, fall far

short of showing that they were members of any governing body, or that they or any of them, in fact, controlled the action or conduct of the Friends of Progress. As hereinbefore stated, all of the appellants were charged in the indictment "as members of the governing body" of the Friends of Progress. It was therefore necessary for the People to prove that they were members of such governing body. As we have pointed out, proof is lacking that any of the appellants, with the exception of Noble and Jones, were members of such a governing body. Without such proof the convictions of the appellants Ferenz, Menier, James M. McBride, Joan McBride, Daniel Van Meter, Baron Van Meter and Genevieve Kerrigan cannot be sustained.

In addition to proving that appellants, or some of them, were members of the governing body of the Friends of Progress, it was necessary, as the jury was properly instructed by the trial court, for the People to prove one of the following three allegations concerning the Friends of Progress:

"(1) That it directly or indirectly advocated, advised, taught, or practiced the duty, necessity or propriety of controlling, conducting, seizing or overthrowing the government of the United States or of this State or of any political subdivision thereof, by force or violence; or

"(2) That it was subject to foreign control in that it solicited or accepted financial contributions, loans or support of any kind, directly or indirectly, from, or was affiliated directly or indirectly with a foreign government or political subdivision thereof, or an agent, agency or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization; or

"(3) That it was subject to foreign control in that its policies, or any of them, were determined by or at the suggestion of, or in collaboration with a foreign government or political subdivision thereof, or an agent, agency or instrumentality of a foreign government, or a political subdivision thereof, or a political party in a foreign country, or an international political organization."

Appellants contend that the evidence is insufficient to show that the Friends of Progress, directly or indirectly, advocated, advised, taught, or practiced the duty, necessity or propriety of controlling, conducting, seizing or overthrowing the government of the United States or of this state or of any political subdivision thereof by force or violence. As shown by the statement of facts hereinbefore set forth, at the meetings of the Friends of Progress statements were made and sentiments expressed which are well calculated to excite the indignation of every right-thinking and patriotic American. Vicious and unreasoning attacks were made upon our own government and its policies and upon one of our military allies. Flagrant appeals to false and sinister racial theories were made, and the leaders of our republic, including our President, were grossly maligned. Appellant Noble and other speakers denounced our form of government and praised Hitler, Mussolini and Japan, and boldly asserted that in those countries there was a greater degree of liberty than existed in the United States of America. Indeed, the utterances of appellants Noble and Jones became such that even before the trial of the instant case they were indicted by the Grand Jury of the United States District Court for the Southern District of California, and convicted of the crime of conspiracy to violate section 33 of Title 50 of the U.S.Code, 50 U.S.C.A. § 33, regarding seditious or disloyal acts or words in time of war. During the so-called impeachment trial of the President of the United States there was a life-sized effigy of the President on the platform, and during said trial the statements made regarding the President, and the conduct of some of the appellants and others toward the President, were disgraceful. We can have nothing but the greatest contempt for the statements, actions and conduct of appellants shown by the record, but this does not relieve us from the necessity of determining the question of whether or not there is in the record evidence sufficient to prove that the Friends of Progress was an organization which advocated the overthrow of the government of the United States by *force or violence*. Counsel for respondent, in their brief and upon the oral argument, realizing, no doubt, that there is nowhere in the record any statement by any of the appellants advocating the overthrow of the government of the United States by force or violence, take the position that appellants were advocating what they call "psychological warfare." Upon the oral argument counsel for respondent stated:

"In connection with that we take the position that by advocating the psychological warfare which we have discussed in the

brief and by carrying on the program of the Nazi government here in the United States and giving aid and comfort to the Nazis and the Japanese they were attacking our country by force and violence and in so doing they were advocating the overthrow of our Government by force and violence. I think it is established that it was the intent of the Nazi government to overthrow this Government and set up a world state. Mr. Noble says it will only be a matter of time until there will be a new order of things. By reading the evidence and inferences, I think you can see they were advocating the complete destruction of the form of government as we know it here in the United States, and while we do not contend they were throwing bombs or gathering arms to make an assault, we contend by psychological warfare, following the Nazi program of divide and conquer, they were just as much participating in an attempt to overthrow the Government by force and violence."

[7] While we recognize that any activity which creates a lack of confidence in our form of government and promotes disunity and dissension among our people is in a sense giving aid and comfort to our military enemies, yet, having in mind that we are here considering a penal statute which must be construed narrowly and whose words must be taken in a strict and accurate sense, we cannot hold that a statute which requires proof of the advocacy of the overthrow of the government of the United States by force and violence is satisfied by mere proof that appellants indulged in intemperate, unreasoning, sinister and iniquitous criticism of our form of government, our officials and our allies, or praised a different form of government. Our government has other statutes dealing with the regulation of utterances and acts of citizens in time of war, and we do not believe that a statute such as the one under consideration here, the purpose of which is merely to require registration in the office of the Secretary of State of organizations which advocate the overthrow of the government of the United States by force and violence, means anything other than what the words of the statute aver, namely, "force or violence."

[8] We come, therefore, to the conclusion that the contention of appellants that the evidence is insufficient to show that the Friends of Progress advocated or advised the overthrow of the government by force and violence must be sustained.

We next consider the question as to whether there is any evidence to support a finding that the Friends of Progress "was subject to foreign control in that it solicited or accepted financial contributions, loans or support of any kind, directly or indirectly, from, or was affiliated directly or indirectly with a foreign government or political subdivision thereof, or an agent, agency or instrumentality of a foreign government or political subdivision thereof, or a political party in a foreign country, or an international political organization." This question is to a certain extent interwoven with the further question as to whether or not the evidence was sufficient to support a finding that the Friends of Progress was "subject to foreign control in that its policies, or any of them, were determined by or at the suggestion of or in collaboration with a foreign government or political subdivision thereof, or an agent, agency or instrumentality of a foreign government, or a political subdivision thereof, or a political party in a foreign country, or an international political organization." We shall, therefore, consider and discuss these two questions together.

[9] Appellants contend that there is no evidence in the record to prove any of these requirements of the act; that there is no evidence to show that the Friends of Progress was subject to foreign control or that its policies or any of them were determined by or in collaboration with a foreign government or an agent, agency or instrumentality of a foreign government or foreign political party. It was the theory of the respondent that the Friends of Progress was connected with the German government and the Nazi party through appellant Ferenz, whose activities we have hereinbefore set forth in some detail. Counsel for respondent, upon the oral argument before this court, stated:

"It is our position that Mr. Ferenz was the agent of a foreign country and that is one reason why the background evidence was put in. It shows that Mr. Ferenz at the very inception of the Nazi program in Germany was in close touch with the German government and connected with every single one of the German organizations."

And in respondent's brief it is stated, on page 292:

"We think that there was ample evidence to justify a finding by the jury that appellant Ferenz was an agent of Nazi Ger-

many. His connection with the German-American Vocational League, the German-American Bund, the V.D.A. (Society for the Germans in Foreign Countries) organization, the UFA Film organization, the Winterhelp Abroad program and the German Library of Information shows a connection with every agency of Nazi Germany operating in this country and clearly indicates that he was no loyal American citizen with only a passing interest in his homeland. His every activity was directed toward the promotion of Hitler and Nazi Germany. He was a propaganda agent of Nazi Germany, and we think this was clearly shown by the evidence. When the Friends of Progress accepted suggestions from him, many of which were shown by inference, and one of which we have shown openly existed, its policies were being determined by, at the suggestion of, and in collaboration with, a foreign government, a political subdivision thereof and a political party and an agent of such foreign government."

As we have hereinbefore stated, it is apparent from the record that appellant Ferenz was a member of the Friends of New Germany and later of the German-American Bund; that he was in sympathy with the aims and ideals of the Nazi party in Germany and that he was seeking by means of speeches, letters, sales of literature and the exhibiting of German produced films, to create in the United States a public sentiment favorable to Germany and against the entry of the United States into any war against Germany. It also appears from the evidence that he attended a number of meetings of the Friends of Progress and participated to some extent, as shown in the statement of facts hereinbefore set forth, in the activities of that organization. But a careful study of the record fails to disclose any evidence upon which a finding can be based, either by inference or otherwise, that the policies of the Friends of Progress, or any of them, were determined by or at the suggestion of Ferenz. So even if it could be held that Ferenz was the agent of a foreign government or of a foreign political party, a matter upon which we believe the evidence is likewise insufficient, proof is entirely lacking to show that the Friends of Progress was subject to foreign control in that its policies or any of them were determined by or at the suggestion of an agent of a foreign government. Respondent in its brief laid great stress upon the fact that appellant Ferenz "committed one error in his plan which directly connects him with the program of the Friends of Progress." Respondent then quotes the following from the testimony of the witness William J. McCarthy, Jr., as to what occurred at the meeting of the Friends of Progress on November 15, 1941:

"At this point some person passed a note to Mr. Noble who was speaking and he paused a moment and read the note and then stated, 'I have a note here which contains some very good information which I will pass on to you. It was sent up here by Mr. F. K. Ferenz who is standing in the back of the hall.'

"Mr. Babcock: Q. Did he point to the back of the hall? A. Yes, he pointed to the back of the hall.

"Q. Did you see Mr. Ferenz there? A. And most of the audience turned and observed Mr. Ferenz who was standing at the rear of the hall.

"Q. And you saw Mr. Ferenz there? A. Yes.

"Q. Proceed, please. A. He then read or enlarged upon the note which was as follows: 'In Germany when two young persons desire to be married, they file their intentions with the government and fill in some form and they are granted a loan of five hundred dollars. This gives them an opportunity to get started, to buy their furniture and the other necessities that are necessary at the beginning of marital life. And in contrast to the system in America here two young persons getting married proceed to some furniture store and buy a few hundred dollars worth of furniture paying a dollar down and a dollar a week, and they immediately start out in debt; spend most of their life trying to get out.' * * *"

The fact that respondent relies so strongly upon this incident illustrates the difficulty that respondent or anyone else encounters in trying to find in the record any substantial evidence to support the contention that the Friends of Progress was subject to foreign control or that its policies were determined by or in collaboration with an agent of a foreign government.

The mere fact that a person passed up a note to a speaker at a meeting or even participated in the meeting itself, or in some of the activities of the particular group holding the meeting, cannot be accepted as sufficient evidence to prove that the policies of the organization or group were determined by such person. Particularly is this

so when, as we have already held, the evidence is insufficient to show that appellant Ferenz or any of the appellants other than Noble and Jones were members of the governing body of the Friends of Progress. We are unable to agree with respondent that the evidence is amply sufficient to support the verdict of the jury on the matter of affiliation with a foreign agent, or upon the matter that the policies of the Friends of Progress were determined by or at the suggestion of the agent of a foreign government.

As to whether the Friends of Progress accepted financial contributions or support from a foreign government or agent of a foreign government or a political party, evidence is entirely lacking, and we do not understand that respondent makes any contention that there was evidence to support such a finding.

We deem the following language of our Supreme Court in the early case of Ex parte McNulty, 77 Cal. 164, at page 168, 19 P. 237, at page 239, 11 Am.St.Rep. 257, to be quite applicable here:

"Constructive crimes—crimes built up by courts with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law."

Appellants make numerous other contentions as to errors in instructions given by the court to the jury, errors of the court in the admission of evidence, and error on the part of the court in denying appellants' motion for a mistrial because of alleged misconduct of one of the counsel for respondent in his closing argument to the jury. A number of these contentions raise some very serious questions, but in view of the fact that the judgments and orders must be reversed for the reasons hereinbefore set forth, we deem it unnecessary to unduly prolong this opinion by discussing them.

[10] As hereinbefore stated, appellants in their briefs, and the American Civil Liberties Union as amicus curiae, contend that the California Subversive Organization Registration Act, the act here involved, is unconstitutional because it is in conflict with certain federal legislation on the subject, and that it therefore violates Article VI, cl. 2, of the Constitution of the United States. They contend that the field covered by the act has been wholly occupied by the Registration of Certain Organizations Act, 18 U.S.C.A. §§ 14–17, commonly referred to as the Voorhis Act, and the Registration of Foreign Propagandists Law, 22 U.S.C.A. §§ 601, 611–616, commonly referred to as the McCormick Act. We are frank to state that we are in grave doubt as to the constitutionality of the California Subversive Organization Registration Act, but in view of the fact that the convictions of all of the appellants must be reversed upon other grounds already enumerated, we deem it unnecessary to pass upon the constitutionality of the statute.

We are not unmindful of the fact that individuals, such as the appellants are shown by the record to be, have by their acts and statements justly earned the contempt of patriotic Americans. It is difficult to understand how persons who live under our Constitution and our laws can utter such sentiments as appellants have uttered. This court can only regret that the state of the record is such that we are compelled to reverse the judgments of conviction; but we do not believe that anyone can study the record in this case as we have studied it and arrive at a different conclusion. It must not be forgotten that the offense with which appellants were charged was, briefly, that they were members of the *governing body* of an organization, "Friends of Progress," that advocated, advised, taught and practiced the duty, necessity and propriety of overthrowing the governments of the United States and the State of California, by *force and violence;* that the organization was subject to foreign control in that it accepted financial support from and was affiliated with a foreign government and an agent thereof; that the policies of said organization, or some of them, were determined by, at the suggestion of and in collaboration with a foreign government and an agent thereof; and that, as members of the governing body of such organization they wilfully, unlawfully and feloniously failed to file the information and documents as required by the Subversive Organization Registration Act.

[11] As we have hereinbefore pointed out, the evidence is insufficient to sustain the conviction of appellants of the offense charged in the indictment. Under such circumstances our duty is clear and plain. Unpleasant though it may be, and unpopular though it may prove in such a case, if our judicial system is to be true to the highest traditions of our jurispru-

dence an appellate tribunal should not shirk its responsibility where the record fails, as it does in this case, to support the convictions.

In view of the foregoing, the judgments of conviction as to all appellants and the orders denying the motions of each and all defendants for a new trial should be and they are reversed.

Hearing denied; SHENK, EDMONDS, and SPENCE, JJ., dissenting.




69 Cal.App.2d 44

**CHASE v. TRIMBLE et al.**

**Civ. 14729.**

District Court of Appeal, Second District, Division 3, California.

April 30, 1945.

**1. Mines and minerals ⇐73**

The interest which lessee acquired under oil and gas lease was a "profit a prendre", an interest in real property.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit a Prendre".

**2. Mines and minerals ⇐74**

Lessees of oil and gas lease, who, in making assignment of the lease, retained overriding royalty but did not retain their right to go upon land to operate, could not be considered "cotenants" in the profit a prendre and, hence, their overriding royalty interest could be terminated through assignee's voluntary surrender by quitclaim deed of the leasehold.

See Words and Phrases, Permanent Edition, for all other definitions of "Cotenant".

**3. Mines and minerals ⇐77**

Under terms of oil and gas lease, the notice of default was not a prerequisite to a voluntary surrender of the lease by quitclaim deed.

**4. Mines and minerals ⇐78(1)**

Under provision in oil and gas lease authorizing suspension of drilling operations so long as the established and posted market price offered by the major oil purchasing companies for "oil of the quality produced on said premises, in the district in which the premises are located, shall be less than 75 cents per barrel at the well," drilling operations could be suspended only in event drilling operations had been conducted on the premises and value of quality of the oil produced was less than 75 cents per barrel.

**5. Mines and minerals ⇐73½**

The provision in oil and gas lease that "at the end of 20 years from the date hereof all rights to drill additional wells shall cease and thereafter lessor shall have the right to lease said premises to others * * *" merely limited right to drill additional wells, and was not to be read in connection with provisions respecting right to defer commencement of drilling operations or right to suspend operations under the suspension clause.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Quiet title action by Glywn S. Chase against Raleigh F. Trimble, Helen Kay Trimble and others. From a judgment for plaintiff, the named defendants appeal.

Affirmed.

Arthur C. Fisher, of Los Angeles, for appellants.

Durley & Downes, W. Mark Durley, and John H. Todd, all of Oxnard, for respondent.

DESMOND, Presiding Justice.

Plaintiff commenced a quiet title action on August 11, 1943, against numerous defendants, including Raleigh P. Trimble and Helen Kay Trimble, appellants herein. A default was entered against several of the defendants after the time for answering had expired, and other defendants, subsequent to the commencement of the action, executed quitclaim deeds and were dismissed as parties defendant. The two mentioned defendants, Mr. and Mrs. Trimble, appeal from the judgment quieting title in plaintiff to a particularly described parcel of real property situated in the Rancho El Rio de Santa Clara o' La Colonia, County of Ventura, State of California.

There is no factual dispute in this case since it was presented to the trial court upon an agreed statement of facts, which are, briefly, these: On April 25, 1934, plaintiff (owner of the fee) and his wife,

as landowner-lessors, entered into an oil and gas lease with defendant Raleigh P. Trimble, as lessee, covering the property above mentioned, which lease was duly recorded. The lease was to continue for a period of five years and so long thereafter as drilling operations on the premises were being conducted or deferred under provisions thereof. Lessee was to have the sole and exclusive right of prospecting the premises and drilling and was required to start the drilling of a well within 90 days from the date of the agreement, but was permitted, under the terms of the lease, to extend the period for commencing the first well by giving lessor written notice and paying a monthly rental of a stipulated price per acre. Lessor was to receive as royalty "a sum equal to one-eighth of the market price of all oil produced by it from said premises," as well as one-eighth of the proceeds from the sale of any gas sold by lessee. The lease also provided that non-performance by lessee of any of the acts or covenants required under the lease, ninety-days after written complaint by lessor, at lessor's option would constitute a forfeiture of lessee's rights. Drilling operations could "be suspended or curtailed * * * when there is no market for the oil, or so long as the established and posted market price offered by the major oil purchasing companies for oil of the quality produced on said premises, in the district in which the premises are located, shall be less than seventy-five cents per barrel at the well. * * *"

On April 22, 1936, almost two years after the execution of the lease, lessee Raleigh P. Trimble and Helen Kay Trimble, his wife, assigned "all their right, title and interest" in the lease to Vaca Oil Exploration Company, hereinafter called assignee, reserving to themselves an overriding royalty of 2½% "from the gross proceeds of any oil and/or gas produced and sold from any and/or all of the lands embraced," which instrument was also duly recorded. On July 8, 1938, more than four years after the execution of the lease, the assignee quitclaimed the property, including all rights in the lease, to the plaintiff, the original lessor. No drilling operations on the premises were ever started by the lessee or the assignee. Nor is there any indication in the record that any rental was ever paid for an extension of time in which to commence drilling operations. Two wells were drilled on parcels of land adjoining the premises involved in this action, prior to the assignee's execution of the quitclaim deed. The oil produced from those wells at no time was marketable at a price in excess of 38¢ per barrel, and the established and posted market price offered by the major oil purchasing companies, in the district in which the premises were located, for oil of the quality produced from said wells, was less than 75¢ per barrel at the well. No notice of any default of any of the terms or covenants of the lease was ever served by lessor upon lessee pursuant to the terms of the lease. Plaintiff's quiet title action was filed more than five years from the date of the execution of the lease. In answer to plaintiff's complaint, defendants entered a general denial of each and every allegation, and further alleged that the overriding royalty of 2½% reserved under their assignment to the Vaca Oil Exploration Company constituted a valid and subsisting lien and claim superior to the right, title and interest of the plaintiff.

Upon these facts, the trial court found for plaintiff and by its judgment the title to the real property involved was quieted against "all claims, demands, or pretentions, of said Defendants."

Appellants state that the sole question presented on the appeal is whether an assignee of a lessee under an oil and gas lease, through voluntary surrender by quitclaim of the leasehold, can divest the original lessee of an overriding royalty interest reserved in the transfer of the lease to the assignee?

[1] The interest which the lessee acquired under the oil and gas lease was a profit a prendre, an interest in real property. La Laguna Ranch Co. v. Dodge, 1941, 18 Cal.2d 132, 135, 114 P.2d 351, 135 A. L. R. 546; Callahan v. Martin, 1935, 3 Cal.2d 110, 122, 43 P.2d 788, 101 A.L.R. 871; Dabney v. Edwards, 1935, 5 Cal.2d 1, 11, 53 P.2d 962, 103 A.L.R. 822; Dabney-Johnston Oil Corporation v. Walden, 1935, 4 Cal.2d 637, 649, 52 P.2d 237. By its terms the lease permitted an assignment, in whole or in part, by either the lessor or the lessee. By the recorded assignment the lessee and his wife assigned not only all their right, title and interest in the lease under consideration, subject to a reservation of a 2½% overriding royalty, but also in eight additional leases involving other neighboring lands subject to the same reservation, and in consideration of an agreement that

the assignee pay to them the sum of $40,000 "payable only, however, out of ten per cent. (10%) of any oil and/or gas produced and sold from ground covered by the said nine leaseholds." Thus, the sole and exclusive right to operate, i.e., the entire profit a prendre, was transferred to the assignee with no reservation on the part of the lessee and his wife of any right to enter the premises for the purpose of drilling for oil and gas; their only interest was that of an overriding royalty,—a fractional share of the oil and gas produced and sold.

In La Laguna Ranch Co. v. Dodge, supra, where the court considered the question whether the interest of the holder of a fractional share in the production of oil, created out of the estate of the operating lessee, survived after the lessee's voluntary surrender of the leasehold by quitclaim deed, it was held at page 140 of 18 Cal.2d at page 355 of 114 P.2d, 135 A.L.R. 546, that while the overriding royalties were interests in real property, they "were not unlimited but were determinable interests limited to the duration of the existing lease. Termination of the oil and gas lease would result in the termination of the interests created under it." While in the La Laguna case the facts differ from those in the case at bar, the situation is not such as would change the character of the overriding royalty interest. In the former case the original operating-lessee executed the quitclaim deed, while in the present case, as we have indicated, the quitclaim was executed not by the original lessee but by his assignee, who, within the intention of the parties, was to become the actual operator, and who took with all the rights and privileges and subject to all the duties and liabilities fixed by the lease. See Civ. Code, secs. 822 and 823. The lease provided that the lessee could at any time, either before or after discovery of oil on the premises, quitclaim the land, or any part of it, to the lessor and all rights and obligations of the parties thereafter were to cease. It further provided that if "the estate of either party hereto is assigned, and the privilege of assigning in whole or in part is hereby expressly granted, *the covenants hereof shall extend to their* * * * *assigns.* * * *" (Italics added.) Under the express terms of the lease, its provisions were to extend to the assignee and it, therefore, had the right to quitclaim the premises, in the absence of any fraud or inequity, and thereby legally to terminate the lease.

[2] Whether the quitclaim deed was sufficient to destroy the interest of the lessee-assignors is dependent upon whether they, having made their assignment without retaining the right to go upon the land to operate, are to be considered cotenants in the profit a prendre. Under the reasoning of the court in the La Laguna case, supra, they are not to be so considered, and they can derive no comfort from the case of Payne v. Callahan, 1940, 37 Cal.App.2d 503, 517, 99 P.2d 1050, where the court enunciated the principle that the owner of an overriding royalty and his successors in interest became cotenants in the profit a prendre with the lessees and their successors in interest. This principle has been expressly disapproved by the Supreme Court in the La Laguna case, where the court stated, 18 Cal.2d at page 138, 114 P.2d at page 354, 135 A.L.R. 546: "Thus, in so far as Payne v. Callahan [supra], holds that the fractional interests created either by the lessor or the operating lessee constitute a tenancy in common in a *profit a prendre as a matter of law,* it is expressly disapproved. In any case, the intention of the parties is controlling, and in the absence of a clear indication that such was the intent, the court will not construe royalty interests created for the duration of a specific oil and gas lease as granting the right to enter upon the land in question for the purpose of carrying on oil production or as creating a tenancy in common in the *profit a prendre* for that purpose." (Italics added.) The assignment in the instant case indicates that the parties did not intend to create a tenancy in common in the leasehold estate, nor was there any intent on the part of the lessee and his wife to limit, by any personal covenants with the assignee, the right to quitclaim the property. Appellants' overriding royalty interest, not entitling them to cotenancy and limited, as it was, to the duration of the lease, expired when their assignee executed and delivered the quitclaim deed to the landowner-lessor.

We have not overlooked the argument contra urged by appellants based upon the following italicized portions of an excerpt from the opinion of the La Laguna case, 18 Cal.2d at page 139, 114 P.2d at page 355, 135 A.L.R. 546: "* * * In Callahan v. Martin, supra, 3 Cal.2d at pages 123, 124,

43 P.2d [at page] 788, 101 A.L.R. 871, similar rights to share in the production of oil and gas were held to be interests in real property when created *by the lessor.* That holding was based upon the analogy drawn between the right to receive future rents from real property and the right to receive oil royalties reserved by the lessor in an oil and gas lease. [Cases cited.] A *similar conclusion may be reached where the lessee, not intending to operate the oil wells himself,* makes a sub-lease and *reserves an overriding royalty for himself.*" (Italics by appellants.) The argument that the facts in the present case bring it within the foregoing excerpt is not convincing since appellants fail to note the distinction between a sublease, which conveys an interest less than the leasehold with a reversion to the sublessor, and an assignment, which conveys the entire leasehold to the assignee.

[3-5] Nor have we overlooked the further contention of appellants that plaintiff could not quiet title as against them for two reasons, namely, that plaintiff did not give notice as required, and that such notice would have been ineffective "because Lessee had fully complied with the provisions of the lease, and the same cannot be terminated by notice unless at the time of such notice the price of oil of the quality *producable* (sic) on the premises, as offered by the major oil producing companies, was seventy-five cents per barrel at the well; or until twenty years had elapsed and at the expiration of said twenty years there was no production on the premises." (Italics added.) Since we have already held that the quitclaim by the assignee legally terminated the lease and all interests created under the leasehold, it is unnecessary for us to discuss this argument at any great length, but it seems sufficient to point out that under the terms of the lease notice of default was not a prerequisite to a voluntary surrender of the lease by quitclaim deed. Also, appellants have misinterpreted the provisions of the lease respecting the suspension of drilling operations "so long as the established and posted market price offered by the major oil purchasing companies for oil of the quality *produced on said premises,* in the district in which the premises are located, shall be less than seventy-five cents per barrel at the well." (Italics added.) Appellants attempt to substitute the word "producible" for the word "produced," but this can not be done for under the terms of the lease the drilling operations could be suspended only in the event drilling operations had been conducted on the premises and the value of the quality of the oil *"produced on the premises"* was less than seventy-five cents per barrel. This clause contemplated production on the premises as well as in the district. Nor can appellants derive any benefit from the twenty-year clause of the lease, which provided that "At the end of twenty years from the date hereof all rights to drill *additional wells* shall cease and thereafter Lessor shall have the right to lease said premises to others. * * *" (Italics added.) This provision merely limited the right to drill additional wells and is not to be read in connection with the provisions respecting the right to defer commencement of drilling operations for five years by payment of rental or the right to suspend operations under the suspension clause.

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.




69 Cal.App.2d 51

**LYNCH v. HOLMSTRAND (WATSON).**

**Civil No. 14789.**

District Court of Appeal, Second District, Division 3, California.

April 30, 1945.

Rehearing Denied May 25, 1945.

Hearing Denied June 28, 1945.

**1. Appeal and error ⇐110**

An order denying plaintiff's purported motion for a new trial is not appealable. Code Civ.Proc. § 963.

**2. Appeal and error ⇐345(1)**

Filing of alleged notice of motion for new trial by plaintiff after judgment dismissing action without trial upon issues presented by the pleadings did not extend time for filing notice of appeal, since a motion for a new trial is not a proper proceeding to review action dismissing a cause where there has been no trial upon issues present-

ed by the pleadings. Code Civ.Proc. § 656; Rules on Appeal, rules 2(a), 3.

3. Appeal and error ⇐356, 782

Where appeal was not taken within 60 days from entry of judgment dismissing the action, District Court of Appeal had no jurisdiction to consider the case on the merits and the appeal was dismissed. Rules on Appeal, rules 2(a), 3.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Henry L. Lynch, also known as H. L. Lynch, against John S. Holmstrand, wherein the defendant filed a cross-complaint. Upon death of the defendant, Claude A. Watson, administrator of the estate of John S. Holmstrand, deceased, was substituted as defendant and cross-complainant. From judgment dismissing the action, the plaintiff appeals.

Appeal dismissed.

Henry L. Lynch, in pro. per., for appellant.

Walter G. Danielson, of Los Angeles, for respondent.

FOX, Justice pro tem.

Defendant contends that the plaintiff filed his notice of appeal from a judgment of dismissal too late and that therefore his appeal must be dismissed. This contention is correct.

[1] Plaintiff, on August 9, 1940, filed an action against John S. Holmstrand, who, on September 5, 1940, filed his answer and cross-complaint. On October 7, 1940, plaintiff filed his answer to the cross-complaint. On July 7, 1942, Mr. Holmstrand died. On October 14, 1943, the administrator of his estate was substituted as defendant and cross-complainant. The case not having been brought to trial, the administrator, on November 10, 1943, pursuant to due notice, made a motion, supported by affidavits, to dismiss the action upon three grounds: (1) That plaintiff had failed to file or present any claim against the estate of Holmstrand as required by section 709, Probate Code; (2) that he had failed to prosecute said action with due or any diligence; and (3) that he had failed to file a non-resident cost bond as required by section 1030, Code of Civil Procedure. Plaintiff filed counter affidavits. The motion to dismiss was granted, the minute order directing the "Attorney for the Defendant to prepare Judgment." The formal judgment dismissing the action was signed and filed on November 16, 1943. Plaintiff, on December 22, 1943, made a purported motion for a new trial. It was denied on that date. On January 19, 1944, plaintiff filed his notice of appeal "from the judgment herein made on the 22 day of December, 1943." There was, however, no *judgment* made in said case on December 22, 1943. The only thing that happened on that date was the denial of plaintiff's purported motion for a new trial. This order, however, is not appealable. Code Civ.Proc. sec. 963; Confar v. Whelan, 1935, 8 Cal.App.2d 101, 46 P.2d 991; 20 Cal. Jur., sec. 139, p. 213.

[2] If, however, we disregard the date stated in plaintiff's notice of appeal and consider that the appeal was taken from the judgment dismissing the action, said notice of appeal was not filed within the time required by law. Under Rule 2(a) of Rules on Appeal, "Notice of Appeal shall be filed within 60 days *from the date of entry* of the judgment, unless the time is extended as provided in Rule 3." (Italics added.) Under Rule 2(b) of said Rules on Appeal, *the date of entry is the date of the filing* of the signed order when the minute order expressly directs that a written order be prepared, as it did in this case. The notice of appeal should therefore have been filed within 60 days from November 16, 1943, unless the time for filing same was extended by the purported proceedings on motion for a new trial. Under Rule 3(a) of Rules on Appeal, "Where a valid notice of intention to move for a new trial is served and filed * * * the time for filing the notice of appeal from the judgment is extended for all parties until 30 days after denial of the motion by order of court or by operation of law." Plaintiff's notice was not a "valid" one. The filing of the alleged notice of motion for a new trial by plaintiff did not have the effect of extending the time for filing the notice of appeal because a motion for a new trial is not a proper proceeding to review the action of the court in dismissing a case where there has been no trial upon the issues presented by the pleadings. In such case there is no provision for a new trial and the notice of intention to so move is ineffectual for any purpose. Code Civ.Proc. § 656; Gray v. Cotton, 1917, 174 Cal. 256, 162 P. 1019; City of Pasadena v. Superior Court, 1931, 212 Cal. 309, 298 P. 968; City of Pasadena v.

Grace, 1931, 114 Cal.App. 24, 299 P. 565; Hotel Park Central v. Security-First Nat. Bank, 1936, 15 Cal.App.2d 293, 59 P.2d 606; Mann v. Superior Ct., 1942, 53 Cal.App.2d 272, 285, 127 P.2d 970. In Gray v. Cotton, supra, 174 Cal. at page 258, 162 P. at page 1020, the court said: "It is well settled that proceedings for new trial do not lie to secure the re-examination of the decision of a motion."

[3] The appeal not having been taken within 60 days from the entry of the judgment, the court has no jurisdiction to consider the case on the merits and the appeal must be dismissed. Lawson v. Guild, 1932, 215 Cal. 378, 10 P.2d 459; Kocher v. Fidelity & Deposit Co., 1934, 137 Cal.App. 474, 30 P.2d 535; Confar v. Whelan, supra, 8 Cal.App.2d 101, 46 P.2d 991.

The appeal is dismissed.

DESMOND, P. J., and SHINN, J., concur.

Hearing denied; CARTER, J., dissenting.




69 Cal.App.2d 100

**RUSSI v. BANK OF AMERICA N. T. & S. A.**

**Civ. 12857.**

District Court of Appeal, First District, Division 2, California.

May 4, 1945.

**1. Appeal and error ⇐556, 573, 607(1)**

In bringing up record on appeal, Rules on Appeal permit appellant to choose the transcript, the settled statement, or the agreed statement.

**2. Appeal and error ⇐607(1)**

Where appellant has elected to appeal on judgment roll and exhibits, there is nothing in Rules on Appeal which permit him to commence over and to prepare entirely different form of record, as by moving to augment record by including transcript of oral testimony, in absence of some unusual circumstance, such as complete inability to obtain the record originally sought. Rules on Appeal, rules 4, 5(a, f), 12 (a-c), 53(b).

**3. Appeal and error ⇐607(1)**

The Rules on Appeal prescribe mandatory times for notices calling for particular type of record and, after time has expired, party seeking to appeal is in default and can be relieved only on a showing of good cause. Rules on Appeal, rules 4, 53(b).

**4. Appeal and error ⇐607(1), 654**

The provision of Rules on Appeal authorizing reviewing court to order transmission of portions of oral proceedings does not entitle appellant to change at pleasure from appeal on judgment roll to appeal on a record which includes transcript of oral proceedings. Rules on Appeal, rule 12(a).

**5. Appeal and error ⇐654**

Even where matter sought to be added to record on appeal is proper or proposed correction of record is warranted, neither augmentation nor correction is a matter of right, and may be denied for inexcusable neglect in preparing record, delay in presenting application, or for other reasons.

**6. Appeal and error ⇐654**

The basic reason for provision of Rules on Appeal concerning respondent's right to require inclusion of oral proceedings where appellant appeals on judgment roll is to afford certain necessary protection for respondent, and it does not purport to authorize appellant, after appealing on judgment roll, to augment record by including transcript of oral proceedings. Rules on Appeal, rule 5(f).

Motion to Augment Record from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Frank B. Russi against Bank of America N. T. & S. A., as executor of the will of Francisco Bertolli Rossi, also known as F. B. Russi, also known as F. C. Rossi, deceased. Appeal having been taken by defendant, it moves for augmentation of the record.

Motion denied.

J. M. Inman, of Sacramento, for appellant.

Dreher, McClellan & McCarthy, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The appellant moves for an order of augmentation of the record "whereby the

clerk's transcript of the testimony taken at the trial of said cause may be augmented by including in said transcript of testimony all oral testimony received and admitted at the trial of said cause." The "ground" of the motion is stated to be "in order to correctly and properly present the record of the proceedings in the lower court." In support of the motion the appellant refers to Rules on Appeal numbers 12(a), 12(b) and 12(c). The respondent resists the motion upon the ground that appellant has voluntarily foreclosed itself from the relief which it seeks by electing to appeal upon the judgment roll.

The only one of the three rules cited which is at all applicable is Rule 12(a) which authorizes a reviewing court to order "that portions of the oral proceedings be transcribed, certified and transmitted to it." But Rule 4 provides that "When an appellant desires to present any point which requires a consideration of the oral proceedings * * * he shall serve on the respondent and file with the clerk of the superior court, within 10 days after filing of the notice of appeal, a notice to prepare a reporter's transcript of the oral proceedings * * *." Appellant filed a notice of appeal from the judgment on April 11, 1944. He filed on April 18th a notice to the clerk under Rule 4 in which he requested "a clerk's transcript consisting of the judgment roll and of the notice of appeal and all exhibits offered by plaintiff and defendant." Such a transcript was prepared, certified by the clerk, and filed, improperly, with the clerk of the District Court of Appeal of the Third Appellate District on November 3, 1944, transferred and filed with the clerk of the Supreme Court on November 10, 1944, and transferred to this court on December 4, 1944. After appellant and respondent had filed their briefs and the cause had been placed on the calendar for hearing the appellant gave notice of this motion for augmentation of the record.

[1-3] In order to understand the problem presented by this motion, we should point out what procedures the rules offer for bringing up a record on appeal. The appellant has considerable latitude in this regard; he may choose one of three different types of record: (1) The transcript; (2) The settled statement; (3) the agreed statement. In the present case he elected to use a transcript but in doing so he had to determine at the outset whether to bring up just the judgment roll and exhibits or the oral proceedings also. He elected to come up on the judgment roll, together with certain exhibits. He gave his notices accordingly and did not request the transcription of any of the oral proceedings as required by Rule 5(a). Accordingly he has elected the particular form of record called for and is not entitled to commence all over again to prepare an entirely different form of record in the absence of some such unusual circumstance as the complete inability to obtain the record originally sought. See Averill v. Lincoln, 24 Cal.2d 761, 151 P.2d 119. It would be improper, and unfair to the respondent as well as a plain disregard of the rules, to permit an appellant long after his time has expired to give notices for a type of record which he voluntarily chose not to request within the time allowed. The rules prescribe mandatory times for the notices calling for a particular record, and after the time has expired the party is in default and can be relieved only upon a showing of good cause.

[4, 5] Appellant contends that Rule 12 operates in his favor to circumvent the provisions of all of the other rules mentioned herein. As has been pointed out, Rule 12 is merely a revised version of certain former statutes and rules dealing with "diminution" of the record and its purpose was to carry on the former procedure with as little procedural difficulty as possible. See 17 So. Cal.L.Rev. at 130. But neither the old nor the new rule was designed as a means by which the appellant could at any time during the progress of the appeal switch from one record to another. Its meaning and purpose are clear. Parties are encouraged to bring up only relevant matters on appeal and occasionally it will develop that there has been omitted from the record some paper, exhibit or portion of the oral proceedings. In such case it is desirable and proper upon a showing that the omitted material was relevant and that its omission was excusable, to bring it up in order that the appeal might be determined on an adequate record. But as has been correctly said: "Even where the matter sought to be added is proper, or the proposed correction is warranted, neither augmentation nor correction is a matter of right; they both may be denied for inexcusable neglect in preparing the record, for delay in presenting the application, or for other reasons. The new rule does not deal expressly with this aspect of

the question and the discretion of the court to deny the application still remains. Hence the augmentation procedure is not to be regarded as a cureall, nor as an assurance that negligent preparation of the record will entail no harmful results." See 17 So.Cal. L.Rev. 130. There is nothing in Rule 12 which can justify the appellant's contention that he may at his pleasure change his judgment roll form of appeal to one which includes a reporter's transcript.

[6] Nor is Rule 5(f) of any assistance to the appellant. That rule provides that when the appellant elects to appeal on the judgment roll alone the respondent may not require the inclusion of oral proceedings except when necessary to prevent a miscarriage of justice. That section protects the respondent against any unfairness in the appellant's limitation of the form of record. Its purpose has been explained as follows: "The appellant may limit his grounds of appeal to matters appearing on the face of the judgment roll, and if he does so the evidence usually would contribute nothing relevant. There are, however, certain special situations in which the evidence would be material, e.g., to justify additional findings on appeal, thereby eliminating inconsistency between findings and judgment, or to show that an erroneous ruling in connection with the pleadings was cured at the trial." 17 So.Cal.L.Rev. at 111. This necessary protection for the respondent is the basic reason for Rule 5(f) and there is nothing in that provision which purports to grant any privilege to the appellant to enlarge his judgment roll appeal once he has chosen that method.

Appellant urges that he should be given relief under Rule 53(b), which authorizes a reviewing court "for good cause shown" to relieve a party from a default ocasioned by any failure to comply with the new rules. The relief is similar to that which may be granted under section 473 of the Code of Civil Procedure, and as in the code section, it is limited to cases where "good cause" is shown for the default. The procedure in this particular under the new rules is not different from that of the code. When the parties came to the settlement of the transcript they stipulated in writing that the clerk's transcript which was thereafter filed herein should be settled as a full and fair transcript of the proceedings covering all matters "except oral testimony" and it was then agreed that the purpose of adding the quoted words was to show clearly that the transcript did not include any of the oral testimony. It is plain therefore that appellant was not taken by surprise, that it has not shown any excusable neglect, and that the omission was made purposely and voluntarily. There is no good cause shown for the relief prayed for.

The motion is denied.

GOODELL, J., and DOOLING, Justice pro tem., concur.




69 Cal.App.2d 129

**PINON v. POLLARD.**

Civ. 12794.

District Court of Appeal, First District, Division 1, California.

May 7, 1945.

**1. Judgment ⇐17(2)**

Service of summons on a resident of state absent therefrom by publication and mailing of copy of summons and complaint to defendant's address outside the state did not give court jurisdiction to enter money judgment against defendant in personal injury action.

**2. Judgment ⇐17(3)**

Service of summons in personal injury action against nonresident of state by publication and mailing of copy of summons and complaint to his address outside state did not give court jurisdiction to enter money judgment against nonresident defendant who did not appear voluntarily or agree to submit to service of process extraterritorially.

**3. Courts ⇐21**

A court may not acquire jurisdiction in personam over defendant by service of notice or other process outside territory or state in which the forum exists.

**4. Judgment ⇐119**

Judgment on default entered eight days after last publication of summons in action against a defendant who was absent from the state was void, regardless of whether

defendant was a resident of state. Code Civ.Proc. §§ 407, 412, 413, 415.

**5. Process ⇐11**

A "summons" is an order signed by proper authority directing party served to appear within ten days, if served in county, otherwise within 30 days, unless a particular statute provides differently, and constitutes notice that unless defendant so appears plaintiff will take judgment. Code Civ.Proc. § 407.

See Words and Phrases, Permanent Edition, for all other definitions of "Summons".

**6. Notice ⇐9**

A notice must apprise the party of what is required of him. Code Civ.Proc. §§ 407, 412, 413, 415.

**7. Courts ⇐21**
**Judgment ⇐17(2)**

Where jurisdiction is obtained by a prescribed form of constructive notice, the statutory conditions upon which the service depends must be strictly construed, and unless statute has been complied with court has no jurisdiction to render judgment. Code Civ.Proc. §§ 407, 412, 413, 415.

**8. Judgment ⇐119**

Where summons is served by publication, a default may not be taken until 30 days after the last publication. Code Civ. Proc. §§ 407, 412, 413, 415.

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Appeal from Superior Court, San Mateo County; C. J. Goodell, Judge.

Action by Charles Pinon against John Pollard, alias Jack Pollard, alias "Red" Pollard, for personal injuries sustained by plaintiff following alleged assault upon him by defendant. From an order and judgment vacating and setting aside a default judgment against defendant, plaintiff appeals.

Order and judgment affirmed.

E. C. Mahoney, of Burlingame, for appellant.

F. E. Hoffmann, of San Mateo, for respondent.

WARD, Justice.

This is an appeal by plaintiff from an order, judgment and decree vacating and setting aside a judgment entered upon default after service "personally and by publication" upon defendant. In June of 1941 plaintiff filed an action for damages for injuries sustained following an alleged assault upon plaintiff by defendant in San Mateo County. The complaint prayed for damages in the sum of $10,984.76. Defendant was served with summons personally in November, 1941, in the State of New Hampshire. The following month he appeared specially to quash service of summons. His affidavit in support of the motion set forth: "I presently reside at 209 Babcock Street, Brookline, Massachusetts where I have resided since my marriage in 1939. My wife lived there prior to our marriage for about 23 years. The summons and complaint in this action were served on me at Rockingham Park Race Track, Salem, New Hampshire, on November 20, 1941. By profession I am a jockey, that is a rider of race horses. The nature of my vocation necessarily requires that I travel to many states. I have worked in Rhode Island, New Hampshire, New York, Maryland, California and other states as well as in my home state of Massachusetts. Towards the end of last year my work took me to California where I remained until about April 14, 1941, at which time I left for my home in Brookline, Massachusetts." The attorney for plaintiff filed a counter-affidavit which asserted that the "defendant resided in the state of California and affiant is informed and believes and therefore alleges that defendant owns a home at Santa Anita, California, and that the aforesaid town and state is his legal residence." The motion to quash service was granted. The order granting the motion was in effect a declaration that Pollard's residence since his marriage in 1939 had been in Massachusetts and not in California. Subsequently, upon plaintiff's application for service of summons by publication, it was averred by affidavit: "That the defendant last resided in the City of San Mateo, county of San Mateo, in this state, but he departed from this state prior to the commencement of said action and resides at 209 Babcock Street, Brookline, Massachusetts." This averment is contrary to the adjudication in the order quashing service of summons that defendant's legal residence was Massachusetts. Despite this fact, service of summons by publication was ordered on April 2, 1942, the summons to be published at least once each week for two months and a copy of the summons and complaint to be sent to defendant's Massachusetts address. The copy was mailed and the summons pub-

lished once a week from and including the 10th day of April, 1942 to and including the 12th day of June, 1942. It appears that the default of the defendant was entered June 20, 1942, and on July 24, 1942 the court rendered judgment against him for $4,884.76. The judgment sets forth the following: "* * * service of summons upon the defendant, John Pollard, alias Jack Pollard, alias 'Red' Pollard, having been made personally and by publication, as heretofore ordered, said defendant having failed to appear and answer the plaintiff's complaint filed herein and the default of said defendant having been duly and regularly entered * * *."

On January 7, 1944 a motion to vacate the judgment was granted upon the ground that it was null, void and of no effect.

It is appellant's contention that since the affidavits, etc., show that respondent was a resident of California although absent from the state, he could be served by the procedure adopted. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 343, 85 L.Ed. 278, 132 A.L.R. 1357, is cited as authority in support of this argument. In the Milliken case the Colorado Supreme Court held null and void a judgment of a Wyoming court. The defendant, who was asserted to be a resident of Wyoming, was served in Colorado. The Colorado Supreme Court held that the Wyoming decree was void on its face because of an irreconcilable contradiction between the findings and the decree. Colorado did not pass on the jurisdiction of Wyoming over the parties. The Supreme Court of the United States said: "While outside the state, he was personally served in accordance with a statutory scheme which Wyoming had provided for such occasions. And in our view the machinery employed met all the requirements of due process. Certainly then Meyer's domicile in Wyoming was a sufficient basis for that extra-territorial service."

[1] Assuming for a moment that plaintiff was correct in asserting that defendant was a resident of California, he cannot prevail because of the case of De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am.St.Rep. 165. In that case the wife sued her husband for divorce and for custody of the children. The husband took the children out of California prior to the commencement of the action. The service of summons was by publication and by mailing a copy of the complaint and summons to Paris, France. It was held in substance that the jurisdiction of the court even as against one of its own residents was limited to the termination of the marriage status and that the court had no jurisdiction to render a decree for the support or the custody of the children.

[2, 3] The present action is one for damages against defendant, a non-resident of this state, upon whom no personal service has been made within the state and who did not appear voluntarily nor agree to submit to service of process extraterritorially. The constructive service by publication of summons under such circumstances may not be approved. This is the identical point decided in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. In Frey & Horgan Corp. v. Superior Court, 5 Cal.2d 401, 404, 55 P.2d 203, 204, the court held: "The general rule has long been established that a court may not acquire jurisdiction in personam over the defendant in an action, by service of notice or other process outside the territory or state in which the forum exists. It was so decided in the case of Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, and there are innumerable decisions in accordance with that authority."

[4-7] In this case, regardless of other questions, the judgment was a nullity because defendant's default was entered prematurely. A summons is an order signed by proper authority directing the party served to appear within ten days if served in the county, otherwise within thirty days, unless a particular statute provides differently. The summons is notice that unless the defendant so appears the plaintiff will take judgment as set forth in Code of Civil Procedure, sec. 407. The general rules for service by publication are governed by the provisions of sections 412, 413 and 415. A notice must apprise the party of what is required of him. Peabody v. Phelps, 9 Cal. 213, 226. When jurisdiction is obtained by prescribed form of constructive notice, the statutory conditions upon which the service depends must be strictly construed. Unless the statute has been complied with there is no power to render a judgment. Lima v. Lima, 26 Cal.App. 1, 147 P. 233, 237; Langley v. Zurich Gen. Acc. & L. Ins. Co., 97 Cal.App. 434, 275 P. 963; Matter of Tracey, 136 Cal. 385, 69 P. 20.

[8] In the present case the last publication of summons was on June 12, 1942. Eight days later default was entered; that

is, on June 20, 1942. A default may not be taken under such circumstances until thirty days after the last publication. Foster v. Vehmeyer, 133 Cal. 459, 65 P. 974; Savings & Loan Society v. Thompson, 32 Cal. 347; Estate of Sankey, 199 Cal. 391, 249 P. 517; Sacramento M. U. Dist. v. All Parties, etc. 6 Cal.2d 197, 57 P.2d 506.

The order and judgment setting aside the judgment dated July 28, 1942 is affirmed.

PETERS, P. J., and DOOLING, Justice pro tem., concur.




## IRVINE CO. v. CALIFORNIA EMPLOYMENT COMMISSION etc., et al. *

Civ. 3288.

District Court of Appeal, Fourth District, California.

May 4, 1945.

Rehearing Denied May 29, 1945.

Hearing Granted July 2, 1945.

**1. Taxation ⇐219**

Specialized services rendered by employees of corporate owner of a large ranch for the most part not in direct cultivation of soil, but in maintaining and repairing buildings and equipment, maintaining and operating irrigation and reclamation systems, operating heavier types of machinery, managing, supervising, and furnishing supplies and food for men working the land, and bookkeeping, all of which were incidental and essential to development, cultivation and operation of ranch, constituted "agricultural labor" exempt from Unemployment Insurance Act. St.1939, p. 2850, § 7(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

**2. Taxation ⇐219**

Exemption of those engaged in "agricultural labor" from operation of Unemployment Insurance Act depends upon the work being done and circumstances under which it is done, and not upon whether workman has a special trade or calling in which, under other circumstances, he would not be exempt. St.1939, p. 2850, § 7(a).

**3. Taxation ⇐219**

The rule of State Employment Commission that specialized services not closely connected with agriculture do not constitute agricultural labor exempt from operation of Unemployment Insurance Act, though performed on a farm by employee of owner or tenant, is unreasonable, arbitrary, and discriminatory insofar as it purports to exclude from agricultural labor classification work essential to and directly connected with growing of agricultural crops on a large ranch. St.1939, p. 2850, § 7(a).

**4. Taxation ⇐219**

Specialized services performed by employees of corporate owner of large ranch on a portion of the land leased to tenants largely on crop sharing basis, such work being done in connection with drainage, reclamation, irrigation, making repairs, and harvesting crops, without charge or on cost basis, constituted "agricultural labor" exempt from operation of Unemployment Insurance Act. St.1939, p. 2850, § 7(a).

**5. Taxation ⇐219**

Whether specialized services performed by employees of corporate owner of a large ranch on land leased to tenants constituted agricultural labor within provision of act excluding such labor from operation of the act was immaterial, where more than half of the time of such employees was spent in what constituted agricultural labor on land operated by the corporation. St.1939, p. 2850, § 7(a), (*l*) (10).

**6. Taxation ⇐59**

One who received payment by the ton from operator of salt works for loading salt and employed and paid men to do the work without control by operator except as to the place where they should work, and who paid costs of carrying unemployment compensation protection and furnished men with living accommodations and transportation, was an "independent contractor" and men employed by him were not "employees" of operator of salt works for purposes of unemployment insurance.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".



* Subsequent opinion 165 P.2d 908.

**7. Constitutional law ⇐70(3), 77**

Whether specialized services rendered by employees of corporate owner of a large ranch essential to and directly connected with the growing of argicultural crops, but not in direct cultivation of the soil, should be exempt from operation of Unemployment Insurance Act, is a question of policy to be determined by the Legislature and not by an administrative agency or the courts. St.1939, p. 2850, § 7(a).

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Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Actions by the Irvine Company against California Employment Commission, etc., and others for refund of contributions under the Unemployment Insurance Act paid under protest. The actions were consolidated for trial and a judgment was rendered in favor of plaintiff, from which defendants appeal.

Judgment affirmed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellants.

Rogers & Clark, John H. Painter, and Verne-Marie Freeman, all of San Francisco, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought several actions under section 45.10 of the Unemployment Insurance Act, St.1939, p. 2058, for a refund of certain contributions paid under protest in 1939, 1940 and 1941, on the theory that the services involved were performed in agricultural labor and that Rule 7.1 is invalid insofar as it would exclude such services from the term "agricultural labor". The actions were consolidated for trial and a judgment was rendered in favor of the plaintiff, from which the defendants have appealed.

The respondent owns and operates a large ranch of which approximately 97,000 acres are used for farming purposes. About 6000 acres are devoted to citrus fruits and other orchards, about 4500 acres to grain and field crops, about 60,000 acres to grazing, and about 26,000 acres have been leased to tenant farmers, largely on a share basis, and are used to raise citrus fruits, vegetables, grain and other crops. When the respondent acquired this ranch in 1894, it was used largely for cattle and sheep range. As the years have passed the productive capacity of the ranch has been gradually and greatly increased by developing irrigation, draining swamp land, washing out alkali and developing a system to prevent soil erosion in respective portions of the land. This has required the installation of a large number of electrically operated pumps, and the building of some dams, many miles of canals and pipe lines, roads, and terraces to control the movement of water in certain areas.

The respondent purchases electricity from a power company which is delivered at the edge of the ranch. It has installed and maintains its own distributing system within the ranch, using the electricity to operate pumping plants and motors and for lighting purposes. The respondent also furnished electricity to some of its tenant farmers and employees, to some cooperative marketing associations located on the ranch and to one private concern off the ranch, in that case trading electricity for sewage water. These other users of electricity were charged only the cost thereof and it is conceded that no profit was made therefrom. The respondent's reason for leasing portions of the ranch was that in those cases greater production could be obtained through the closer attention given by tenants having a personal interest in the crops.

While the respondent was mainly engaged in agriculture it operated, or was interested in, a few comparatively small industrial or commercial activities, mostly along the ocean, including a salt works. Contributions assessed in connection with such activities have been paid and no controversy exists relative thereto, with the exception of one item which will be later considered. No question is here raised with respect to a large portion of respondent's employees who are engaged in the work of actually tilling the soil, it being conceded that such services are agricultural labor within the meaning of the act.

To facilitate its work of preparing land for cultivation, raising crops, maintaining buildings and equipment, selling crops and keeping records, the respondent has, for greater efficiency, arranged a division of labor by assigning special duties to certain of its employees. One group, called the "Cummings Crew" after its foreman, consists of about twenty men who maintain and operate the irrigation, drainage and reclamation systems. They install, operate and repair pumps, repair dams and ditches,

drill some wells, construct terraces, remove silt deposits from orchards, level land for irrigation, operate a portable sprinkler system for irrigation, and construct and maintain private roads over the ranch to serve ranch purposes. At times, they operate some ten different kinds of heavy equipment requiring some degree of skill, and at times they do ordinary work, including the use of a pick and shovel when the occasion requires. Most of these men were ordinary laborers when they joined this crew. In this connection, a surveyor is employed, with occasionally an assistant, to determine grades, run lines for ditches and pipe lines, and do other work of this nature to promote the more efficient operation of the ranch. Another group are electricians who repair and maintain the electric lines on the ranch, do wiring, and repair and maintain the various motors on the irrigation pumps and in certain shops. Another group consists of carpenters, painters and plumbers. There are 245 large buildings on the ranch and 180 small sheds. They are located in twelve groups which are used as operating centers for the ranch. While all major construction work is done by outside contractors a small carpenter shop is operated and members of this group repair and maintain the various buildings and fences on the ranch.

The extensive operations of this ranch require a large amount of mechanical farming equipment, including tractors, trucks, automobiles, harvesters, spray rigs, and numerous other machines and equipment, most of which are tractor drawn. Another group, consisting of three or four blacksmiths and eight mechanics, are engaged in repairing and maintaining this sort of equipment, including the sharpening of various tools. Another group consists of bookkeepers, stenographers, a timekeeper, a selling and purchasing agent, and other office help. There are also foremen, superintendents and managers of various kinds. The trial court found that 85% of the services performed in office work, and of the services of the various supervisors and managers, were essential to and directly connected with the growing of agricultural crops by the respondent on this ranch and the farming of the property. The court further found that the work done by all of the other employees above referred to was necessary and essential to and directly connected with the growing of agricultural crops on this ranch.

[1] We are here concerned with certain specialized services rendered for the most part, not in the direct cultivation of the soil, but in maintaining and keeping in repair the buildings and equipment of the ranch; in maintaining and operating the irrigation and reclamation systems; in operating some of the heavier types of machinery; in managing, supervising and furnishing supplies and food for the men working the land; in keeping the necessary books and records; and all of which is incidental and essential to the development, cultivation and operation of the ranch.

By its terms "agricultural labor" is excluded from the operation of the Unemployment Insurance Act. The question here involved is whether these specialized services should be classified as agricultural labor within the meaning of the act. The appellants contend that "the rationale of the agricultural labor exemption is based on the concept of a small family farm", that because of its size this agricultural enterprise should be considered as industrial or commercial in nature, and that the services here involved are such specialized services as to be, from their very nature, industrial or commercial even when performed on a farm and in connection with farming activities. It is further contended that in any event such services do not constitute agricultural labor because of a provision added to Rule 7.1 of the Commission in 1940. That provision reads as follows:

"Where the nature of the service is such that it might be properly said of the individual performing it that he is pursuing a special trade, calling, or occupation not closely connected with agriculture, the service does not constitute 'agricultural labor' even though the service may be performed on a farm by an employee of the owner or tenant thereof. Typical of such services are those performed by managers, supervisors, foremen, carpenters, painters, blacksmiths, mechanics or engineers, timekeepers, bookkeepers or other clerical workers, watchmen, janitors, cooks and gardeners."

This act was adopted as a part of a national plan of social welfare and was designed to work closely with similar federal legislation. Originally, the federal act and the federal administrative definition of agricultural labor contained no "special trade" provision. In 1937 and 1939 such a

provision was adopted by the federal administrative authorities. It was then held in three cases that persons employed by farmers and for farm purposes were engaged in agricultural labor even though it might properly be said they were pursuing special trades. Stuart v. Kleck, 9 Cir., 129 F.2d 400; Jones v. Gaylord Guernsey Farms, 10 Cir., 128 F.2d 1008; Latimer v. United States, D.C., 52 F.Supp. 228. In 1939, Congress amended the federal act and provided that services "in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment" should be considered agricultural labor. 26 U.S.C.A. Int.Rev. Code, § 1426(h). To conform to this definition an administrative rule was adopted repeating substantially this language and providing that such services may include, for example, those performed "by carpenters, painters, mechanics, farm supervisors, irrigation engineers, bookkeepers, and other skilled or semi-skilled workers, which contribute in any way" to the operation of a farm which is operated by the person employing them. In 1943, the legislature of this state passed a bill amending section 7 of this act by defining agricultural labor in conformity with the federal definition and in such a way as to include as agricultural special services which contributed to the conduct of a farm operated by the employer. This bill was vetoed by the governor but, in any event, it stands as the latest expression of the legislative intent. The Commission's construction of the term "agricultural labor" as used in the act was changed five times between 1936 and 1940. It has been "neither uniform nor of long standing". See Whitcomb Hotel, Inc. v. Cal. Emp. Comm., 24 Cal.2d 753, 151 P.2d 233, 236. Moreover, in a letter dated November 10, 1939, an employee of the Commission advised the respondent's counsel that "* * * it appears to be a well settled point of law in this state that any person who is performing services on a farm and contributing to the operation of the farm is engaged in 'agricultural labor', regardless of the fact that due to the size of the farm and the use of modernized equipment his services are highly specialized * * *".

The services here in question were performed on a farm for the owner of a farm, as a part of regular farming operations, and for the sole purpose of producing and marketing agricultural crops. In State v. Christensen, 18 Wash.2d 7, 137 P.2d 512, 520, 146 A.L.R. 1302, it is said:

"The courts * * * have had difficulty with this type of case, and some of this difficulty * * * has, in our opinion, arisen because the courts have attempted to pick out some particular phase of the operation as determinative of whether it was agricultural, industrial, or commercial, instead of looking primarily to the main general purpose of the operation."

The appellants rely on the oft quoted suggestion that the test of what constitutes agricultural labor is "the nature of the work modified by the custom of doing it". In other cases they have strongly contended that work which was inherently agricultural in nature became industrial or commercial when the general business of the employer was of that nature. Strangely enough, they here contend that services which are of a kind ordinarily associated with a particular trade or calling does not become agricultural, even though performed on a farm for a farmer and as a direct part of the business of producing agricultural crops. If, because of the surrounding circumstances, work which is by nature agricultural ceases to be such, within the meaning of section 7(a) of the Act, St.1939, p. 2850, when its performance is incidental to an industrial enterprise, a similar rule should be applied when the work is not only incidental but essential to an agricultural enterprise.

[2] When this act was adopted in this state there were many large ranches producing agricultural crops by the use of mechanized equipment, with a division of labor, and by using irrigation, reclamation and drainage. In adopting the language of the act the legislature must have had these large ranches in mind as well as the smaller farms, and while the words "agricultural labor" are not defined in the act they are also not limited, and it is unreasonable to suppose that it was intended to limit the exemption to small farms or to hand labor or to any particular part of the labor then being generally used on ranches and farms. It is easy to say that a carpenter is still a carpenter, a machinist a machinist or a bookkeeper a bookkeeper no matter where he is working. But we are here concerned with the meaning of a particular statute. That statute does

not include or exempt a carpenter because he is a carpenter or an unskilled laborer because he is such. He is included or exempted because of the services he performs at a particular time and the relation of those services to something else. If he is engaged in agricultural labor the statute says he is exempt, and this is not made dependent upon whether he has a special trade or calling in which, under other circumstances, he would not be exempt. Regardless of his trade or calling it is the work he is doing and the circumstances under which he does it that brings him within or without the provisions of the act. If his services are performed on a farm for the owner of the farm and for the very purpose of producing agricultural crops, if they are essential to that end under the setup established for that purpose, and if they are regular and not merely temporary, it would reasonably seem that he was engaged in agricultural labor.

Agriculture, like industry, has developed, changed and grown under modern conditions and with the adoption of new methods and the advent of improved machinery, including the use of electrical power and the internal combustion engine. This has also brought about, in some cases, changes in the methods and ways of doing the work necessary in carrying on agricultural operations. While we still have the small farm operated largely by hand labor and horse-drawn tools, the use of power machinery and larger and more varied equipment is now general on large and medium-sized farms and to some extent even on smaller farms. A large part of our agricultural products are now produced on large farms, the efficient operation of which would have been impossible a generation ago, and which largely utilize modern methods and machinery. In spite of such changes in methods and means of operation they are still agricultural enterprises and are operated for the purpose of producing agricultural products. It may well be said that the real question here is whether the statute in question contemplated agricultural labor under the conditions then actually existing and well known to the legislature, and as broadly applying to the business of agriculture in its entirety, or whether the exemption thus provided for was intended to be limited to agricultural labor under primitive conditions or as existing a century or more ago, and to apply only insofar as those conditions and methods may still survive. We think it was intended to cover and apply to existing conditions, those under which agriculture is now carried on throughout the state, and that it was intended to be limited by the circumstances under which the work is performed and not by whether the operations under which the work is done happen to be large or small.

It may be conceded that the fact that services may have some indirect or remote connection with the production and sale of agricultural crops is not sufficient to exempt them under the terms of the act. For example, services in the manufacture of plows, tractors, and many other things would, of course, not be agricultural labor even though the products of such labor may contribute to the success of farming operations. But there is a logical difference between such remote and indirect effect upon agriculture and services rendered on a farm for the owner thereof, which are an inherent and indispensable part of the farming operations, which are performed as a direct part of the farming enterprise being conducted for the sole purpose of producing agricultural crops, and without which such crops could not be produced. On a smaller scale, the same services would be held to be agricultural labor. Leveling ground so crops can be grown, digging irrigation ditches, sharpening and repairing tools, keeping pumping plants running and like services are essentially agricultural labor when done by the small farmer or his hired hand, as a part of the necessary work of raising crops on a farm. The character of the work is in no way changed when it is done on a larger scale by more men, and the situation is naturally and logically the same when the scale of operations is sufficiently large to justify a division of the labor and the use of men in particular portions of the work in which they have or develop special skill. To distinguish between persons engaged in the same form of work because in some cases there is more of that kind of work to be done, enough to permit an economical specialization in that regard, seems discriminating, illogical and in disregard of the apparent intent of the statute. If specialized services such as those of mechanics, supervisors and bookkeepers are a legitimate part of industry and properly classed as industrial labor when directly performed in an industrial enterprise it would seem only reasonable that they are a legitimate part of agriculture and should be considered as agricultural labor when

performed on a farm and as a direct and necessary part of an agricultural enterprise.

[3] We agree with the trial court's conclusion that insofar as Rule 7.1 "purports to exclude from the classification of 'agricultural labor' work which is necessary and essential to and directly connected with the growing of agricultural crops upon plaintiff's said ranch and other similar ranches, it is unreasonable and arbitrary and discriminates against plaintiff and against others engaged in operating large ranches in this state".

[4, 5] Appellants further contend that the court erred in holding as exempt from the operation of the act certain services performed by some of these employees of the respondent on lands leased by it to tenants, mostly on a crop-sharing basis. These services consisted of work in connection with the drainage and reclamation of the land to make it more productive, for which no charge was made, it being a part of the general improvement of the ranch; of operating a "rain making" sprinkler system for irrigation, and making certain repairs where the tenant had no facilities for doing the work, for which the cost of the work was charged; and work performed in harvesting tenant-grown grain on a cost basis. Not only should these services be considered agricultural under the circumstances here appearing, but so far as we can see from the record this matter is immaterial under section 7*l* (10) of the act, St.1939, p. 2850, which provides that where two kinds of services are performed the classification shall be based upon the one in which more than half of the time is spent in a given period.

[6] Finally, there is a controversy with respect to one item relating to the operation of the salt works, a non-agricultural activity. One Madrid furnished certain men for work in this connection. The court found that Madrid was an independent contractor, and that these men were not employees of the respondent. The appellants contend that this finding is not supported by the evidence. The work consisted in shoveling salt into cars and was paid for by the ton. The men were not on the respondent's payroll and the money therefor was all paid to Madrid who paid the men. Madrid paid all costs of carrying Workmen's Compensation protection and furnished the men with living accommodations and transportation. There is evidence that the only instructions given to these men by the respondent were as to the place where they should work, and that none were given as to the method of doing the work. If it can be said that there is any conflict in the evidence the finding in this regard is fully supported.

[7] The general question as to whether services of the nature with which we are here concerned should or should not be exempt from the operation of this act is one of policy which should be determined by the legislature and not by an administrative agency or the courts. In the long run, the purpose of such legislation will be better served if this time-honored distinction is retained. Under the statute, as it now stands, we think these services were exempt and that the special trade or calling provision of Rule 7.1 is void insofar as its application to these circumstances is concerned. In our opinion, the statute was intended to exempt from the operation of this act all "agricultural labor" and not merely a part of it.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.




69 Cal.App.2d 95

**SMITH et al. v. McKINSTRY et ux.**

**Civ. 14780.**

District Court of Appeal, Second District, Division 2, California.

May 2, 1945.

**1. Appeal and error ⇐717**

The opinion of trial court could not be used on appeal as a substitute for findings of fact which were waived at the trial.

**2. Appeal and error ⇐931(3)**

Where findings of fact were waived, every intendment is in favor of judgment, and it must be presumed that court found all the facts necessary to support the judgment.

3. Fraud ⇐41

In action for false representations in exchange of properties, complaint, alleging that defendants represented that there were two springs on ranch exchanged and that there was ample water supply for stock and household use and that, after taking possession of ranch, plaintiffs discovered that representations were false, stated a cause of action.

4. Fraud ⇐58(1)

In action for false representations made by defendants in exchanging their ranch for plaintiffs' residential rental property, evidence warranted judgment for plaintiffs on ground of defendants' misrepresentations that there were two springs on the ranch and that there was ample water supply for stock and household use.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Claude H. Smith, Sr., and another against Harry J. McKinstry and another to recover damages for false representations made by defendants in exchange of real properties owned by the respective parties. From a judgment for plaintiffs and from an order denying a motion for new trial, defendants appeal.

Appeal from order dismissed and judgment affirmed.

Joseph Lynn and DeForrest Home, both of Los Angeles, for appellants.

William Bronsten, of Los Angeles, for respondents.

W. J. WOOD, Justice.

Defendants have appealed from a judgment in favor of plaintiffs in the sum of $2,950, damages awarded by the court for false representations made by defendants in the exchange of real properties owned by the respective parties. Plaintiffs were the owners of residential rental property in Hawthorne, Los Angeles County. On October 27, 1942, they entered into an agreement with defendants for the exchange of this property for a ranch located in the State of Washington which had been owned by defendants for about ten years. The agreement was consummated and the parties took possession of their newly acquired properties on or about November 5, 1942. Plaintiffs alleged in their complaint that defendants represented to them that there were two springs on the Washington ranch and that there was ample water supply for stock and household use but that after taking possession of the ranch they discovered that the representations were false.

[1] Findings of fact were waived at the trial, which consumed three days. Defendants now contend that the evidence is insufficient to justify a judgment against them. From the reporter's transcript it appears that after all of the evidence was received and counsel had argued the court discussed the various issues at some length and gave reasons for the conclusions it had reached. After the explanation by the court counsel for defendants expressly waived findings. But counsel now seeks to attack the judgment by making reference to the oral statement made by the court at the close of the argument. The opinion of the trial court cannot be used as a substitute for findings of fact. "To hold that oral or written opinions or expressions of judges of trial courts may be resorted to to overturn judgments would be to open the door to mischievous and vexatious practices. Neither a juror nor a judge is permitted to impeach his verdict or judgment." De Court v. Howell, 190 Cal. 741, 751, 214 P. 444, 448.

[2-4] Since findings were waived every intendment is in favor of the judgment and it must be presumed that the court found all the facts necessary to support the judgment. Haime v. De Beaulieu, 20 Cal.2d 849, 129 P.2d 345. The complaint states facts sufficient to constitute a cause of action and to serve as a basis for the judgment. If we need to look to the evidence to determine whether it is sufficient to support the judgment (see Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 137, 130 P.2d 421; Antonelle v. Board of New City Hall Commissioners, 92 Cal. 228, 28 P. 270; Haime v. De Beaulieu, supra), we have only to refer to the statements of plaintiff Claude Smith, who testified concerning the failure of the water supply and concerning the actions of defendants in preventing a proper inspection of the property before the exchange.

The purported appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

MOORE, P. J., concurs.

McCOMB, Justice (concurring).

I concur in the judgment but do not concur in the implication in the opinion that

after findings of fact have been waived the sufficiency of the evidence to support the implied findings can be questioned on appeal. The rule is clearly established in California by a long line of authorities that where findings of fact are waived it is conclusively presumed that every fact essential to the support of the judgment was proved and found by the court. (Bekins Van Lines, Inc., v. Johnson, 21 Cal.2d 135, 136 et seq., 130 P.2d 421.)




69 Cal.App.2d 17

**ESTRIN v. KASVINER.**

**Civ. 14896.**

District Court of Appeal, Second District, Division 2, California.

April 26, 1945.

**1. Appeal and error ⇐931(1)**

Evidence will be viewed on appeal in the light most favorable to respondent.

**2. Mortgages ⇐319(3)**

In action to quiet title to realty covered by trust deed unsatisfied of record, evidence was sufficient to sustain finding that plaintiff's note, secured by trust deed, was paid in full.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Rose Estrin against Tillie Kasviner to quiet title to realty. Judgment for plaintiff, and defendant appeals.

Affirmed.

Harry G. Sadicoff and Edward I. Harris, both of Los Angeles, for respondent.

Albeck & Albeck, of Los Angeles, for appellant.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to quiet title to a parcel of real property from the cloud cast thereon by a recorded deed of trust unsatisfied of record, defendant appeals.

[1] The evidence being viewed in the light most favorable to the plaintiff (respondent) and pursuant to the rules set forth in Re Estate of Isenberg, 63 Cal.App. 2d 214, 216 et seq., 146 P.2d 424, the material facts are:

[2] On November 10, 1925, plaintiff and her husband, who is now deceased, were owners of a parcel of real property in the city of Los Angeles. On such date plaintiff and her husband executed and delivered to defendant's husband, Leon Kesviner, who is also deceased, a promissory note in the sum of $3,000. They also executed and delivered a trust deed conveying the legal title to the real property above mentioned to the California Trust Company as trustee to secure the aforementioned promissory note. On July 1, 1929, plaintiff's husband conveyed to her his interest in the real property described in the trust deed. Defendant's husband died April 25, 1940, and she is the successor in interest to all his properties. Prior to November 10, 1928, the promissory note above mentioned and the interest due thereon was paid by plaintiff's husband to defendant's husband and the note was delivered to plaintiff's husband, who destroyed it.

This is the sole question presented for our determination:

*Was there substantial evidence to support the trial court's finding that the promissory note for which the trust deed had been executed and delivered as security had been paid in full?*

This question must be answered in the affirmative. Mr. Philip Garbus was called as a witness on behalf of plaintiff, and after testifying that he in 1925 was in the produce business in partnership with Mr. Estrin, husband of the plaintiff, with reference to the payment of the note gave evidence as follows:

"Q. And do you know whether any payments were made upon this note? A. I do.
* * *

"Q. Do you know how long these monthly payments were made? A. It was made until it was paid off.

"Q. Well, do you remember whether there was—

"The Court: When was it paid off, if you know? A. I remember it was paid

off in about close to three years, I believe, because I do remember—

"The Court: Never mind the reason; do you recall the fact? A. The fact is this, I recall when he came over with pride and he says, 'Phil, thank God this is paid off.' * * *

"Q. By the Court: Was that the original note? A. Yes, sir, it must have been.

"The Court: Not what it must have been; did you see it at the time? A. I saw it when he brought in that note, he said, 'Thank God that is paid off,' and he—

"The Court: Wait a minute.

"(Record read.)

"The Witness: (continuing) Tore it up.

"Mr. Albeck: If your Honor please, I understand that the statement that he said—

"The Court: 'Thank God' may go out as a conclusion, except I am allowing it to remain in to show the circumstances under which the document itself was exhibited. * * *

"Q. And I believe you testified that it was paid up in three years? A. Somewhere in three years, or less or more, I don't remember, but it was paid off. I remember when he came in with pride and says, 'That is paid off.' * * *"

In addition to the foregoing testimony, Mrs. Garbus, who was the bookkeeper for Mr. Estrin and Mr. Garbus commencing in December, 1925, testified thus:

"Q. Now, do you remember making any checks to Mr. Kasviner in connection with the note and trust deed? A. I did.

"Q. Will you please tell the court what you know about it? A. Well, we used to make checks out every month to Leon Kasviner on a note for $3,000.00.

"The Court: How large were those checks? A. $50.00 a piece.

"The Court: Was there ever any larger than $50.00 that you know of? A. Yes, I think about two and a half years later we made a check for over $1,000.00, but exactly the amount I don't remember.

"The Court: All right.

"Q. By Mr. Sadicoff: That was supposed to be in payment for what? A. In full for Leon Kasviner note."

The foregoing testimony without the slightest doubt constitutes substantial evidence to sustain the trial court's finding that the note in question had been paid in full.

Since no error appears in the record the judgment must be affirmed.

It is so ordered.

MOORE, P. J., and W. J. WOOD, J., concur.






69 Cal.App.2d 97

## ERWING v. JONES.

Civ. 14816.

District Court of Appeal, Second District, Division 2, California.

May 2, 1945.

1. Reference ⇐48

Where it appeared from record that court intended referee to make decisions which he made and to report to court on issues on which report was made, defendant could not complain that referee was appointed for sole purpose of taking an accounting of financial transactions of parties and that he exceeded his authority in reporting on issue of ownership of formula belonging to joint adventure which was being dissolved. Code Civ.Proc. § 639.

2. Reference ⇐8(1)

Under Code section authorizing court to order referee to report on an issue of fact if trial requires examination of a long account, referee may be directed to hear and decide the whole issue. Code Civ. Proc. § 639.

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Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Jim Erwing against Ned H. Jones for dissolution of a partnership which court determined to be a joint adventure. From a judgment dissolving the joint adventure based upon the report of a referee, defendant appeals.

Affirmed.

Willis O. Tyler, of Los Angeles, and Theodore Robinson, for appellant.

Walter L. Gordon, Jr., of Los Angeles, for respondent.

W. J. WOOD, Justice.

In his complaint plaintiff alleged that on October 4, 1941, he and defendant became partners in a concern known as Prize Winner Insecticide and Disinfectant Company, organized for the purpose of manufacturing and selling insecticides; he asked that by court order the partnership be dissolved, the firm's debts be paid, the surplus, if any, be divided between the two partners; and that the court decree the rights of the partners in and to the formulas for the insecticides.

In its findings the court designated the activities of plaintiff and defendant as a joint adventure instead of a partnership, and this designation appears to be satisfactory to the parties. The court found that by agreement of the parties defendant was to furnish to the joint adventure formulas for the manufacture of insecticides known as "Freezit," "Destructo" and "Liquid Fire", the agreed value of which was the sum of $1,500; and plaintiff was to furnish advertising "in the amount of $1500 and all profits made from said advertising were to be equally divided between the parties"; that the formulas and advertising were furnished in accordance with the agreement. The court further found that "the profit of the joint adventure consisted of the formulas to the aforesaid insecticides, tables and materials for manufacturing said insecticides". The court further found that defendant had applied some of the receipts from the sale of the merchandise of the joint adventure to his own use. The court entered an order, designated "interlocutory judgment", in which the dissolution of the joint adventure was decreed, and of its own motion appointed Mark S. Feiler as referee "to take and state an account of all dealings and transactions had between plaintiff and defendant in the aforesaid joint adventure".

The referee made his report to the court and at a hearing by the court the objections to the report made by defendant were overruled. The court thereupon entered a judgment by which the joint adventure was dissolved and by which it was adjudged that plaintiff and defendant are equally entitled to use the trade names "Liquid Fire", "Destructo" and "Freezit", "including their respective ingredients in the future manufacture of said insecticides". The court also ordered defendant to deliver to plaintiff a copy of each of the formulas, to pay plaintiff the sum of $3.50 in cash and to deliver to plaintiff a specified number of gallons of distillate oil and "Liquid Fire". The court ordered that each party "share equally in the loss of the joint adventure amounting to the sum of $231.32 and that each party is entitled to one-half of the uncollected accounts after their collection". Defendant has appealed from this judgment, which was based upon the report of the referee.

[1, 2] Defendant now argues that the judgment finally entered is not in conformity with the interlocutory decree and that the referee was appointed for the sole purpose of taking an accounting of the financial transactions of the parties; that he exceeded his authority in reporting on the issue of the ownership of the formulas. Although the procedure followed and the steps taken in the case were not in the most approved method, nevertheless there is no justification for interfering with the court's judgment. Apparently the court intended the referee to make the decisions which he made and to report to the court on the issues on which a report was made. The court expressly found the existence of a joint adventure in which the parties had contributed equal shares and concluded that the parties should share equally in the profits of the concern. The court appointed a referee "to take and state an account of all dealings and transactions" between the parties. Authority for the making of this order is to be found in section 639 of the Code of Civil Procedure, which especially authorized the court to order the referee to report on an issue of fact if the trial required the examination of a long account. In such a case a referee may be directed to hear and decide the whole issue. See Williams v. Benton, 24 Cal. 424.

We find no error which has resulted in prejudice to defendant. The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

**PEOPLE v. GORMAN et al.**

**Civ. 7053.**

District Court of Appeal, Third District, California.

April 30, 1945.

Rehearing Denied May 29, 1945.

Hearing Denied June 28, 1945.

**1. Appeal and error ⇐1071(6)**

A finding, contained in superior court's judgment against claimant of interest in realty condemned by state that decision of District Court of Appeal, in action against claimant and her husband for division of assets of joint venture, including such realty, that claimant had no interest therein, was binding on superior court, constituted finding on ultimate fact as to title to realty and all probative facts necessary to sustain such ultimate finding, so that all other issues became immaterial and court's failure to find thereon was not reversible error.

**2. Appeal and error ⇐934(2)**

Where trial court makes one clear, sustained, and sufficient finding on which judgment thereof may rest, appellate court will conclude, on appeal from such judgment, that it was rested on such finding, as every presumption is in favor of judgment appealed from.

**3. Judgment ⇐712**

In state's action to condemn realty, copy of judgment roll in another action, wherein superior court quieted defendants' title to such realty, was admissible in evidence as material on primary issue as to their title.

**4. Judgment ⇐725(1)**

A judgment or decree, necessarily affirming existence of any fact, is conclusive on parties or their privies whenever existence of such fact is again in issue between them, not only when subject matter of subsequent action is the same, but when point comes incidentally into question in relation to different matter in same or any other court.

**5. Judgment ⇐720**

A matter of fact, once adjudicated by court of competent jurisdiction, whether concurrent or exclusive, may be relied on as estoppel in subsequent collateral suit in same or any other court, when either party or his privies allege anything inconsistent with such fact, whether subsequent suit is on same or different cause of action.

**6. Judgment ⇐747(5)**

A judgment quieting title to realty in both parties to action for division of assets of joint venture operated as estoppel, preventing one of such parties from alleging anything inconsistent therewith at hearing in state's action to condemn realty for highway purposes.

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Appeal from Superior Court, Mono County; Pat R. Parker, Judge.

Action in eminent domain by the People, acting by and through the Department of Public Works, against Mary W. Gorman, June Knapp, and others to condemn certain realty. From a judgment denying defendant Knapp's claim to an undivided half interest in the realty, she appeals.

Affirmed.

Benjamin Chipkin, of Los Angeles, for appellant.

Lincoln V. Johnson, Francis J. Carr, Holloway Jones, Geo. C. Hadley, and Jack M. Howard, all of San Francisco, and C. R. Montgomery, of Sacramento, for respondent.

PEEK, Justice.

This appeal is the outgrowth of a controversy between appellant June Knapp, her husband E. W. Knapp, and T. G. Watterson, regarding the ownership of certain real property situated in Mono county, which property the State of California, through its Department of Public Works, had condemned for highway purposes, and will be hereinafter referred to as the Mono county case. A second action is also involved and will be designated as the Inyo county case. The facts and circumstances surrounding the two cases are as follows:

The Inyo county case: Approximately two weeks after the state filed its complaint in eminent domain in Mono county, T. G. Watterson filed a complaint in Inyo county wherein he alleged a joint venture between himself and Mr. Knapp and prayed for an accounting and division of the assets thereof. The Knapps joined in a cross-complaint by which they sought, among other things, to quiet their title to the parcels of land involved in said action, which included the property in controversy

in the Mono county case. At the conclusion of the hearing on the issues so raised the trial court found "* * * that the defendant, June Knapp, has not now and never did have any right, title, interest, claim, demand or possession, in or to said lands and appurtenances, adverse to plaintiff and defendant, Wannell Knapp * * *." The judgment of the trial court dissolved the joint venture, partitioned the assets thereof, and quieted the title of both parties to the real property so partitioned. From said judgment the defendants appealed to the District Court of Appeal in and for the Fourth Appellate District, which court, on October 23, 1939, filed its opinion affirming the judgment of the trial court. It appears from said opinion that said joint venture began approximately ten years prior to the filing of plaintiff's complaint, and had as its principal object the purchase of land and the right to purchase land in Inyo and Mono counties with the expectation of selling said property at a profit to the water department of the city of Los Angeles. Both parties devoted some time and money to the enterprise. Fee title to two tracts was acquired. Certificates of purchase of a number of parcels of state lands were also obtained. Title, or the purchase right, was taken in plaintiff's name to two parcels. The larger number were taken in the name of Wannell Knapp, and in almost every instance he, with June Knapp, his wife, immediately assigned or conveyed an undivided one-half interest in the certificates and the lands to plaintiff. Throughout the entire period the joint adventure was in operation, Mr. Knapp, through mesne conveyances, placed title in his wife to all certificates and the lands originally standing in his name. Mrs. Knapp joined with her husband in written assignments and deeds of interests in various parcels of lands to Watterson. These documents and her letters show that she knew of the joint adventure, of many of its properties and of plaintiff's interest in them. The evidence does not suggest that she ever claimed to be more than the holder of the bare record title to the various parcels, except to one which she was permitted to keep. Under these circumstances she was merely a trustee holding the record titles to various parcels for the joint adventurers. The court concluded that she was not prejudiced by being divested of those bare record titles, and affirmed the judgment of the trial court.

The Mono county case: On August 19, 1935, the state filed its action in eminent domain, and among other things alleged that the real property in question was owned by defendants June Knapp as to an undivided one-half interest, and T. G. Watterson as to an undivided one-half interest. On September 3, 1936, June Knapp answered, admitting the one-half interest and denied on information and belief that Watterson was the owner of the other one-half interest. Her husband also answered but disclaimed any interest in the property. The defendant Watterson, by his answer filed on August 26, 1937, denied that June Knapp was the owner of an undivided one-half interest, and affirmatively alleged that he was the sole owner thereof. He further alleged that the interests of all parties were subject to the Inyo county action, and in support thereof attached to his answer a certified copy of the judgment roll in that proceeding. According to the briefs on file herein, on or about September 20, 1937, or approximately one week before the trial date, counsel for the parties appeared in court and requested that the cause be dropped from the calendar awaiting the decision on the appeal of the Inyo county case which was then pending. The order made by the trial court pursuant to such request was the source of previous appellate proceedings in this court. People v. Gorman, 65 Cal.App.2d 482, 150 P.2d 962.

Judgment in condemnation was entered on June 18, 1940, in favor of Watterson, awarding to him the entire sum of money then on deposit with the Clerk of the Superior Court of Mono County pursuant to a stipulation previously entered into between Watterson and the state calling for payment to be made in accordance with the final determination of title in the Inyo county case.

On August 20, 1940, appellant's claim was heard, and at the conclusion thereof the trial court determined that she had no interest in the property and that the proceedings should be dismissed as to her. However, no judgment was entered, and on September 14, 1942, pursuant to an order vacating the previous proceedings in regard to her claim, a further hearing was had and additional evidence taken. The trial court thereafter entered judgment against appellant. Her appeal from that judgment is the case now before this court.

Appellant herein contends (1) that inasmuch as findings of fact and conclusions

of law were not waived as stated in the judgment, and as no findings were in fact made, the judgment must be reversed, and (2) that the Inyo county case, upon which the trial court herein predicated its judgment, was not properly before the court; and if it was, it was not decisive of the question of title to the Mono county property in that the Superior Court of Inyo county did not and could not consider the merits of the condemnation case in Mono county; that the parties were not the same, and that res judicata as a defense must be affirmatively alleged.

[1, 2] It is true the record discloses no waiver of findings nor do findings as such appear therein. It is also true that at the time of the argument before this court on appellant's motion to augment the record, this fact was admitted by counsel for the respondent. However, an examination of the judgment of the trial court does disclose the following:

"The Court finds that the District Court of Appeal, Fourth Appellate District, in the action titled Watterson, Respondent v. Knapp et al., Appellants, 35 Cal.App.2d 283, 95 P.2d 154, decided that June Knapp did not have any right, title or interest in and to the NW ¼ of the NE ¼ of Section 16, T. 4 S., R. 27 E., M.D.B. & M., which decision is binding on this Court and decisive of the issues here involved * * *."

The basic question which was before the court was in regard to the title to the real property. This fact must be conceded. It likewise must be conceded that if the quoted portion of the judgment properly can be construed to be a finding upon that ultimate fact, and we conclude it was, it was not necessary for the court to expressly find upon all the probative facts involved, for the former includes a finding upon all such facts necessary to sustain it. This rule is too well established to warrant specific citation. 24 Cal.Jur. 915, and cases cited. As said finding was against the appellant on the one fact upon which her case must stand or fall, all other issues as previously stated become entirely immaterial and unnecessary, and failure to find thereon does not constitute reversible error. Merrill v. Gordon & Harrison, 208 Cal. 1, 6, 279 P. 996. If, in any case, there be one clear, sustained and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be concluded that the court did rest the judgment upon that finding. Bowers v. Union Trust Co., 117 Cal.App. 259, 3 P. 2d 614.

[3, 4] The argument in support of appellant's second contention completely overlooks the amended answers of the State and the defendant Watterson, both of which affirmatively alleged the Inyo county case and its effect upon the Mono county case. The only objection made to the introduction by respondent of a copy of the judgment roll in the Inyo county case was that it was incompetent, irrelevant and immaterial, which objection the trial court properly overruled. Obviously such record was competent, relevant and material to the issues of the case. In both cases the title of the parties to the land in question was a primary issue for determination. In each instance the proof of title was in the nature of a condition precedent to the recovery of a judgment by the defendant June Knapp. Under such circumstances the statement of the Supreme Court in the case of In re Clark's Estate, 190 Cal. 354, 360, 212 P. 622, 625, is particularly apropos:

"It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes incidentally in question in relation to a different matter in the same or any other court. Freeman on Judgments, §§ 249 and 253; Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am.St. Rep. 66; Reed v. Cross, 116 Cal. 473, 484, 48 P. 491; Atchison, T. & S. F. Ry. v. Nelson, 9 Cir., 220 F. 53, 135 C.C.A. 621."

[5] Appellant's further argument in this regard, that the actions being different in character and different relief being sought, is likewise answered in the Clark case, wherein it is said:

"That is to say, 'a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided

in the first suit cannot be disputed.' Bigelow on Estoppel, pp. 110, 111, 112; Rauer v. Rynd, 27 Cal.App. 556, 150 P. 780."

[6] Applying this rule to the present controversy, the conclusion is inescapable that as the Inyo county case conclusively adjudicated the question of title, such determination operated as an estoppel thereby preventing appellant from alleging anything inconsistent therewith at the hearing in the Mono county case. Todhunter v. Smith, 219 Cal. 690, 695, 28 P.2d 916.

For the foregong reasons the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; GIBSON, C. J., dissenting.




69 Cal.App.2d 134

**KIRACK et al. v. CITY OF EUREKA.**
**Civ. 7121; Sac. 5686.**

District Court of Appeal, Third District, California.

May 8, 1945.

Rehearing Denied June 4, 1945.

Hearing Denied July 5, 1945.

**1. Municipal corporations ⇐819(4)**

Evidence of long existing rotten condition of stringers under board sidewalk which caused one end of sidewalk plank to fly up and catch pedestrian's ankle, causing fall and personal injuries, when other end of plank was stepped upon by another pedestrian, authorized judgment against city. St.1923, p. 675, § 2.

**2. Municipal corporations ⇐791(5)**

Where city officials knew that stringers under board sidewalk were laid on bare ground and subject to deterioration and one resident of neighborhood testified that sidewalk was unsafe and had not been improved in nine years, and superintendent of streets limited inspection of sidewalk to what he could see while driving in an automobile, city had constructive notice of dangerous condition of sidewalk, notwithstanding that no one personally notified authorities of such condition. St.1923, p. 675, § 2.

**3. Municipal corporations ⇐795**

Officers of a city, whose business requires them to inspect and repair sidewalks, owe a duty to exercise due care to discover either patent or latent defects which may be reasonably anticipated. St.1923, p. 675, § 2.

**4. Municipal corporations ⇐795**

Constructive as well as actual knowledge of a dangerously defective sidewalk or street may render a city liable for damages for injuries sustained on that account when such defect should be reasonably anticipated by officers in charge or when reasonable inspection would have disclosed the dangerous condition. St.1923, p. 675, § 2.

**5. Appeal and error ⇐996**

When reasonable minds may differ regarding question as to whether defective condition of city sidewalks, which has existed for sufficient time, under particular circumstances of a case, will charge city with constructive knowledge thereof, conclusions of jury in that regard may not be interfered with on appeal. St.1923, p. 675, § 2.

**6. Trial ⇐194(16)**

Charge, which told jury that complaint alleged an injury to plaintiff wife as proximate result of maintenance of an obviously defective sidewalk which defendant city failed to remedy after reasonable notice thereof, that city was not an insurer of pedestrians, that, unless jury found that sidewalk was defective as alleged and that city failed to repair in reasonable time after actual or constructive notice thereof, verdict could not be returned for plaintiffs, and that burden was on plaintiffs to prove every material allegation of complaint, did not necessarily require jury to return a verdict in city's favor. St.1923, p. 675, § 2.

**7. Trial ⇐127**

In personal injury action against city where witness for city testified on direct examination that he was an investigator, and on cross-examination, without objection, explained that he was also an adjuster, and city's attorney volunteered that witness was an employee of city, followed by assertion by plaintiff's attorney that he was entitled to bring out nature of witness' business, to which statement an objection was sustained, no misconduct of plaintiff's

attorney as injecting the question of insurance into case was shown.

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Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Anna Kirack and Alex Kirack, her husband, against the City of Eureka to recover for injuries sustained by first-named plaintiff caused by a defective board sidewalk. Judgment for plaintiffs, and defendant appeals.

Affirmed.

E. S. Mitchell, City Atty., of Eureka, for appellant.

Chester Monette and Donald H. Wilkinson, both of Eureka, for respondent.

THOMPSON, Justice.

The City of Eureka has appealed from a judgment of $4,803, which was rendered against it in a suit for damages for personal injuries received by Mrs. Kirack, a pedestrian, as the result of falling over a loose board in a defective sidewalk, which board tilted and caught her foot as her daughter stepped upon the opposite end of it. The liability of the city is based on Section 2 of the Statutes of 1923, page 675. 2 Deering's Gen.Laws of 1937, p. 2630, Act 5619. The cause was tried with a jury, which returned a verdict in favor of the plaintiffs on an implied finding that the city was charged with notice and knowledge of the rotten and defective stringers upon which the loose boards of the sidewalk had been maintained for a considerable length of time. Motions for a nonsuit, for a directed verdict, for judgment notwithstanding the verdict and for a new trial were denied.

The appellant contends that the verdict and judgment are not sustained by the evidence for the chief reason that the decayed stringer and defects in the sidewalk were latent and hidden and that the city had no knowledge thereof. The instructions are not criticised by the appellant, but it asserts that if the jury had followed the instructions it would have been bound to return a verdict in favor of the city.

The plaintiffs are husband and wife. They had resided in Eureka about one year prior to the accident which is involved in this case. A wooden sidewalk was constructed and maintained along the south side of Harris Street. Mrs. Thelma Gillis testified that the walk was there when she arrived more than twenty-five years ago. It was constructed of planks which were nailed at a right angle to wooden stringers placed upon the ground. The planks were laid flush with the top of a concrete curb next to the street. The sidewalk had deteriorated. Some of the planks were loose and "rattled" when pedestrians or bicycles passed over them. One witness said it was rickety. Stewart Hill, who was employed to assist the Superintendent of Streets, testified that "the wood had rotted from around the nails" in several boards. Mrs. Gillis, who lived in a house on Harris Street near the place where the accident occurred, said that Vincent Getty, who had been Superintendent of Streets for six and a half years, replaced several deteriorated planks near her home sometime during the year preceding the accident. The Superintendent, whose duty it was to inspect sidewalks and streets, testified that he had driven along Harris Street "four or five times a month" and saw no dangerous defects in the sidewalk. Regarding his method of inspection, he said:

"When I see a defect I get out and investigate it. * * * When I am going along, I see if anything is wrong with them. * * *

"Q. The only inspection then, as I understand it, is if you happen accidentally to see a bad sidewalk then you stop your car and inspect it. A. That's right.

"Q. You know that every board sidewalk has stringers underneath it, do you not? A. I do.

"Q. And you know that they rot? A. That's right."

The day after the accident occurred, Mr. Getty tore up the sidewalk at that point between N and O Streets for a space of ten or twelve feet. He removed about twenty planks. Several of the planks were loosened from the stringers. John Witherow, a city inspector or investigator, testified that the stringer which caused the accident was "rotted; it was very rotten, you could crumble it with your hand." He said the rotted portion was crushed down several inches by the end of the loose plank. The decayed stringer gave no support whatever to the dislodged plank. It is evident that the stringer and the sidewalk had been in that deteriorated and dangerous condition for sometime. Mrs. Jessie Davis, who for seven years lived near the place where the accident occurred, testified that portion of the sidewalk "was

rattly and the boards were none too safe"; that when she used that sidewalk she would get off that portion and walk on the curb because "you could see * * * part of the boards were loose and didn't look any too safe; * * * I wouldn't risk walking on it." She said she hadn't noticed any improvement in that sidewalk "in the last nine years." Immediately after the accident she observed the one plank which caused the accident depressed at one end and "the other was sticking up in the air."

The plaintiff, Anna Kirack, who lived on Grant Street, and had never before traveled on the sidewalk along Harrison Street, and who had no knowledge of its dangerous condition, was walking along that street between N and O Streets with her daughter on Sunday afternoon. The daughter stepped on one end of a loose plank which, on account of the decayed stringer beneath it, went down causing the opposite end to fly up and catch the foot of Mrs. Kirack. She fell over the board and broke her arm and otherwise injured herself.

It is not contended the judgment is excessive. This suit for damages was commenced. The jury returned a verdict in favor of plaintiffs. From the judgment which was accordingly rendered this appeal was perfected.

[1] The judgment is adequately supported by the evidence. The statute previously referred to renders municipalities liable for injuries sustained by persons as the result of dangerous or defective conditions of public streets and ways, which includes sidewalks, when the officers "having authority to remedy such condition, have knowledge or notice" thereof and fail or neglect to do so "for a reasonable time after acquiring such knowledge or receiving such notice."

[2] It is not contended that anyone personally notified the authorities of the dangerous and defective condition of the sidewalk, but clearly the officers of the City of Eureka had constructive notice and knowledge of that dangerous condition. There is substantial evidence to support the implied finding of the jury that the Superintendent of Streets, who had occupied that position for six and a half years, failed to exercise due care to inspect that sidewalk to see that it was kept in reasonably safe condition for the use of pedestrians. He admitted that he merely drove by on the street, making a casual inspection, and that he repaired only such defects as were obvious to him in passing by. He knew that board walk had existed for a long period of time; that the planks were laid on wooden stringers which rested on the bare ground and were subject to deterioration. He actually repaired a portion of that same sidewalk within a short distance of the point where the accident occurred the year previous to the accident and should be charged with knowledge of the dangerous condition which had existed for several years. Under the circumstances of this case the rotten stringer may not be said to be a mere latent defect. Many of the planks were loose and rattled when a pedestrian or bicycle crossed them. The wood had rotted about the nails which originally fastened them to the stringers. That condition was notice to a reasonably prudent person that the stringers which rested on the earth were also likely to be rotted and dangerous.

[3] A duty is imposed upon officers of a municipality, whose business requires them to inspect and repair sidewalks, to exercise due care to discover either patent or latent defects which may be reasonably anticipated. Billings v. City of Snohomish, 51 Wash 135, 98 P. 107; Colquhon v. City of Hoquiam, 120 Wash. 391, 207 P. 664; 7 McQuillin's Mun. Corp., 2nd Ed., 246, sec. 3664. In notes of the Cumulative Supplement of 1943, to the last cited authority, it is said "Defects due to natural wear of a bridge must be anticipated by the municipality. Mowery v. Mounds, 245 Ill. App. 338" that "Defects are not 'latent' if they are discoverable by exercise of reasonable diligence. O'Gorman v. Kansas City [233 Mo.App. 124] 93 S.W.2d 1132," and that "Notice of rotten condition of wooden culvert imposes duty upon municipality to inspect, where such inspection would have disclosed the condition. Tharpe v. Sibley Lake Bisteneau & S. R. Co., La.App., 144 So. 274."

In the Billings case, supra, based upon facts remarkably similar to those of the present case, the foregoing principle supporting the doctrine of liability of a municipality for injuries sustained by a pedestrian who tripped and fell over a board in a dangerously defective sidewalk, is clearly asserted. That case was reversed solely because of a lack of evidence to support

the measure of damages. It was held that the judgment was excessive. Regarding the principle previously stated, the court said [51 Wash. 135, 98 P. 108]:

"The injured respondent tripped over a board in the walk, which was raised up immediately in front of her by being stepped upon at the other end by the person with whom she was walking. It is contended that there was no evidence tending to show that the walk at the place of the accident was not reasonably safe for public travel, nor was there any evidence tending to show that the city had notice, either actual or constructive, of the actual condition of the walk. That the walk was so far defective as to render it unsafe for public travel at the place of the accident, it seems to us, the evidence leaves no doubt. The walk was originally constructed by laying three stringers parallel with the course of the street and nailing boards crosswise thereon. At the time of the accident, the stringer next the property line had entirely rotted away, and the one next the street had so far decayed as to allow one of the boards forming the walk to sink, when stepped upon, below its original level. The effect was that the boards, when stepped upon at one end, would raise at the other, thus tending to trip any one who might be passing at that time. Manifestly such a condition renders a walk unsafe.

"* * * The evidence * * * tended further to show: That the walk had been down something over five years; * * * that the stringer next the street had decayed on the inner side, leaving a thin shell to support the boards, and this shell had been crushed down beneath the board over which the respondent received her injury; that the nails that originally held the board to the stringers had pulled out in part, leaving the walk in a loose condition, so that it rattled when walked upon; and that it had been in this condition for some months before the accident. This, if believed by the jury, warranted a finding that the city had constructive notice of the defect. The city officers must exercise reasonable diligence in the care of the city's walks. They must take notice that constant use will gradually wear out a walk, that nails will pull and supports decay, and that at best the life of a wooden sidewalk is limited to but a few years. It is not enough that they may find that the surface of the walk appears sound. The walk as an entirety must be examined and kept in repair, if the city is to escape the charge of negligence."

[4, 5] The rule is well established that constructive as well as actual knowledge of a dangerously defective sidewalk or street may render a municipality liable for damages for injuries sustained on that account when such defects should be reasonably anticipated by the officers in charge, or when reasonable inspection would have disclosed the dangerous condition. When reasonable minds may differ regarding the question as to whether defective conditions which have existed for sufficient time, under the particular circumstances of a case, will charge a municipality with constructive knowledge thereof, the conclusions of the jury in that regard may not be interfered with on appeal. George v. City of Los Angeles, 51 Cal.App. 2d 311, 315, 124 P.2d 872; Smith v. County of San Mateo, 62 Cal.App.2d 122, 128, 144 P.2d 33; Silva v. County of Fresno, 63 Cal.App.2d 253, 260, 146 P.2d 520; Balkwill v. City of Stockton, 50 Cal.App.2d 661, 667, 123 P.2d 596; Johnson v. County of Fresno, 67 Cal.App.2d —, 153 P.2d 557; Fackrell v. City of San Diego, 26 Cal.2d of Fresno, 67 Cal.App.2d 116, 153 P.2d 557; Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625; 43 C.J. 1026, §

[6] The appellant is in error in asserting that the instructions necessarily required the jury to return a verdict in its favor. The jury was very fully and fairly instructed on every essential issue of the case. It was told that the complaint alleged the plaintiff, Anna Kirack, was injured as the proximate result of the maintenance of an obviously dangerous and defective sidewalk, of which defect the city had notice and knowledge and which it failed to remedy after reasonable notice and knowledge thereof. It was clearly and repeatedly instructed that the city was not an insurer of pedestrians, and that the jury could not render a verdict for plaintiffs unless it appeared that the sidewalk was defective and dangerous as alleged, and that the city had either actual or constructive notice thereof and failed for a reasonable time thereafter to repair or remedy the defects. The jury was told that the burden was on plaintiffs to prove every material allegation of the complaint. Those issues were all determined by the

jury adversely to the appellant. The jury was fairly and correctly instructed. The evidence is not in conflict with either the instructions or the verdict.

[7] There was no misconduct on the part of plaintiffs' attorney in the cross examination of defendant's witness John Witherow. There is no evidence even intimating that the City of Eureka was insured against liability for damages for injuries to individuals. It does not appear that the witness was an insurance agent. He was called as a witness for the defendant. In response to a question propounded by defendant's attorney, he said that he was an "investigator." On cross examination, without objection, he explained that he was also an "adjuster." Defendant's attorney volunteered the statement that "For the purpose of identification, he is an employee of the City of Eureka." Plaintiffs' attorney then said "I am entitled to bring out the whole facts, what his business is," to which an objection was for the first time made. That objection was sustained. There was no misconduct, nor prejudice to defendant on that account.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; EDMONDS, J., dissenting.

26 Cal.2d 320

**BURGESS et al. v. CAHILL et al.**

**Sac. 5684.**

Supreme Court of California.

May 4, 1945.

**1. Trial ⇐178**

A court may direct a verdict only when, disregarding conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiffs.

**2. Automobiles ⇐192(1)**

Prior to the imputed liability statute, the general rule was that an automobile owner, not present at the time of the operator's negligence, was not liable unless operator was his agent or servant and was engaged in his service. Vehicle Code, § 402, St.1937, p. 2353.

**3. Automobiles ⇐192(1)**

The purpose in enacting imputed liability statute was to protect innocent third persons from careless use of an automobile, and such protection should be paramount to rights of an owner who, though nonculpable, has permitted the use of his automobile by others. Vehicle Code, § 402, St. 1937, p. 2353.

**4. Automobiles ⇐192(1)**

The imputed liability statute defines an automobile owner's liability where the principle of respondeat superior is inapplicable, in order to make the owner liable for negligence of any person to whom he has expressly or impliedly given permission to operate the automobile. Vehicle Code, § 402, St.1937, p. 2353.

**5. Automobiles ⇐192(1)**

Under imputed liability statute, the foundation of automobile owner's liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public. Vehicle Code, § 402, St.1937, p. 2353.

**6. Automobiles ⇐192(1)**

Under imputed liability statute, prior knowledge of use of automobile is not necessary in order that implied permission by automobile owner for its use may be inferred, and knowledge or information of intended use of the automobile has reference to element of "express" as opposed to "implied" consent.

**7. Automobiles ⇐245(31)**

Evidence that a farm corporation employed a mechanic to care for farm machinery and provided him with a pickup truck kept at his home and furnished oil and gasoline, and that on a Sunday evening mechanic and his son and wife, who was driving, were using the truck to obtain shrubbery for their prospective home when collision occurred was sufficient for jury on issue of corporation's permission for use of the truck so as to render corporation liable for resulting injuries under imputed liability statute. Vehicle Code, § 402, St.1937, p. 2353.

**8. Automobiles ⇐192(1)**

Where owner of automobile expressly or impliedly permits its use, and it is being driven by another with consent of permittee, who accompanies the driver, owner is liable for driver's negligence to extent set forth in imputed liability statute. Vehicle Code, § 402, St.1937, p. 2353.

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Billy Burgess, a minor, etc., and others against Samuel A. Cahill, H. P. Garin Company and others for personal injuries and wrongful death resulting from a collision involving a truck owned by the defendant company. From a judgment on a directed verdict for the company, plaintiffs appeal.

Reversed.

Prior opinions, 154 P.2d 395, 149 P.2d 716.

Gumpert & Mazzera and Charles A. Zeller, all of Stockton, for appellants.

Neumiller & Ditz and C. H. Hogan, all of Stockton, for respondent.

SHENK, Justice.

Plaintiffs have appealed from a judgment for the defendant H. P. Garin Co. entered pursuant to a directed verdict. No appeal was taken from the separate judgments entered for the plaintiffs against the other defendants.

[1] The settled rule is that a court may direct a verdict only when, disregarding

conflicting evidence and giving plaintiffs' evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn therefrom, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiffs. In re Estate of Lances, 216 Cal. 397, 400, 14 P.2d 768; In re Estate of Flood, 217 Cal. 763, 768, 21 P.2d 579; Burlingham v. Gray, 22 Cal.2d 87, 94, 137 P.2d 9. Viewing the evidence in accordance with the rule, the following facts appear:

The defendant H. P. Garin Co. was engaged in a farming enterprise on Bouldin and other islands situated about eight miles northwest of Stockton. In 1942 this defendant employed Samuel Cahill as a mechanic to keep its farm machinery in repair. The company provided Cahill with a Ford pickup truck for his exclusive use while in its employ. The car was garaged at Cahill's home. It was used on many occasions for his personal business, and at least once on a fishing trip to Bouldin Island. The company furnished the oil and gasoline for the car but made no effort to check the mileage or the amount of fuel consumed. Printed stickers were attached to some of the company's cars prohibiting the use of the machines for private purposes, but none was attached to the car in the possession of Cahill. On January 17, 1943, at 7 o'clock p. m., Cahill, his wife and son, were riding in the car for the purpose of obtaining some plants and shrubs to be planted at the site of a new home. On this trip, and while Mrs. Cahill was driving, a collision occurred between the car and an automobile driven by Utah R. Thornburgh. As a result of the accident Thornburgh and another person in his car were killed and others seriously injured.

An issue arose on the trial as to whether Cahill was expressly prohibited from using the car for his personal purposes, and therefore whether he had permission for its general use. Cahill testified that he at no time received instructions, either oral or written, restricting its use to company business.

At the conclusion of the trial, the court instructed the jury to return a verdict in favor of the defendant company on the ground that there was no substantial evidence that the Ford pickup was being operated at the time of the accident with the permission of the owner of the vehicle. The jury returned a verdict in compliance with that instruction and judgment was entered accordingly.

The asserted liability of the defendant corporation is based on section 402 of the Vehicle Code, St.1937, p. 2353, which provides in part: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

It becomes necessary to determine whether the trial court correctly ruled that there was insufficient evidence to go to the jury on the question of permission of the employer for the general use of the car by the defendant Cahill.

[2] Prior to the enactment of the imputed liability statute the general rule was that the owner of an automobile who was not present at the time of the negligent act which caused injury to a third person could not be held liable unless it was shown that the person in charge was the agent or servant of the owner and at the time was engaged in his service. Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42.

[3-5] A reading of the language of the statute and a review of the decisions in this state reveal that the legislative purpose in the enactment of section 1714¼ of the Civil Code (now section 402 of the Vehicle Code), was to protect innocent third parties from the careless use of automobiles and that this protection should be paramount to the rights of an owner who has permitted the use of his car by others even though he, personally, was not guilty of negligence. The wording of the statute is clear and indicates that purpose. The statute defines the owner's liability in cases where the principle of respondeat superior is inapplicable, in order to make the owner liable for the negligence of any person to whom he had expressly or impliedly given permission to operate his car. Souza v. Corti, 22 Cal.2d 454, 457, 139 P.2d 645, 147 A.L.R. 861, citing Bayless v. Mull, 50 Cal. App.2d 66, 122 P.2d 608; Plaumbo v. Ryan, 213 App.Div. 517, 210 N.Y.S. 225. The legislation was plainly intended to enlarge the liability of the nonculpable owner of a motor vehicle for its operation on a public highway. The foundation of the statutory

liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public.

[6] In construing the statute earlier cases have seemed to turn on the question of knowledge or information on the part of the owner that the vehicle was being driven by the person with whose negligence he is sought to be charged, before implied permission could be inferred. For example, in Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453, 455, it was said: "A person cannot be said to have permitted that of which he had no knowledge or information," citing Bradford v. Sargent, 135 Cal. App. 324, 332, 27 P.2d 93. But in Burford v. Huesby, 35 Cal.App.2d 643, 96 P.2d 380, it was recognized that prior knowledge was not necessary in order that implied permission be inferred, and that knowledge or information of the intended use of the car had reference to the element of "express" as opposed to "implied" consent.

The defendant relies on the cases of Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, and Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, where it was held that use by the permittee beyond certain express restrictions was without permission. They are not determinative here. There was no question in those cases of either express or implied permission for general use.

[7] Here the employer and employee relationship existed. The defendant employer gave exclusive possession and permission for the use of the vehicle to its employee, and, according to the testimony most favorable to the plaintiff, without restrictions upon its use, without effort to check the mileage, or the consumption of gasoline or otherwise supervise or limit the use of the car.

Evidence of employer and employee relationship together with the other factors mentioned would support an inference that the vehicle was being driven with the permission of the owner. Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Hicks v. Reis, 21 Cal.2d 654, 659, 134 P.2d 788, and cases cited. Those cases involved a similar relationship and evidence on the issue of permissive use. In the case of Blank v. Coffin a judgment entered on a directed verdict in favor of the defendant owner was reversed. It was held in the Hicks case on the appeal from the judgment against the owner, that the trier of the facts was justified in inferring that permission existed.

The defendant owner refers at length to evidence in its favor and in conflict with the evidence favorable to the plaintiff. The presence in the record of such conflicting evidence is readily conceded but it may not influence the result on an appeal of this character.

[8] The fact that at the time of the accident the wife of the defendant Cahill was operating the vehicle would not defeat recovery. Mr. Cahill was in the car and his wife was driving with his consent. If an automobile is being driven by another with the consent of the permittee, where the permittee accompanies the driver, the owner is liable to the extent set forth in section 402 of the Vehicle Code. Hicks v. Reis, supra; Sutton v. Tanger, 115 Cal. App. 267, 1 P.2d 521; Hughes v. Quackenbush, 1 Cal.App.2d 349, 37 P.2d 99; Armstrong v. Sengo, 17 Cal.App.2d 300, 61 P. 2d 1188. Cf. Souza v. Corti, supra.

It follows that a directed verdict was improperly ordered.

The judgment is reversed.

GIBSON, C. J., TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

CARTER, Justice.

I concur in the judgment of reversal and agree that the evidence was sufficient to justify the trier of fact in determining that the H. P. Garin Co. had given its consent to the operation by Cahill of the Ford pickup truck at the time and place of the accident which is the subject of this action. In my opinion it was not necessary for plaintiffs to go further than to establish the fact that the automobile came into Cahill's possession lawfully, and that he had the permission of the owner to operate it upon the highway, in order to fasten liability upon the owner for damages resulting from its negligent operation.

The language of section 402 of the Vehicle Code is clear and is not susceptible to the interpretation that an owner may give his permission to the operation by a third person of his automobile upon a public highway and restrict his liability for the negligent operation thereof by limiting such operation to time or place. The obvious purpose of the Legislature in the enactment of said section was to protect persons who might be injured as the result of

the negligent operation of automobiles by persons other than the owners thereof who are operating the same with the permission of such owners. When a person entrusts the operation of his automobile to a third person out of his presence, he has placed in the hands of such third person an instrumentality which may be used to cause injury or death to innocent persons who may become victims of his negligent use of such instrumentality. For this reason, the Legislature wisely saw fit to place liability upon the owner for such negligent operation. If the Legislature had intended that the owner should have the right to limit his liability by restricting the operation of such automobile to a specific time or place, it could have so stated, but it did not do so for obvious reasons. The protection which the statute was designed to afford would be clearly reduced by permitting the owner to so limit his liability. The owner can protect himself by insurance against any risk he may assume by permitting the operation of his automobile by third persons, while a victim of the negligent operation of such automobile suffers the same loss whether the automobile is being operated with or without the permission of the owner.

In my opinion such cases as Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, and Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, are contrary to the intention clearly expressed by the Legislature by its enactment of section 402 of the Vehicle Code and should be overruled. The views expressed by the court in those cases indicates that the trend of the philosophy of the law at that time was to protect the owner of the automobile who voluntarily permitted a third person to make such use of it that an innocent victim was caused to suffer damages which would not have occurred except for the owner's voluntary act in permitting the use of such instrumentality by a third person. In my opinion the Henrietta and Engstrom cases were erroneously decided. The basic concept and philosophy underlying these decisions is out of harmony with the purpose and object of the legislation embraced within section 402 of the Vehicle Code, and this court should now declare the law to be that owners of automobiles who voluntarily permit their operation by third persons are liable to persons who suffer injuries as the result of the negligent operation of such automobiles regardless of whether the persons operating such automobiles violate the instructions of the owners as to time, place, or manner of such operation.

EDMONDS, Justice.

I concur in the judgment of reversal upon the ground that the evidence upon the issue of Cahill's permission to use the truck at the time of the injury presented a question of fact for the determination of the jury. But in reaching that conclusion, Justice Shenk states that the cases of Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, and Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, are not determinative of the present controversy. That statement is correct, in my judgment, but not because, as he said: "There was no question in those cases of either express or implied permission for general use."

In the Henrietta case [10 Cal.2d 526, 75 P.2d 1052] this court held: "On principle, there is no fundamental ground of distinction between a limitation of time and one of purpose or place, in so far as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission. For example, an owner might entrust his car to another for the purpose of driving it to his home, or to a garage for repairs; and, if the driver took the car out on a pleasure trip, it could hardly be contended that he was acting with the permission of the owner." The second decision affirmed a judgment for the defendant. As the only permission given Herndon to use the car was that he might have it for the particularly specified period, said the court, when that time had expired, he was not then driving it with the permission, either express or implied, of the owner.

Were the court now considering a judgment rendered upon evidence showing, without conflict, that the truck of the Garin Company was turned over to Cahill solely for his use in going to and from the company's place of business and not to be driven on Sundays for personal errands, the rule of the prior decisions would require a determination that the owner was not liable for damages because of the accident. But the only issue now presented is whether the directed verdict was proper.

## CITY OF COMPTON v. BOLAND et al.

## LLOYD A. FRY ROOFING CO. v. SAME.

L. A. 18956, 18955.

Supreme Court of California.

May 1, 1945.

Rehearing Denied May 28, 1945.

**1. Taxation ⇐301(7)**

Taxpayer's objection to county budget adopted by supervisors and levies based thereon were waived for failure to appear and be heard concerning any item of budget after receiving notice that budget was available. Pol.Code, § 3714.

**2. Taxation ⇐302**

Alleged excessive tax levies of 1927 and 1929 against lands in the city of Compton were cured by the 1943 Curative Act, where no vested rights had intervened prior to effective date of the curative statute and the irregularity complained of was not such as to deprive the officials of jurisdiction to levy the tax. St.1943, p. 1993, §§ 1, 2(a, b).

**3. Municipal corporations ⇐479**

The city of Compton improvement bond assessment, with respect to sufficiency of the diagram and assessment to cover certain lots subsequently sold for delinquent taxes, substantially complied with requirements of the Improvement Act of 1911. St. 1929, p. 1660, § 20i.

**4. Municipal corporations ⇐513(5)**

Failure to pursue remedy for correction of assessment for city improvements by a proceeding commenced within 30 days after recording of the warrants, diagram, and assessments, barred property owners from asserting such invalidity. St.1929, p. 1660, § 26.

**5. Taxation ⇐688**

That the notices of tax delinquency contained incorrect amounts was not a jurisdictional defect which could not be cured by the 1943 Curative Act. St.1943, p. 1993, §§ 1, 2(a, b).

**6. Taxation ⇐302, 305, 308, 439, 449(1), 450 (3), 688, 770**

Under the 1943 Curative Act, all budget preparations rates, equalizations, assessments, levies, tax sales, certificates, and conveyances resulting therefrom, were validated and declared legally effective, unless the irregularity consisted of the omission of the jurisdictional steps essential to the observance of constitutional guaranties. St.1943, p. 1993, §§ 1, 2(a, b).

**7. Constitutional law ⇐193**

Although the Legislature cannot cure the omission of jurisdictional requisites, the manner of procedure, after jurisdiction is acquired and the mandates of due process are complied with, are matters within the legislative discretion and may be subject to the exercise of the healing power so long as further constitutional inhibitions are observed.

**8. Taxation ⇐623**

The Legislature may prescribe changes in the manner of pursuing jurisdictional steps, and, if the notice of tax delinquencies is adequate to comply with due process, the Legislature may make changes in the mode or manner of giving notice, or the details of the matter to be contained therein. Pol.Code, § 3764.

**9. Taxation ⇐627, 688**

Although the requirement for publication of tax delinquency and notice constitutes a jurisdictional prerequisite, the form and contents thereof are details which are subject to legislative or administrative discretion, and defects therein are related to the mode of exercise of the power, which, being merely directory, may be made effective by a curative act. Pol.Code, § 3764.

**10. Taxation ⇐688**

The purpose of the 1943 Curative Act is to rehabilitate tax deeded property and procure its return to the tax rolls, and it is a matter of public importance that the validating act be applied to effectuate the legislative purpose so long as constitutional mandates are observed. St.1943, p. 1993, § 1 et seq.

**11. Taxation ⇐688**

The omission of the mention of penalties and costs from notice of tax sale with reference to tax levies of 1927 and 1929 was an irregularity which was cured by the 1943 Curative Act. St.1943, p. 1993, § 1 et seq.

**12. Taxation ⇐688**

Where notice of tax sale adequately referred to and described certain lots, although one lot was misdescribed in the preliminary portion thereof, such irregularity did not render tax sale void, but was cured by the 1943 Curative Act. St.1943, p. 1993, § 1 et seq.

**13. Taxation ⇐757**

Recitals in deeds to the state, appearing in the margins thereof, that the property described was deeded to the city of Compton on a certain date as per tax collector's report, was sufficient compliance with statute relating to contents of deed. St.1939, p. 1326, § 3480.

**14. Taxation ⇐658(3)**

Notice of sale of tax deeded property by registered mail to last assessee, addressed to him at county seat, was sufficient compliance with statute relating to mailing of notice, where assessment list did not show an address for assessee. St. 1939, p. 1343, § 3799.

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In Bank.

Appeals from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Actions by City of Compton and by Lloyd A. Fry Roofing Company against John J. Boland, individually and as administrator, etc., and others to quiet title to certain realty. Judgments for plaintiffs, and defendants appeal.

Affirmed.

Prior 151 P.2d 40.

Ralph Miller, Edwin J. Miller, John F. Poole, and W. S. Weatherwax, all of Los Angeles, for appellants.

Ralph K. Pierson, City Atty., of Compton, and John F. Bender, Sp. City Atty., and Gizella Loshoncy, both of Los Angeles, for respondent.

Robert W. Kenny, Atty. Gen., John L. Nourse and E. G. Benard, Deputy Attys. Gen., J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, as amici curiae on behalf of respondent.

SHENK, Justice.

In one action the city of Compton sought to quiet title to lots 1, 2, 22 and 23 of the Boland Tract in the city of Compton, county of Los Angeles. In another action Lloyd A. Fry Roofing Company sought to quiet its title to lots 5 and 6, 8 to 20 inclusive, and 25 and 26 of the Boland Tract, and lots 50, 51, 52, 65 and 66 of Tract 9584 in said city. In each case the plaintiff relied on a tax title. In each the defendants relied on irregularities in the tax sale proceedings to avoid the title of the respective plaintiffs. The court found for the plaintiff in each case and decreed ownership accordingly. The defendants appealed from the judgments. As the defendants and appellants were practically the same in each case the appeals were consolidated and submitted on one set of briefs.

Not all of the lots mentioned are involved in the controversy on the appeals, but it is not necessary to designate specifically those in question except as they receive special mention. Nor is it necessary to specify assessment years or other facts except as noted.

Some of the lots were sold to the state on June 30, 1928, for 1927 delinquent taxes. On September 25, 1933, the Los Angeles County Tax Collector executed deeds conveying them to the state.

Upon the termination of the period of redemption, Revenue and Taxation Code, §§ 3511.3, 3511.5 and 3572, St.1941, pp. 1425, 1428, and pursuant to an agreement dated January 7, 1945, between the city of Compton and the Board of Supervisors of Los Angeles County, the city of Compton by deed acquired the lots which were also delinquent for city taxes. By quitclaim deed, for a stipulated consideration, the city of Compton transferred to Fry Roofing Company its interest in certain of the lots.

[1] The first point urged by the defendants in support of their appeals is that the 1927 county tax levy was excessive, thereby resulting in an invalid tax rate. It is stated that the tax levy for that year was excessive by $.0051637 for each $100 of assessed valuation because $61,554.38 of unsecured personal property was not taken into consideration by the board to reduce the tax on real property for the benefit of the general fund, and $86,705.70 of unsecured personal property was left out of consideration in relation to reduction of the tax on real property for the benefit of the salary fund. It is not disputed that in the preparation of the budget these items were not included. The defendants rely on Otis v. Los Angeles County, 9 Cal.2d 366, 70 P.2d 633. In that case it was held that the excessive portion of the tax was illegal. That action was to obtain a refund of the excessive portion of the tax paid. The assumption here of the invalidity of a portion of the tax would not avail the defendants. They had an opportunity to have the budget corrected. Pol.Code, § 3714. In Strong v. Mack, 64 Cal.App.2d 739, 149 P.2d 401, a similar contention was rejected in an action to quiet title. It was there held that the error of the board did not in-

validate the entire tax levy and must be deemed to have been waived by failure to enter an appropriate objection.

[2] Furthermore, in 1943 the Legislature passed a curative act entitled: "An act to validate certain acts of counties, cities and counties and of their officers relating to taxation of property." Stats. 1943, p. 1993; Deering's Gen.Laws, Act 8443. Section 1 provides that every act and proceeding theretofore taken relative to the "preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates" or to "the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy" were confirmed, validated and declared legally effective. The effect of sections 2(a) and 2(b) of the act was to except from the curative force of the statute so-called jurisdictional defects, and to harmonize the legislative intent with constitutional guarantees. In Miller v. McKenna, 23 Cal.2d 774, 781, 147 P.2d 531, this court gave full recognition to the legislative power to enact a curative provision to correct other defects and irregularities, and to the effective application thereof in pending litigation. The decision in that case withheld from the application of the act, in accordance with the limitation of section 2(b) thereof, the vested right of the plaintiff which had intervened prior to the effective date of the curative statute. Here no intervening rights are involved and the irregularity complained of, not being such as to deprive the officials of jurisdiction to levy the tax, must be deemed to have been cured by the 1943 act. The foregoing conclusions apply also to the 1929 tax as to which a similar contention is made.

[3, 4] Next the defendants contend that the Boland Tract was not included in the city of Compton improvement bond assessment and that the attempted assessment was therefore invalid. They concede that the diagram and the assessment as required by the Improvement Act of 1911 (§ 20i, Stats.1911, p. 730, as amended, Deering's Gen.Laws, Act 8199) mentioned the Boland Tract, but assert that there was nothing in the assessment to show that the Boland Tract was included because, although the words "Boland Tract" with map and page number were mentioned on the roll, and lots numbered 1 to 26 were listed, there were no ditto marks or other indication that the lots were part of the Boland Tract. Examination of the record and the exhibits discloses that there was a substantial compliance with the requirements. Assuming, however, that irregularity existed, the defendants' remedy for a correction was provided in section 26 of the act by a proceeding commenced within thirty days after the recording of the warrant, diagram and assessment. Failure to pursue the remedy barred the defendants from asserting such invalidity. Noyes v. Chambers & De Golyer, 202 Cal. 542, 261 P. 1006.

[5] The next contention is that the 1927 and 1929 notices of delinquency contained incorrect amounts, and that consequently the sales were for amounts less than the amounts computed by the defendants as the correct amounts. The plaintiffs on the other hand make computations which are in accordance with the figures stated in the notices. The defendants in this respect rely on cases, such as Dougery v. Bettencourt, 214 Cal. 455, 461, 462, 6 P.2d 499, and Clayton v. Schultz, 22 Cal.App.2d 72, 70 P.2d 512, holding that where all prerequisites as to notice are not strictly complied with, the sale is void. Assuming some error in the amount stated in the notices the result sought by the defendants does not follow from the cited cases.

The Dougery case involved the sale of lands within a reclamation district for delinquent assessments and the failure to comply with section 3480 of the Political Code requiring as the final step in the sale to a purchaser of delinquent land that a copy of the certificate of sale be recorded in the county recorder's office. It was held that the step was necessary to a valid sale, that the rule that proceedings on tax sales were in invitum was applicable, that recording the certificate was an indispensable step, and that failure to record the certificate rendered the sale void.

In Clayton v. Schultz it was held that publication of the delinquent list as a supplement to a newspaper was contrary to the requirement of section 3766, Political Code (as amended in 1921) that the list be published in the newspaper; that publication in the newspaper, rather than in a supplement, was a necessary step, and that failure to comply therewith rendered void a tax sale based thereon.

[6] Other cases recognizing the force of the rule relied on by the defendants need not be reviewed. Our office here is to determine the applicability of the 1943 act to cure the irregularities complained of

and if it is applicable, to declare its effect on the tax deeds relied on by the plaintiffs. By the language of section 1, the curative force applies to every act and proceeding theretofore taken relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates, or to the assessment or equalization of property, or to the levy of taxes thereon, or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy. Consequently, all budget preparations, rates, equalizations, assessments, levies and the tax sales, certificates and conveyances resulting therefrom, were confirmed, validated and declared legally effective unless by section 2(a) the irregularity consisted of the omission of a jurisdictional step essential to the observance of constitutional guarantees.

[7, 8] In Miller v. McKenna, supra [23 Cal.2d 774, 147 P.2d 536], it was said: "While the Legislature cannot cure the omission of jurisdictional requisites, the manner of procedure, after jurisdiction is acquired and the mandates of due process are complied with, are matters within the legislative discretion and may be subject to the exercise of the healing power so long as further constitutional inhibitions are observed." Likewise, the Legislature may prescribe changes in the manner of pursuing jurisdictional steps. If the notice is adequate to comply with due process the Legislature may make changes in the mode or manner of giving notice, or the details of the matter to be contained therein.

[9] It follows that if the Legislature could have omitted a detail in the giving of the notice or in the content thereof, it could exercise the healing power to cure an omission or irregularity in the same respect. We may assume that the requirement for publication of delinquency and notice, Pol. Code, § 3764, constitutes a jurisdictional prerequisite; but the form and content thereof are details which are subject to legislative or administrative discretion, and defects therein are related to the mode of the exercise of the power, which being merely directory, may be made effective by a curative act. People v. Van Nuys Lighting District, 173 Cal. 792, 797, 162 P. 97, Ann.Cas.1918D, 255.

[10] The purpose of the validating statute is to rehabilitate tax-deeded property and procure its return to the tax rolls. The accomplishment of the purpose is conducive to equality in assessments for the support of government and therefore to stability in government. It is a matter of public importance, therefore that the validating act be applied to effectuate the legislative purpose so long as constitutional mandates are observed.

[11] We conclude that the irregularity directly under discussion, namely, the statement of incorrect amounts in the notices of delinquency, as well as the irregularities in the fixing of the budget and tax rates, were cured by the 1943 act. The same result follows as to the defendants' remaining claims of irregularity which are: that the words "penalties and costs" were omitted from a specified statement appended to the notice; that lot 25 was not sufficiently described in the published delinquent tax list; and that the tax deeds were void on their face.

The asserted omission of the words "penalties and costs" or "penalties," is the same irregularity involved in Bussenius v. Warden, 71 Cal.App. 717, 236 P. 371; Jones v. Walker, 47 Cal.App.2d 566, 118 P.2d 299; Miller v. McKenna, supra, and other cases cited therein. Prior to the adoption of the 1943 curative act an irregularity in the contents of the published delinquent list and appended notice which indicated that penalties and costs were not included in the amount stated invalidated the tax sale. In view of the effect of the 1943 act in curing that irregularity the cases relied on by the defendants are not controlling.

[12] The defendants' contention that Lot 25 of the Boland Tract was insufficiently described is likewise without merit for similar reasons. Although that lot was misdescribed in the preliminary portion thereof, the notice of sale adequately referred to and described the lot as "Lot 25 assessed to John J. Boland (Adm)."

[13] The defendants urge that since the deeds to the purchasers did not state the fact and date of sale by the tax collector to the city of Compton, they were void on their face. The defendants rely on section 3480 of the Revenue and Taxation Code which was adopted in 1939, effective February 1, 1941, St.1939, p. 1326. That code did not provide the form of deed to be executed, but section 3480 listed the facts to be recited in the deed. Subsection (d) required the recital of the name of the purchaser at the tax sale and the fact and date that the property was sold to him for nonpayment of delinquent taxes which were a

lien on the property. The deeds to which the defendants refer in support of their contention are twenty-two tax deeds to the state (executed several years prior to the effective date of the Revenue and Taxation Code) on each of which is stamped in the margin the fact that the property was deeded to the city of Compton on June 14, 1942, "as per tax collector's report. * * *" etc. In accordance with our recent decision in the case of Chambers v. Duvall, 26 Cal.2d 139, 156 P.2d 921, the information appearing on the face of the deed is a substantial and therefore proper compliance with the requirements of the section relied on.

[14] Lastly, the defendants contend that notice was not mailed to the assessee, John J. Boland, Admr., and that he did not receive notice. The assessment list did not show an address for John J. Boland, Admr., and in the absence thereof the notice was sent within due time by registered mail addressed to him at the county seat with a thirty-day return direction thereon. The defendants' contention is without merit inasmuch as the mailing was in accordance with the provisions of section 3799 of the Revenue and Taxation Code (formerly Pol.Code, § 3897d.)

Other points do not require discussion. The judgments are affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.




69 Cal.App.2d 104

**BOOTH v. LOS ANGELES COUNTY et al.**

Civ. 14662.

District Court of Appeal, Second District, Division 3, California.

May 4, 1945.

**1. Appeal and error ⇐1203(3)**

Where a judgment, which ordered county auditor to pay over certain fund due under a judgment against county to be applied in satisfaction of plaintiff's judgment, was reversed for nonjoinder of necessary parties and appellate court refused to consider county's counterclaim claiming fund because of unpaid taxes due, trial court properly dismissed the action as to all defendants because case was not brought to trial within three years after remittitur as required by statute. Code Civ.Proc. §§ 583, 710.

**2. Appeal and error ⇐1203(3)**

Where judgment was reversed and remanded for further proceedings and appellate court refused to consider counterclaim, a form of trial was necessary to prevent subsequent dismissal of action by trial court under statute providing that where judgment is reversed and remanded for new trial action must be dismissed by trial court unless cause is brought to trial within three years from date of remittitur, even if facts had been settled by stipulation for purposes of trial. Code Civ.Proc. § 583.

**3. Trial ⇐1**

A "trial" is examination before competent tribunal, according to law of the land, of facts or law put in issue in a cause for purpose of determining such issue.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

**4. Appeal and error ⇐1203(3)**

Where judgment was reversed and cause remanded for further proceedings and three years have elapsed after filing remittitur without the action being brought to trial, court was without jurisdiction to proceed further except to order a dismissal. Code Civ.Proc. § 583.

**5. Appeal and error ⇐1203(3)**

Though defendant's motion to dismiss was not made on ground that action had not been brought to trial within three years after filing of remittitur on reversal and remand for further proceedings, nevertheless, since statute made it trial court's duty to dismiss under such circumstances, and there being nothing shown to contrary, appellate court presumed that trial court acted in performance of that duty. Code Civ. Proc. § 583.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Bates Booth, administrator of the estate of Gaylord F. Lloyd, deceased, against the County of Los Angeles to collect moneys allegedly due on a judgment

and for other relief. From a judgment of dismissal, the plaintiff appeals.

Affirmed.

Don Marlin, Freston & Files, and Charles A. Loring, all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, all of Los Angeles, for respondents.

SHINN, Justice.

This case is before the court upon a second appeal; a judgment in favor of plaintiff's intestate, Gaylord F. Lloyd, having been reversed in Lloyd v. County of Los Angeles, 1940, 41 Cal.App.2d 808, 107 P.2d 622. Reference is made to the reported opinion for a further statement of the points involved and those decided on that appeal. After the remittitur was filed plaintiff caused service to be made upon the county treasurer, county auditor and county clerk, as defendants sued under fictitious names. The action was dismissed as to all of the defendants, including the county, upon their several motions, and plaintiff appeals. The motion of the officer defendants was made upon the ground that summons had not been served upon them within three years after the commencement of the action. Although the appeal is from the judgment as a whole, appellant does not urge a reversal as to the county officers. The ground stated in the motion of the county was that no judgment could be rendered in the action consistent with the decision upon the former appeal except a judgment of dismissal. The judgment of dismissal did not specify the ground upon which it was rendered and the county now makes the additional point that a dismissal was mandatory for failure to bring the action to trial. It is a fact that more than three years had elapsed between the filing of the remittitur on the former appeal and the judgment of dismissal herein, and that no proceeding had been taken in the meantime to bring the action to trial as required by section 583 of the Code of Civil Procedure. New counsel have recently entered the case and they were first advised that this additional ground for dismissal was involved on the appeal when the point was raised in respondent's brief. In their reply brief they contend that the action was not subject to dismissal under section 583. Their position is that under a proper construction of the opinion upon the former appeal there was nothing for the trial court to do but strike out the provisions of the judgment which ran against the county auditor and county clerk and allow it to stand as a judgment against the county; that no further trial was necessary and that section 583 therefore does not apply to the case. Unless this position is sustainable the judgment must be affirmed.

The litigation has the following history: Gaylord F. Lloyd recovered a judgment against Caddo Company in the sum of $15,000 on October 5, 1933; the Caddo Company recovered judgment against the County of Los Angeles February 9, 1934, for $5,368.33 for a refund of taxes. On February 9, 1934, pursuant to section 710 of the Code of Civil Procedure, Lloyd served upon the county auditor an abstract of the judgment against Caddo Company. The county recovered a judgment against Caddo Company for delinquent taxes on December 20, 1934, in the amount of $2,553.89. It also made levies against Caddo Company for unsecured personal property taxes in the total amount of $7,700.07 and brought suit to recover the same. On February 19, 1934, Hughes Industries, a corporation, filed with the county auditor a notice that it was the owner of the judgment of Caddo Company against the county by virtue of a previous assignment of the latter's claim against the county, and demand was made for the payment of the amount of the judgment to Hughes Industries. On May 14, 1934, Lloyd brought suit against the county, Caddo Company, Hughes Industries, and numerous fictitious defendants, seeking judgment that he was entitled to collect and receive the amount of the judgment of the Caddo Company against the county. The several defendants answered and the county filed counterclaims setting forth its judgment against Caddo Company in the amount of $2,553.89, and its further claim for taxes in the amount of $7,700.07, and it prayed for judgment that $2,553.89 be applied in satisfaction of its said judgment and that the balance of the fund be held to apply upon its claim in the action then untried for the recovery of additional taxes in the amount of $7,700.07. The case was tried upon stipulated facts and judgment was rendered declaring that Lloyd was entitled to receive the amount of the judgment recovered by the Caddo Company, restraining the defendants from claiming any interest in the same, and directing the Auditor to pay the same to the Clerk and directing the Clerk to pay the

amount to plaintiff Lloyd. Among the facts stipulated were those alleged in the counterclaims of the county, and the effect of the judgment was to deny the county the asserted right of offset. The judgment ran against the Auditor and the Clerk, although they had not been named as defendants or served, as well as against the county. The county appealed and the judgment was reversed upon the ground that the action had been brought against the wrong parties, and that the Auditor and Treasurer, and perhaps the Clerk, were necessary parties. It was held that the action could not be maintained against the county alone, and the county insists that the opinion should be construed as holding that it was not even a proper party. But that was not the only question presented by the appeal. The county contended that the trial court had erroneously refused to allow its counterclaims as an offset against the Caddo Company judgment. Upon this point it was said in the opinion 41 Cal.App.2d at page 812, 107 P.2d at page 624: "The defendant complains because the trial court did not allow its counterclaims. * * * Until proper parties are before the court it would be mere obiter to discuss the right to file counterclaims." The judgment was reversed and the action was remanded for further proceedings "not inconsistent with what has been said above." The remittitur was filed February 13, 1941. Nearly three years later the county treasurer, county auditor and county clerk were served with summons; on February 3, 1944, they gave notice of motion to dismiss the action, the county gave its notice on the same day, and the judgment of dismissal was signed and filed February 18, 1944, three years and five days after the filing of the remittitur of the District Court of Appeal.

The concluding sentence of section 583 of the Code of Civil Procedure reads as follows: "When in an action after judgment, an appeal has been taken and judgment reversed with cause remanded for a new trial, * * * the action must be dismissed by the trial court, on motion of defendant after due notice to plaintiff, or of its own motion, unless brought to trial within three years from the date upon which remittitur is filed by the clerk of the trial court."

[1, 2] The parties hold sharply opposing views as to what was decided upon the former appeal with respect to plaintiff's right to sue the county. But whether we should agree with one construction or the other we would be obliged to affirm the judgment. If it was decided on the appeal that the county was not a proper party defendant, then the only action which the trial court could have taken in conformity with that decision would have been to dismiss the action as to the county, and the judgment would have to be affirmed upon that ground. But if the decision should be construed as holding, as plaintiff contends, that the county was a proper party, but that the county officers must also be sued, the judgment must be affirmed upon the ground that a retrial would have been necessary in order to dispose of the county's counterclaims. The action was remanded for further proceedings, which would necessarily have involved an adjudication as to the validity of the counterclaims. We do not see how the case could have been disposed of without a retrial of that issue. The allegations of the counterclaims were deemed to be denied. No judgment could have been rendered which allowed the claimed offsets until the facts alleged had been established by proof. No judgment could have been rendered against the county without determining whether it had a legal right of setoff. A form of trial was necessary even though the facts had been settled by stipulation for purposes of trial.

[3] In Tregambo v. Comanche M. & M. Co., 1881, 57 Cal. 501, at page 505, the word "trial" as used in the Code was defined as follows: "A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial." The courts have frequently approved this definition. It includes trials which involve only questions of law. Goldtree v. Spreckels, 1902, 135 Cal. 666, 67 P. 1091; Provencher v. City of Los Angeles, 1935, 10 Cal.App.2d 730, 52 P.2d 983. It is the determination of an issue of fact or law presented by the pleadings. City of Pasadena v. Superior Court, 1931, 212 Cal. 309, 298 P. 968.

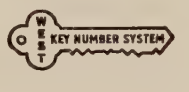
[4] The case is one that could not have been disposed of except by the trial of an issue of fact, and an issue of law, as well, and it was subject to dismissal under section 583. When three years had elapsed after the filing of the remittitur and the

action had not been brought to trial, the court was without jurisdiction to proceed further except by ordering a dismissal. Gonsalves v. Bank of America, 1940, 16 Cal.2d 169, 105 P.2d 118.

[5] Although the county's motion was not made upon the ground that the action had not been brought to trial, nevertheless section 583 made it the duty of the court to dismiss the action under the circumstances and, nothing being shown to the contrary, it will be presumed that the court acted in the performance of that duty. It is unnecessary to decide whether a dismissal was required also under the law of the case, as established on the former appeal.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.




69 Cal.App.2d 109

**PEOPLE v. FREY et al.**
**Civ. 14743.**

District Court of Appeal, Second District, Division 3, California.

May 4, 1945.

Hearing Denied July 2, 1945.

**Appeal and error ⇐907(3)**

On appeal on judgment roll, unsupported by transcript of evidence or bill of exceptions, District Court of Appeal presumes that evidence offered at trial was competent and material to issues, received without objection, and sufficient to support trial court's findings and judgment, since all intendments must be indulged in favor of judgment.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Condemnation proceedings by the People, acting by and through the Department of Public Works, against Amelia Isabel Frey, C. O. Nordin, and others. Judgment for plaintiff, and, from a supplemental judgment allocating defendants' respective interests in the amount of compensation awarded, defendant Nordin appeals.

Affirmed.

William R. Law, of Los Angeles, for appellant.

Rupert B. Turnbull, of Los Angeles, for respondent Amelia Isabel Frey.

DESMOND, Presiding Justice.

Defendant C. O. Nordin appeals from a supplemental judgment entered in this action on June 26, 1944.

Condemnation proceedings were commenced by the State of California on August 1, 1939, against certain defendants, including C. O. Nordin, Irving R. Deist, Amelia I. Frey and Ervyma M. Low, who were alleged to have an interest in the real property sought to be condemned for State highway purposes. The parcel of real property so sought, located in Los Angeles, California, contained 5160 square feet and was described as "The East 100 feet of Lot 12 of Hazard's Annex, as shown on map thereof recorded in Book 7 at page 89 of Maps, in the Office of the County Recorder." The jury found the market value of the property to be $2000. The court made findings of fact and concluded therefrom that plaintiff was "entitled to a judgment in condemnation decreeing that upon the payment into Court for the benefit of defendants Amelia I. Frey * * * Irving R. Deist * * * C. O. Nordin * * * Ervyma M. Low * * * as their interests herein may appear, of the total sum of Two Thousand and No/100 Dollars ($2000.00), together with said defendants' costs of suit, there shall be condemned in fee simple absolute to the People of the State of California for use as a State highway, said parcel of land belonging to said defendants above named * * *." No allocation of the various interests of the defendants was made either in the findings, the judgment in condemnation or in the final order of condemnation. Thereafter, defendant Amelia I. Frey made a motion for an order directing the distribution of the sum of $2000 among the respective defendants, which notice was served upon the aforementioned defendants and plaintiff, and came on for hearing on April 27, 1944. With the exception of Ervyma M. Low, all parties, including the appellant C. O. Nordin, appeared at the hearing and were represented either by counsel or in propria persona, the matter coming before the same judge who had heard the testimony at the

time of the trial. At this hearing the court stated to the parties, "If I have failed properly to find what the interests are according to law I give you this opportunity to tell me what your interests are and prove them now." The record indicates that "evidence oral and documentary" was introduced at this hearing "on behalf of the defendant, Amelia I. Frey, and no evidence * * * offered by any other of the defendants, nor by the plaintiff." The court thereupon made additional findings, which allocated the various interests of the defendants, as follows: (1) That defendant Amelia I. Frey "was the owner in fee of the Southerly forty (40) feet of the Easterly 100 feet" of the parcel of real property involved in the condemnation suit and that her interest was of the value of $1996.00; (2) that defendant C. O. Nordin had no right, title or interest in the real property involved or to the fund of $2000.00, "other than that C. O. Nordin is now a judgment creditor of the defendant, Irving R. Diest, and at the time of the filing of this action and immediately prior attached all the right, title and interest of Irving R. Diest in and to the real property condemned herein; that the interest of C. O. Nordin in said real property is an interest only as an attaching creditor and has only a nuisance value; * * * The Court finds that the interest of said C. O. Nordin in and to said interest is One Dollar ($1.00) and no more. That C. O. Nordin has no interest in the land of Amelia I. Frey"; (3) that defendant Irving R. Diest's interest was in and to a strip approximately "11.6 feet in width and running the long way of the property involved, which is described as the Northerly 11.6 feet of the East 100 feet of Lot 12 of Hazard's Annex, [etc.]"; that the value of his interest is $1.00; (4) that the defendant Ervyne Low, the daughter of defendant Irving R. Diest, had "no interest in any of the property condemned excepting a nuisance value in and to the strip of land 11.6 feet wide, described in paragraph 3 last above mentioned [supra (3)]" and "is entitled to a judgment for said nuisance value in the sum of One Dollar ($1.00), and no more."

A supplemental judgment was entered accordingly and it is from this judgment that defendant C. O. Nordin appeals, his only contention, as stated in his brief, being that there was no evidence to warrant the findings or to support the supplemental judgment based thereon. We must, however, hold adversely to this contention. The appeal comes before us on the part of appellant upon the judgment roll, unsupported by a transcript of the evidence or bill of exceptions. Since all intendments must be indulged in favor of the judgment, it is presumed that the evidence offered at the trial was competent and material to the issues, was received without objection, and was sufficient to support the findings and judgment. See 2 Cal.Jur., pp. 867–887, and 1 Cal.Jur. 10 Yr. Supp., pp. 531–540.

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.




69 Cal.App.2d 171

**KENDRICK v. SCHWARTZ et al.**

**Civ. 14796.**

District Court of Appeal, Second District, Division 2, California.

May 14, 1945.

Rehearing Denied May 25, 1945.

Hearing Denied July 12, 1945.

**1. Fraud ⇐59(3)**

The value of corporate stock is determined by worth of corporate assets, rather than by market value of the stock.

**2. Fraud ⇐57**

In determining measure of damages for fraudulent procurement of sale of corporate stock, future prospects of the corporation, and fact that directors of another corporation had also become directors of the corporation, were proper elements to be considered in determining actual value of stock at time of its fraudulent purchase. Civ.Code, § 3343.

**3. Fraud ⇐58(2)**

Evidence supported finding that actual value of corporate stock purchased by plaintiff was not at time of purchase less than amount paid for the stock, and hence plaintiff was not entitled to recover damages for alleged fraudulent procurement of sale of the stock. Civ.Code, § 3343.

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Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by E. S. Kendrick against Sidney L. Schwartz and others, copartners doing business under the firm name and style of Sutro & Company and others, to recover damages which plaintiff claimed to have suffered because of fraudulent representations and deceit of defendants' agent in sale of 2,000 shares of corporate stock. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Lyndol L. Young, of Los Angeles, for appellant.

O'Melveny & Myers, Pierce Works, and L. M. Wright, all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff sought to recover a judgment in the sum of $7,440, damages which he claims to have suffered because of the fraudulent representations and deceit of defendants' agent in the purchase of 2000 shares of corporate stock of Menasco Manufacturing Company. The trial court rendered judgment in favor of defendants, from which plaintiff has appealed.

Defendants are stock brokers maintaining offices in Los Angeles and San Francisco, doing business under the firm name of Sutro & Co. After conversations with defendant Joyce, who was agent for the other defendants, plaintiff purchased 2000 shares of the capital stock of Menasco Manufacturing Company on December 23 and December 30, 1938, at prices ranging from four and one eighth to five and one eighth dollars per share. In his complaint plaintiff alleged that a number of false representations concerning the financial condition of Menasco Company were made by the agent of defendants for the purpose of inducing him to purchase the stock; that defendants were manipulating the price of the Menasco stock; that defendants concealed certain important facts from plaintiff concerning the dealings of the Sutro partners in the Menasco stock; that the Menasco Company was insolvent at the time of plaintiff's purchase and that its insolvency was known to defendants; that the stock was not worth more than one dollar per share. Plaintiff asked for judgment in the amount paid by him for the stock over and above the sum of one dollar per share.

All of the allegations concerning fraud and concealment were denied by defendants and the trial court found all of these issues in their favor. The court also found that the stock purchased by plaintiff was acquired in the open market and not from the partners or the customers of defendants. The trial court further found that plaintiff did not suffer any damages whatever because of the purchase of the stock and that "the actual value of the 2000 shares of Menasco Manufacturing Company stock purchased by plaintiff was not less than the amounts paid therefor by plaintiff at the time of said purchases."

On this appeal plaintiff contends that the findings are not supported by the evidence. Defendant Schwartz, senior partner of Sutro and Co., testified that in his opinion the Menasco stock was worth $5.50 per share on December 30, 1938. He further testified: "A. We form an opinion of the value of a stock largely by what it will bring. A thing is worth as much as it will bring, and here was a stock that in December some in excess of 100,000 shares of stock were sold and at prices varying from $4.40 to as high as $5.75. Well, certainly that must be taken in part as a yardstick to appraise the value of the stock. Certainly to a man holding a small block of stock like 2,000 shares it would be an indication what he could sell 2,000 shares for. There would be no mishap in disposing of it on the market. It would bring just what the market is. As far as balance sheet values, of course we like to look at balance sheets, we like to look at earnings, but we have to weigh the future prospects of a company because a stock, in my opinion, the value of a stock is a reflection of what it is going to do, not what it is but what are its prospects, what can be done with the company, what developments are there coming forth that will make the stock worth more in the public mind and push it up. A person who buys stocks buys stocks very largely with a speculative view of selling it at a higher price than he obtained it at. Therefore, my idea of the value of a stock is, firstly what will it bring; secondly we have to disregard book values because look at these tremendous plants in the east that have their plants written down at one dollar. They wouldn't sell it at book value. They would sell it at appraised value and the purchaser would pay something for what he thinks the stock of a company will produce in futurum, what it is going to earn, not today."

In answer to the question, "Well what brought the public in?" the witness answer-

ed: "The prospects of the company, the fact that it had Lockheed management, the fact that Lockheed had received large European orders, the fact that the Covic engine at that time looked as if it were to be a success, the fact that the whole prospect for the company had changed from a small company to a company that was going to grow into a very large operation, as it has done, all of which prospects were justified."

The witness Cyril Chappelet testified that he is a director of Lockheed Aircraft Corporation and also a director of Menasco Company. He stated that in his opinion in December of 1938 the business prospects of the Menasco Company were good. He further testified: "The Menasco Company had a development contract with the Lockheed Aircraft Corporation to develop what was called a unitwin power plant. This consisted of taking two of Menasco's in-line engines and hooking them together through a free wheeling device to a single propeller. The Lockheed Aircraft Corporation was vitally interested in this development and had started the design of an airplane in which this particular engine hookup would be incorporated. I believed that the prospects for the sale of that airplane and consequently the engines were excellent. In addition, Menasco Company's principal business was that of designing and manufacturing training engines, engines which were suitable for installation in training airplanes of the type used by our government and other nations. With the quickening of war conditions in the European theatre there was a decided interest on the part of not only the United States Government but other countries in training planes, as well as tactical planes, and I felt that the Menasco engine might very well play an important part in the training program throughout the world, at least in those nations in which we had sales contacts, and at that time the Menasco Company had developed some foreign contacts as well as domestic. In addition, the Menasco Company at that time had undertaken a contract with the Northhill Company to build a quantity of small diesel engines. As I recall that contract at that time was either 1000 or 1500 engines. We believed and I believed at that time that this would result in profitable and sustained business for the Menasco Company. Furthermore, as I recall, the Menasco Company at that time had taken or made a license agreement with the Antioch Casting Company, or whatever its name was, it was associated with the Antioch College, to produce castings by a novel process. It appeared to me that that had promise of good development for the Menasco Company. With those four principal sources of business, plus the miscellaneous machine shop type of business which the Menasco Company obviously was in a position to acquire from other companies who desired to do sub-contracting, or rather, to farm out their machine shop work, I came to the personal conclusion that the Menasco Company's business prospects were good."

[1-3] It appears from the testimony quoted above that in December of 1938 Menasco Manufacturing Company stock was selling at a price at times even higher than the price paid by plaintiff. But the market value of the stock, while being competent evidence of its value, is not the criterion to be followed by the court. It is provided in section 3343 of the Civil Code that one who is defrauded in the purchase of property is entitled to recover "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received * * *." The value of corporate stock is to be determined by the worth of the corporate assets rather than by the market value of the stock. Zinn v. Ex-Cell-O Corporation, 24 Cal.2d 290, 297, 149 P.2d 177; Note in 57 A.L.R. 1153. The future prospects of Menasco Manufacturing Company and the fact that Lockheed directors had become directors of Menasco were proper elements for the court to consider in determining the value of the stock which plaintiff had purchased. It is apparent that the testimony above quoted gives ample support to the finding of the trial court that the actual value of the shares purchased by plaintiff was not at the time of purchase less than the amount paid for the stock.

Since the finding on the element of damages is supported by the evidence it is manifest that plaintiff is not entitled to recover a judgment against defendants. Discussion of other issues is unnecessary.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

69 Cal.App.2d 164

## In re HOWARD.

District Court of Appeal, Third District, California.

May 10, 1945.

**1. Criminal law ⇐1202(1)**

Previous conviction in New Mexico of theft of personal property worth $45 which under California law would have constituted petty and not grand theft was erroneously considered in adjudging accused to be an habitual criminal. Pen. Code, § 644.

**2. Criminal law ⇐1208(3)**

The court cannot impose a greater penalty than that fixed by the statute violated.

**3. Criminal law ⇐991(2)**

An excessive sentence imposed upon erroneous adjudication that accused was an habitual criminal was a valid sentence for the term authorized by law and was void only to the extent of the excessive imprisonment imposed. Pen.Code, § 644.

**4. Criminal law ⇐991(2)**
**Habeas corpus ⇐30(3)**

Where petitioner had served more than term for which he could lawfully be imprisoned for crime charged in information, his continued confinement under portion of sentence imposed as result of erroneous adjudication that he was an habitual criminal was illegal and he was entitled to discharge on habeas corpus. Pen.Code, § 644.

Proceeding in the matter of the application of William Earl Howard for a writ of habeas corpus directed to Robert A. Heinze, Warden of the California State Prison at Folsom, to obtain release from custody.

Petitioner discharged.

William Earl Howard, in pro. per.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

PEEK, Justice.

By his petition for a writ of habeas corpus petitioner alleges that he is now unlawfully imprisoned and restrained of his liberty by the Warden of Folsom Penitentiary in that he has served the maximum term of imprisonment as provided by law on the legal portion of the judgment under which he was committed.

The information to which petitioner pleaded guilty and under which he was adjudged to be an habitual criminal, charged him with the commission of a prior felony in the state of New Mexico, for which he was convicted and served a term in prison in that state. Respondent concedes that the New Mexico conviction was for the theft of an overcoat and a lumber jacket of the value of $45, which, under the laws of the State of California, would have constituted petty and not grand theft; that it was not such a crime as is enumerated in Section 644 of the Penal Code, and petitioner has served more than the maximum term of imprisonment under the valid portion of the judgment. However, respondent questions the propriety of habeas corpus under the circumstances.

[1] On the authority of People v. McChesney, 39 Cal.App.2d 36, 102 P.2d 455, People v. Pace, 2 Cal.App.2d 464, 38 P.2d 202, and our recent decision In re Connell, 68 Cal.App.2d 360, 156 P.2d 483, we must hold that the trial court erroneously considered the New Mexico conviction as bringing the petitioner within the provisions of said Section 644.

[2, 3] A court cannot impose a greater penalty than that fixed by the statute violated. 13 Cal.Jur. 243, sec. 22. That is not to say that the excessive portion of the sentence herein attacked renders the judgment wholly void. It was a valid sentence for the term authorized by law, and was only void to the extent of the excessive imprisonment imposed. In re Williams, 4 Cal.App.2d 351, 40 P.2d 890.

[4] Therefore, as petitioner has now served more than the term for which he could be lawfully imprisoned for the crime charged in the information, his continued confinement is illegal (In re Morck, 180 Cal. 384, 181 P. 657; In re Leypoldt, 32 Cal.App.2d 518, 90 F.2d 91), and under such circumstances the writ of habeas corpus is available to him.

The petitioner is discharged.

ADAMS, P. J., and THOMPSON, J., concur.

## MILANA v. CREDIT DISCOUNT CO. et al.*

Civ. 14567.

District Court of Appeal, Second District, Division 3, California.

April 30, 1945.

Rehearing Denied May 25, 1945.

Hearing Granted June 28, 1945.

**1. Usury ⇐26**

A warranty of validity or worth of negotiable instrument or an account on sale thereof by payee, as at a discount, does not create debtor-creditor relation between seller and buyer, as basis for claim of usury.

**2. Usury ⇐117**

Evidence that discount company, after inspection of manufacturer's book accounts, agreed to advance money for pay roll, was insufficient to establish debtor-creditor relation contrary to subsequent written agreement for sale of accounts at a discount, and hence there was no basis for manufacturer's claim of usury.

**3. Usury ⇐26**

That discount company, designated in written agreement as buyer of manufacturer's current accounts at a discount, occasionally advanced sums on invoices issued shortly before shipment of goods, and had also charged manufacturer for telegrams, postage, and attorney's fees on collections, was not inconsistent with company's ownership of accounts of manufacturer, who alleged existence of debtor-creditor relation as basis for claim of usury.

**4. Usury ⇐26**

That discount company, which made continuing agreement to buy at a discount current accounts of manfacturer, who warranted payment in 60 days, frequently returned delinquent accounts to manufacturer, at least as book transactions, and that some of such accounts would later be resold to company at the usual discount, was not necessarily inconsistent with seller-buyer relation, as distinguished from debtor-creditor relation relied on by manufacturer as basis for claim of usury.

**5. Usury ⇐119**

In action based on claim of usury because of transfer at a discount of manufacturer's current accounts to discount company under written agreement ostensibly creating seller and buyer relation, construction of writings involved a question of law.

**6. Usury ⇐119**

In action based on claim of usury because of transfer at a discount of manufacturer's current accounts to discount company under written agreement ostensibly creating seller and buyer relation, contention that real agreement was entirely different and was to be inferred from parties' conduct presented a question of fact.

**7. Appeal and error ⇐927(3)**

On appeal from judgment of nonsuit, question was whether there was substantial evidence, in view most favorable to plaintiff, which would have supported a judgment for plaintiff.

**8. Contracts ⇐153**

Where contract is susceptible of two constructions, one lawful and the other unlawful, the former is preferred. Civ. Code, § 1643.

**9. Usury ⇐117**

In action based on claim of usury arising out of transfer of manufacturer's current accounts under written agreement for sale thereof at a discount, evidence justified finding that transactions involved sales of accounts and not loans.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Rose C. Milana, doing business as Liberty Embroidery Company, against Credit Discount Company and others, based on a claim of usury. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

David Schwartz and Samuel Mirman, both of Los Angeles, for appellant.

Earl E. Moss and C. V. Caldwell, both of Los Angeles, for respondents.

SHINN, Justice.

This is an appeal by plaintiff from a judgment of nonsuit in an action based upon a claim of usury. Plaintiff, Rose C. Milana, was engaged in the manufacture of embroidered articles which she sold to many retail establishments. Being desirous of securing funds with which to carry on her business, she arranged with de-



* Subsequent opinion 163 P.2d 869.

fendants Arthur Kramer and Charles Kramer, doing business as Credit Discount Company, to transfer to them current accounts owing by her customers. She entered into a written agreement with the defendants May 23, 1940, which designated plaintiff as seller and defendant Credit Discount Company as buyer, and provided in part as follows: "That seller agrees to sell, and buyer agrees to buy, from time to time, in separate schedules, all acceptable current accounts, bills receivable, trade acceptances, notes, and choses in action (all hereinafter for convenience sometimes designated as 'accounts') tendered to buyer by seller, and buyer agrees to pay therefor the full face value thereof less any discount shown on invoices relating thereto, and less a further discount of 2 per cent, said purchase price to be payable as follows: 85 per cent thereof concurrently with the assignment of the schedule of accounts in which the account purchased is listed, and the balance immediately after all of accounts listed in said schedule shall have been fully paid." A second agreement was made September 5, 1941, upon the same terms as the first, except that the discount taken by defendants was raised from 2 per cent to 2½ per cent. Between the date of the first contract and the institution of the action, plaintiff transferred many accounts to defendants pursuant to the agreements, of the face value of $63,649.83. She received from defendants in cash $44,731.29. Defendants charged as discount or profit the sum of $1,387.04. The difference between these two sums and the total face value of the invoices was made up of uncollectable accounts returned to plaintiff, customers' discounts, and a few minor charges. Defendants admitted that upon a settlement of accounts they owed plaintiff $107.48, payment of which had been tendered to plaintiff. It is not disputed that the sum of $1,387.04 was retained by defendants as the total of the discounts taken by them. Certain other charges for attorney's fees, postage, etc., which defendants deducted in their offered settlement, were in dispute, plaintiff contending that they were not authorized by the agreements. The latter items are not important, however, inasmuch as the total amount of the discounts taken by defendants would exceed the amount of interest which would have been earned at the rate of 10 per cent per annum upon the sums received by plaintiff from defendants covering the periods when defendants were out the use of their money. If the transactions amounted to loans, they were usurious; if they constituted sales of plaintiff's accounts, they were legitimate.

[1-4] The agreements were made upon defendants' printed forms, filled in to make them complete, but without other interlineations or changes. It is unnecessary to quote them in full. Plaintiff warranted that all accounts would represent bona fide sales of her merchandise, that there were no offsets chargeable against them, that the customers were solvent, and that the accounts would all be paid by the customers within 60 days after receipt of the goods. It was provided as follows: "That in the event from time to time, the accounts listed in any particular schedule, or any of said accounts, shall not be fully paid on or before the date fixed in seller's said guaranty, the deferred portion of the purchase price of the accounts listed in such particular schedule shall be applied by buyer to the payment of said unpaid accounts listed in said particular schedule, or such of them as buyer may select, but such application of the deferred portion of the purchase price of the accounts listed in such schedule shall not prejudice buyer in the enforcement of seller's warranties and/or guaranties, herein, for any sum not liquidated by such application." There was nothing in the agreements which could be construed as creating the relation of debtor and creditor. A warranty as to the validity or worth of a negotiable instrument or account, upon a sale thereof by the payee, does not create that relation between the seller and buyer. And there was nothing, except the warranties, which would have obligated plaintiff to make good any losses which defendants might sustain. In brief, the agreements throughout were consistent with the relationship of buyer and seller of book accounts, warranted to be good and collectable, and inconsistent with the existence of a debtor-creditor relationship. The entire theory of plaintiff's case is that the writings did not express the true agreement of the parties; that plaintiff did not in fact sell any of her accounts but only borrowed money from defendants from time to time and assigned the accounts as security, and that the terms of the agreement which provided for the sale and purchase of the accounts were employed as a screen for the loan of money at usurious rates. In support of this claim, plaintiff testi-

fied to the circumstances of her meeting with defendant Arthur Kramer. She had been referred to Mr. Kramer as one from whom she might receive financial assistance in her business, and she gave the following account of her conversation with him at the first meeting: "A. I said I wanted to borrow some money and I had a lot of good accounts, shipping merchants, and he looked at the book and he agreed with me that they were all good accounts, and he said he would charge me 2 per cent on what I got out of the invoice and for me to send the statement through the mail. I told him that I needed some money right away to meet the payroll, and he said, 'How much do you have on your books for which you did not get paid?', and I told him and I told him, 'I don't know but between $10,000.00 and $20,000.-00', and he said, 'Make out the schedule and come to my office and you will get some of the money right away, and as soon as you sign the agreement you will get the balance.'" This testimony is referred to by appellant as "preliminary discussions which established the relationship of lender and borrower, rather than that of seller and buyer." It constituted all of the evidence of conversations between the parties preliminary to the execution of the written agreement, which followed immediately, and was manifestly insufficient to override the plain terms of the agreement, and thereby convict defendants of engaging in forbidden and fraudulent transactions. Plaintiff places further reliance upon the manner in which the business was transacted, to support her charge of usury, contending that the practices which were followed were inconsistent with defendants' ownership of the accounts. The practices upon which plaintiff places this construction were the following: that defendants at times "advanced" plaintiff sums upon invoices which were issued shortly in advance of the shipment of goods. Defendants admitted having made such advances upon occasions when plaintiff needed money for the fulfillment of orders on hand, but they contended, and correctly so far as the record shows, that these sums were charged against the reserve which was always maintained in some amount and which was made up by deductions equal to 15 percent of all invoices, under the terms of the agreement. Appellant points out that defendants had charged plaintiff the sum of $203.09 for telegrams, postage, and attorney's fees on collections, which charges, it is said, were inconsistent with defendants' claim that the accounts receivable were purchased by defendants. The making of these charges, even though not authorized by the contract, having resulted, so far as shown, from a bona fide effort to make collections, was not inconsistent with defendants' ownership of the accounts, since it was obviously to the advantage of plaintiff, as well as of defendants, that the accounts be collected promptly. Our attention is called to a particular transaction of November 28, 1941, when a schedule of accounts was made up totaling $2,290.07 and which defendants "rebought," although they had previously been assigned to defendants. A point is made of the fact that upon this so-called repurchase there was a discount of 2 or 2½ per cent and it is argued from this fact that title to the accounts had never been transferred to defendants; otherwise defendants could not have repurchased them from plaintiff. The record discloses that the trial court had before it evidence which purported to explain the nature of this and other similar transactions. It appears that there were many times when delinquent accounts were returned to plaintiff, at least as book transactions. There was evidence that she would be credited with the face value of these accounts without deduction for the discounts originally taken. At times some of the returned delinquent accounts would be rescheduled and resold to defendants at the usual discount. There was nothing in the contract which called for the reassignment to plaintiff of delinquent accounts nor was there anything to prevent it. Defendants would have had the right to call on plaintiff under her warranty to make good on all the accounts which were not collected within 60 days. They did not stand upon that right and the practice was developed of continuing to treat some of the delinquent accounts as live accounts, and it may be that this was done because they were generally still good accounts, although they had not been paid within 60 days. That they should have been treated as good accounts and should have been returned to plaintiff, rescheduled and resold to defendants as a book transaction appears as a mere detail of the business. It was a logical way of continuing the financing of plaintiff's business and it amounted to no more than a temporary waiver by defendants of their right to call upon plaintiff to make good

her warranty. There was nothing in this practice which was necessarily inconsistent with the relationship of buyer and seller.

[5-8] Plaintiff's entire argument is founded upon the matters which we have discussed, that is to say, she relies for her claim of usury not upon the written agreements which she made, but upon extrinsic evidence as to the construction placed upon them by the manner in which the parties operated under them. She contends that the true intentions of the parties, their understanding of the agreements, and the relationship which they created are to be inferred from the manner in which they carried on their business. The question presented to the trial court was as to the nature of the agreements under which the transactions were had. The construction of the writings involved a question of law. The trial court properly construed them as agreements for the purchase of plaintiff's accounts and not for loans of money. But the contention that the parties in reality made an agreement wholly different from the one which they expressed in writing, and the nature of which was to be inferred wholly from their conduct, presented a question of fact. The question on this appeal from a judgment of nonsuit is whether there was substantial evidence, in the view most favorable to plaintiff, which would have supported a judgment in her favor. It was, without doubt, permissible, under the evidence, for the court to construe the conduct of the parties as entirely consistent with the terms of the written agreements. It may be conceded that, as plaintiff contends, the manner in which the accounts were handled was not inconsistent with the existence of the debtor-creditor relationship which it would have been necessary for plaintiff to prove in order to support her claim of usury. But this conceded fact is negative in character and, standing alone, could not be accepted as sufficient to prove the making of a usurious contract. Plaintiff testified that she spoke to defendant Arthur Kramer about borrowing money. His response was to submit to her the written agreement which she signed. The written agreements were the only ones entered into by the parties; there was no evidence of any other. This is made perfectly clear if we suppose a case in which the defendant herein would be endeavoring to recover against plaintiff for money loaned. Upon the record which is before us there would not be a scintilla of evidence to prove an obligation of plaintiff herein to repay the sums received as loans made to her. Where a contract is susceptible of two constructions, one lawful, the other unlawful, the former is preferred. Civil Code, sec. 1643. It is, however, unnecessary to rely upon this rule because we think all of the substantial evidence tended to prove the making of a lawful agreement.

[9] The trial court was justified in concluding that the transactions involved sales of accounts and not loans. There was not sufficient evidence to have justified a finding that the writings did not express the true agreement of the parties.

The claim of usury was the sole matter in issue and was not sustained. Plaintiff was not suing for any balance that might be found due her upon an accounting and no judgment could have been entered in her favor for any money that may be due her. The judgment of nonsuit was proper.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.




69 Cal.App.2d 147

**In re MARIN'S ESTATE.**

**BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. ROBBINS et al.**

**Civ. 14771.**

District Court of Appeal, Second District, Division 2, California.

May 9, 1945.

Hearing Denied July 5, 1945.

**1. Appeal and error ⇐1008(3)**

Where construction given to instrument by trial court is reasonable and appears to be consistent with intention of party making it, appellate courts will not substitute another interpretation for that of trial court, notwithstanding it may seem equally tenable.

**2. Wills ⇐457**

The statutory rule requiring technical words in will to be given their technical sense did not apply to will which provided for disposition of personalty without mentioning war bonds, which will was drawn by attorney who was asked to copy a provision of previous will prepared by another attorney, and who was not made aware of fact that testatrix kept any bonds. Probate Code, § 106.

**3. Property ⇐4**

The expression "personal property" in its popular meaning, different from its technical meaning, is often used in a more restricted sense embracing goods and chattels only.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property".

**4. Wills ⇐443, 470**

In interpreting a will, general intention of decedent governs and must be discovered from examination of all provisions of will, and meaning of particular phrases must be subordinated to dominant purposes of decedent.

**5. Wills ⇐565(1)**

Under will bequeathing to a doctor all of testatrix' "personal property, household furniture, furnishings, bric-a-brac ornaments and equipment" located on realty devised to him, expression "personal property" was used in its popular sense and hence did not include war bonds, where quoted provision was copied by attorney from copy of will previously executed at time when testatrix had not purchased the bonds.

**6. Wills ⇐565(1)**

Under rule of ejusdem generis, a gift of personal property in general terms together with enumeration of certain classes of personalty is generally limited to articles of classes which are enumerated specifically.

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Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Carrie W. Marin, deceased, wherein Bank of America National Trust & Savings Association filed a petition and David Robert Robbins, M. D., contested distribution of the estate in favor of Herman Marin and another. From an order of the probate court by which the contestant was denied distribution of war bonds, the contestant appeals.

Affirmed.

James E. Collins and Harold F. Collins, both of Los Angeles, for respondent Bank of America.

Hazard & Reina, of Beverly Hills, for appellant David Robert Robbins, M. D.

James Cleary, of Battle Creek, Mich., for legatee and respondent Herman Marin.

McPherson, Harrington, Waer & Cary, of Grand Rapids, Mich., for legatee and respondent Hattie Marin.

W. J. WOOD, Justice.

David Robert Robbins has appealed from an order of the probate court by which he was denied distribution of United States War Bonds of the value of $12,000, and by which the will of Carrie W. Marin was given the interpretation that these bonds became a part of the residue of the estate.

Carrie W. Marin died on September 4, 1943, leaving her last will dated August 16, 1943. The will had been prepared by James E. Collins, an attorney at law, and was attested by witnesses.

The twelfth and thirteenth articles of the will provide as follows:

"Twelfth: I give, devise and bequeath to David Robert Robbins, M. D., whose office is in Room 618, Brockman Building, Los Angeles, the real property, and the residence situated thereon, located at and known by the street number as 2643 Hillcrest Drive, Los Angeles, California.

"The said real property and the house thereon are, and constitute my residence.

Thirteenth: In addition to the above devise and legacy, I also give, devise and bequeath to said Dr. David Robert Robbins all the personal property, household furniture, furnishings, bric-a-brac ornaments and equipment of whatsoever nature or description which may be located in, upon or about said residence or real property at the time of my death. The above devise and bequests are made by me because of my great appreciation of Dr. David Robert Robbins' continued and devoted kindness to me and my husband."

Before her death decedent had been a patient of appellant, a physician and surgeon, for approximately fifteen years. Decedent's husband, Morris Marin, who predeceased her by six or seven years, had

also been a patient of appellant. No children were born of the marriage of decedent and her husband. The residuary legatees and beneficiaries, Hattie Marin and Herman Marin, are the daughter and son, respectively, of decedent's husband from a former marriage.

The court found that at the time of decedent's death there were located in her residence, 2643 Hillcrest Drive, Los Angeles, two war savings bonds of the face value of $5000 each and two war savings bonds of the face value of $1000 each. The court also found that decedent during her lifetime had a safe deposit box in the vault of a Los Angeles bank, which she had entered several times shortly before her death; that the bonds had been purchased prior to the execution of decedent's last will; that the approximate value of decedent's estate was $85,758.69 and that the approximate value of the residuary estate was estimated by the executor to be $60,000; that it was the intention of the testatrix that the bonds of the face value of $12,000 which were found in the residence should not pass under the thirteenth article of the will to appellant but that they should become a part of the residue of the estate.

[1] The probate court placed a reasonable construction upon the terms of the will. It is well established that where the construction given to an instrument by a trial court is reasonable and appears to be consistent with the intention of the party making it, appellate courts will not substitute another interpretation for that of the trial court, even though it may seem equally tenable with that given by the trial court. In re Estate of Northcutt, 16 Cal.2d 683, 690, 107 P.2d 607, and cases there cited.

It is important to note that Mr. Collins, the attorney who drew the will, testified that he had prepared another will for decedent on May 5, 1939, which contained a provision similar to that contained in article thirteen of the will now before the court and that when he prepared the 1939 will decedent had given him a will dated January 14, 1937, which had been prepared by another attorney, since deceased; that decedent had told the witness that he should copy into the will he was drafting the provisions of the older will. The will prepared in January, 1937, was presented in court and it shows that appellant was given the Hillcrest Street residence and "all the personal property, household furniture, furnishings, bric-a-brac, ornaments and equipment of whatsoever nature or description which may be located in, upon or about said residence or real property at the time of my death." The witness further testified that when the last will was drawn there was no conversation with decedent about the thirteenth article of the will. The bonds which are the subject of this appeal were purchased long after the execution of the wills of 1937 and 1939. All of the bonds were purchased after January 1, 1942, and before the date of the execution of the will now before the court.

[2] Appellant relies upon the rule set forth in section 106 of the Probate Code that "technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense." It is true that the will in question was drawn by an experienced lawyer, but the reason for the rule disappears when it is shown that the lawyer was merely given a prior will from which the thirteenth article was to be copied, and when it is recalled that the bonds involved were not purchased until after the will containing the original provision had been executed. Moreover, the rule loses much of its force when it is not shown that the lawyer who drafted the will was aware of the fact that decedent kept any bonds at her residence. In 2 Page on Wills, 3rd Ed.1941, sec. 921, p. 825, the author states: "If the will was drawn by a lawyer and it is not shown that he was acquainted with the facts which were involved, words may be construed in their usual or popular sense. * * *"

[3-6] The expression "personal property" has a popular meaning different from its technical meaning. "In its ordinary and popular sense, however, it is often times used in a more restricted sense embracing goods and chattels only." Bills v. Putnam, 64 N.H. 554, 561, 15 A. 138, cited with approval in Re Estate of Puett, 1 Cal.2d 131, 134, 33 P.2d 825. It is a fundamental rule in the interpretation of wills that the general intention of the decedent should govern, to be discovered from an examination of all the provisions of the will. The meaning of particular phrases is to be subordinated to the dominant purposes of decedent. Estate of Puett, supra. In view of all the circumstances surrounding

the execution of the will now before us we are satisfied that the trial court was justified in ruling that the expression, personal property, was used in its ordinary and popular sense. The conclusion of the court is given added justification by the application of the rule of ejusdem generis. In referring to the use of the expression, personal property, in a will it is stated in 3 Page on Wills, 3rd Ed.1941, sec. 964, p. 45. "A gift of personal property in general terms together with an enumeration of certain classes of personal property is generally held to be limited to articles of the classes which are enumerated specifically."

The order is affirmed. Respondent executor to recover costs on appeal.

MOORE, P. J., and McCOMB, J., concur.




69 Cal.App.2d 28

**CONGER v. WHITE et al.**

**Civ. 14679.**

**District Court of Appeal, Second District, Division 3, California.**

**April 30, 1945.**

**Supplemental Opinion May 21, 1945.**

**1. Evidence ⇐589**
**Witnesses ⇐362**

In action for fraud committed upon plaintiff pursuant to an alleged conspiracy, testimony of one defendant, who was an accomplice and had been convicted of a felony, connecting other defendant with the transaction was required to be looked upon with suspicion.

**2. Witnesses ⇐370(1)**

That witness had a poor opinion of defendant and was unfriendly toward defendant could be considered in weighing testimony of witness as to defendant's alleged admissions to witness.

**3. Fraud ⇐58(1)**

Evidence was sufficient to connect defendant with conspiracy to defraud plaintiff in the sale of each of three parcels of real estate to her.

**4. Evidence ⇐574**

In action for fraud in sale of land to 81 year old widow at from $135 to $195 an acre, testimony of witness, who was duly qualified as an expert, and who had taken usual means of investigation to familiarize himself with property values, that market value of land in question was $17.50 per acre was of sufficient probative value to authorize jury acceptance of his appraisal in preference to valuation of $50 per acre given by defendant's expert who based his opinion upon hypothetical and nonexistent factors.

**5. Trial ⇐206, 210(1)**

The code section authorizing instruction that testimony of an accomplice should be viewed with distrust and that testimony of oral admissions of a party should be viewed with caution, is constitutional. Code Civ.Proc. § 2061, subd. 4

**6. Trial ⇐235(6), 236(1)**

In fraud action based upon sale of three parcels of real estate, where resort to testimony of codefendant, who was an accomplice and who had been convicted of a felony, was required along with circumstantial evidence to connect defendant with second and third transactions, denial of defendant's requested instructions that testimony of an accomplice should be viewed with distrust and testimony of oral admission of a party should be viewed with caution and that jury should consider the felony conviction of witness in judging his credibility was error. Code Civ.Proc. §§ 2051, 2061, subd. 4.

**7. Trial ⇐140(1)**

Proof that witness has been convicted of a felony must be given some weight, but determination of full effect of such proof is for jury. Code Civ.Proc. § 2051.

**8. Trial ⇐206**

Where testimony of two witnesses with regard to alleged oral admissions by defendant, one of which witnesses was unfriendly to defendant, was capable of more than one construction, defendant's requested instruction that testimony of oral admissions of a party should be viewed with caution, should have been granted. Code Civ.Proc. § 2061, subd. 4.

**9. Appeal and error ⇐1064(1)**

Where issues in fraud case were clearly defined and representations upon which plaintiff relied were specifically pleaded

and were stated with great particularity in instructions and jury were told that, unless plaintiff proved by preponderance of evidence that one or more of such representations had been made and that it was a material representation, verdict must be for defendant, the error in modification of instruction which was wholly irrelevant to the issues, by adding words which implied that defendants should have delivered to plaintiff a copy of a report by real estate commissioner, was harmless.

**10. Fraud ⇐60**

In action to recover damages for fraud practiced upon plaintiff in the sale to plaintiff of certain real estate, jury had discretion to allow interest notwithstanding that there had been no rescission of the purchases. Civ.Code, § 3288.

**11. Fraud ⇐60**

Where recovery is for fraud and jury allows interest, award of interest should run from date when money was paid or property lost. Civ.Code, § 3288.

**12. Action ⇐38(1)**

Complaint alleging a conspiracy between defendants to defraud plaintiff by selling her speculative oil properties, pursuant to which plaintiff was sold three parcels of realty in transactions so interwoven that it would have been impossible for plaintiff to prove fraud in second or third purchases without first proving fraud in the first purchase, stated a single cause of action for fraud.

**13. Action ⇐38(1)**

In action for damages for fraud a complaint, which alleges a series of fraudulent acts committed in execution of an entire scheme to divest plaintiff of his property, states a single cause of action.

**14. Trial ⇐307(1)**

Computations made by counsel and used in arguments are not evidence and, if reduced to writing, except by jurors, their use in jury room is unauthorized. Code Civ.Proc. § 612.

**15. Trial ⇐307(1)**

Action of juror in taking from a blackboard and into jury room a sheet of paper upon which plaintiff's attorney had entered his computation of damages was improper, but use of figures by jury was not necessarily prejudicial to defendant. Code Civ. Proc. § 612.

**16. Trial ⇐307(1)**

Where juror, in full sight of the court and defendant's counsel, took from a blackboard and into jury room a sheet of paper on which plaintiff's counsel had entered his computation of damages, and defendant made no objection at the time, subsequent objections on motion for new trial after adverse verdict and on appeal were too late. Code Civ.Proc. § 612.

**17. Appeal and error ⇐1140(1), 1172(4)**

In action for fraud based upon sale to plaintiff by defendants of three parcels of realty, where it was apparent that verdict for plaintiff with respect to first transaction, which accounted for half plaintiff's loss, would have been returned regardless of errors, District Court of Appeal affirmed verdict in so far as it applied to first transaction and reversed and remanded with respect to second and third transactions and reduced award of exemplary damages by half, with provision that, if plaintiff would file a written consent to a specified remission, judgment would be affirmed. Rules on Appeal, rule 24b.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Caroline Conger against Harry White and others to recover damages for fraud. From a judgment for plaintiff, defendant James M. Gordon appeals.

Reversed and remanded for a new trial in accordance with opinion.

Maurice Gordon, of Los Angeles, for appellant.

William B. Etheridge, of Pasadena, for respondent.

SHINN, Justice.

Plaintiff won a verdict for $17,003.92 (including $5,000 as exemplary damages) against Harry White and appellant, James M. Gordon, as damages sustained in three purchases of real property in Tulare County, which purchases were found to have been induced by fraudulent representations of the defendants. Defendant Gordon appeals.

The first purchase was on December 6, 1940, of 40 acres for a price of $5400 in cash and the transfer by plaintiff of 16 acres in the same vicinity; the second on January 3, 1941, of 20 acres for $2700, and the last one on February 11, 1941, for a

price of $3000. In the second transaction plaintiff repurchased 15 of the 16 acres she had parted with in the first transaction, although she alleged she did not know this at the time. As the several sales were agreed upon with plaintiff, the land would be purchased from the owner and subdivider, one Murray Blank, in the name of an employee of White, who would convey to plaintiff. The purchases from Blank were at $35 per acre. Plaintiff is a widow 81 years of age. White had made heavy purchases of grazing land from Blank ($175,000 over a three year period), reselling it to the public as oil land. Plaintiff had purchased her 16 acres from Gordon in 1939 at a price of $150 per acre. In White's first conversation with plaintiff he represented that he was the agent of the Northwest United Oil Company and was acting for the company in acquiring land to sell to a major oil company, that the transaction had been arranged, the oil company had placed its money in escrow, that the sale would be completed in about two months, or as soon as the desired land could be secured, and that plaintiff would at least double her money when the deal was closed. He also represented that the land was assessed at $300 per acre as grazing land. In her first purchase plaintiff gave her check for $5400 and a deed to her 16 acres and received a deed of 40 acres from White's employee. On the following Christmas she received a box of candy from Northwest company, with a card from White, and a box of crystallized fruit from Gordon. The representations were repeated by White in the second sale and it was urged upon plaintiff that the more land she had to turn over to the major oil company the more money she would make. In the last sale of 20 acres White represented also that the oil company would not take a tract of less than 80 acres and that plaintiff would have to buy an additional 20 acres so that her land could be included. He also represented that plaintiff would then own 80 acres in one piece. The facts were that the Northwest company was a fictitious name under which White transacted business, the land was assessed at only $6 per acre, there was no deal in prospect with any oil company, and the three parcels were not contiguous, one of them being six miles distant from the other two.

Appellant does not suggest that there was a semblance of honesty in the transactions but he earnestly asserts that there was insufficient evidence to connect him with them, especially with the second and third. The salient features of the evidence as to appellant's participation in the fraud are the following: White, who was a stranger to plaintiff, called upon her at the apartment house where she lived in Pasadena, representing himself as desirous of purchasing her 16 acres for the Northwest company. Plaintiff told him she had promised appellant not to dispose of the land without first consulting him. White finally proposed to sell plaintiff 40 acres. He had not intended to buy her land but offered to take it in as a part of the deal. Appellant put in an appearance at this time, which White testified was in accordance with an arrangement which they had. Plaintiff introduced the two and neither acknowledged any previous acquaintance, although they had known each other for several years. The three went to plaintiff's apartment where White, in the presence of appellant, repeated his representations and his proposal to sell plaintiff 40 acres. Plaintiff declined to purchase more land and the defendants left without transacting any business with her. Shortly thereafter White called upon plaintiff again with the same proposition. He testified that he had originally intended to sell plaintiff land in Fresno or Kings County but that appellant advised him to sell her land in Tulare County, where she already had land, stating that plaintiff would offer little resistance to a sale of Tulare County land; that he, White, offered to give appellant fifty percent of the profits on the deal; that between his first and second visits he frequently talked with appellant and it was arranged that when White called upon plaintiff again he would let appellant know so that the latter could be in his office to receive a telephone call; that appellant agreed and stated that he would expect half of the profits. Upon White's second visit plaintiff was still unwilling to buy land but at White's suggestion, she called appellant, who promptly arrived on the scene. White thereupon repeated his statements concerning the land in the presence of appellant but was unable to persuade plaintiff to buy the 40 acres. He finally left the room for fifteen or twenty minutes, at appellant's request, in order that appellant might discuss the matter privately with plaintiff. During his absence appellant said to plaintiff, according to her tes-

timony: "It is a good investment; it is good land; White is a good man; he understands the oil business and his proposition is fair all right; there is a good chance in this investment, and I would advise you to go into it. In fact, I believe if I had the funds, I would go in it myself." Plaintiff was convinced and, at appellant's request, called in White, and appellant told him that plaintiff had decided to make the investment. Plaintiff then wrote a check for $5400 and delivered it to White in the presence of appellant. She testified that she believed and was convinced by appellant's statements that it was a safe investment and that she could rely upon what White told her. White testified that he cashed plaintiff's check, paid for the land, and gave appellant half of the profits in cash. He did not deny having represented that the land would be turned over to an oil company at a large profit but testified that he was only repeating what appellant had told him. White also testified that he talked with appellant after the first sale, that appellant told him he thought plaintiff would repurchase the 16 acres, and that after she had done so he gave appellant $1250 as his share of the profits; that thereafter appellant told him that plaintiff would probably purchase another 20 acres and that after she had done so he paid appellant half of the profits of the sale. He further testified that he and appellant negotiated with Blank for the purchase of the several parcels and that appellant had paid him, White, five percent of $4400, which appellant had received in the transactions, under an agreement that White was not to report payment of any sums to appellant as income, and that the five percent should be used in paying the increased income tax which White would have to pay.

Appellant had become acquainted with plaintiff in 1935. He traded her a small piece of property for two bonds that were in default. Later he acquired two deeds of trust from plaintiff in exchange for real property. He testified that he "advised" plaintiff to make the exchange of her trust deeds; that in 1939 he "recommended" to her that she exchange the property he had first traded to her for 16 acres in Tulare County, which she did. None of the properties were shown to plaintiff. While appellant apparently considered himself to be in a position to advise and recommend investments for plaintiff, it did not appear that his advice had been sought by plaintiff or that he had given her advice upon other occasions prior to the purchase of the 40 acres. Appellant's testimony consisted of denials of any and all participation in the three transactions with plaintiff. He testified that he was present when White was discussing plaintiff's 16 acres and that the only advice he gave plaintiff was that she close any sale she might make through a bank escrow; that he left plaintiff's apartment before White did and did not learn for some time thereafter that plaintiff had purchased any land. He testified that he had known White for several years but had never had any dealings with him. He denied in toto plaintiff's testimony as to his statements concerning White and the merits of his offer and he denied having received any money from White at any time. Appellant did not see plaintiff or talk with her again until after she had made her third purchase.

Murray Blank testified that some two weeks prior to the first sale to plaintiff, appellant came to his office seeking to buy land, told him that he had a partner in the deal, negotiated for land at $35 per acre, came back later with White, and then said that he and White would sell pretty nearly all of Blank's land; that appellant and White came to his office together when the 40 acres were purchased. The witness also testified that he had been selling prospective oil lands to White and appellant for several years; that for about two weeks prior to the purchase of the 40 acres the two were in his office together frequently and that appellant then told him that he and White were going to work together on the property; that he had seen money pass between White and appellant in his office, mostly from White to appellant; that during the month or five weeks in that interval they had been in his office together twenty or twenty-five times. He also testified that in the early part of January, 1942, he had talked with appellant regarding the transactions with plaintiff. Plaintiff's attorney had interviewed him and told him that he was opposing White's release from prison on parole; that he, Blank, sent for appellant, told him of his talk with plaintiff's attorney and also that Mrs. White had telephoned about White's efforts to obtain parole and he urged that a settlement be made with plaintiff. He testified that appellant said: "Well, I don't like White; he betrayed me and I would

rather see him suffer; he stole $8,000 out of that money that he received from that lady for which he didn't account to me" and said further, "I will speak to my brother, who is my lawyer, and see what he says about it." He also testified, "Gordon got fifty percent of $8,000; that is what he said to me." The witness confessed to a strong dislike for appellant and was outspoken in his criticism of the transactions with plaintiff. George Manns, who was White's attorney, testified to a conversation with appellant in February, 1942, in which he told appellant that he had heard from White (who was then in State's Prison) that White was not going to report as income the "moneys" he had paid appellant in 1941, and that appellant had replied that White had agreed to report "those moneys" and that as far as he was concerned that was the end of it.

[1-3] For reasons which will be stated, it is necessary to consider not only the legal sufficiency of the evidence but also the weight of the evidence which was relied upon to connect appellant with the several sales. There were some contradictions in the testimony of plaintiff and also in that of White and some contradictions between the testimony of the one and that of the other, but they related to immaterial matters. Those found in plaintiff's testimony were only such as might have been expected, considering her age and the lapse of time since the events she was describing. Plaintiff gave a clear account of the representations of the defendants and her testimony was strongly corroborated by the circumstances under which she parted with her money. That the testimony of White should have been looked upon with suspicion cannot be gainsaid. It is open to doubt whether, standing alone, it would have carried sufficient weight to convict appellant of fraud. The witness Blank had a poor opinion of appellant and was unfriendly toward him, which was to be considered in weighing his testimony as to appellant's alleged admissions. Appellant's explanations were not too plausible. He insisted that he actually believed White was not intending to sell plaintiff any property but only to buy what she then owned, at a price that would give her what it had cost her. He testified that he left White in the company of plaintiff without any thought that White would try to sell her any land. But in this connection it is noteworthy that he also testified that he had had a previous experience with White, when the latter had made trouble for him with one of his clients, to whom White had made sales amounting to $18,000 or $20,000 and which, he testified, he naturally resented. It is not surprising that the jury rejected this confession of naivete upon the part of an experienced dealer in oil expectancies and believed plaintiff's testimony that it was appellant's assurances that caused her to make the second and third purchases as well as the first. If appellant had not been interested in the result, he undoubtedly would have looked upon White as a trespasser. Appellant did not claim that he had warned plaintiff not to purchase land from White or that he had communicated with her to find out whether she had done so or whether she had sold her land to White. This was not the conduct of a man who was interested in seeing that plaintiff did well with the land which he had sold her, and yet that is the attitude which he professed to hold. It is true there was no direct corroboration of White's testimony that he had divided the profits with appellant. It is, however, scarcely conceivable, assuming the truth of plaintiff's testimony, that he did not receive any of the profits from the first sale. And if he did and his share was paid in cash, he probably would have received his share of the other profits in the same way. And if he recommended White as an honest and reliable man and his proposal as a good one, he should have expected White to take advantage of the recommendation for the purpose of making other sales. There is little doubt in our minds that appellant knew what was likely to happen to plaintiff if she was not warned against White, and it appears probable that with slight encouragement from appellant she would have refused to purchase any land. If the jury believed that he conspired with White to sell land to plaintiff at $135 per acre ($195 per acre on the first sale if the cost to plaintiff of the 16 acres is included), they would have been legally justified in accepting the circumstantial evidence, with the testimony of White, Blank and Manns, as sufficient to connect him with the other sales. There was not such an entire absence of evidence, direct and circumstantial, to connect appellant with the three transactions, as to require a reversal or modification of the judgment upon that ground alone.

[4] Appellant's second contention is that there was insufficient evidence to establish the value of the land which plaintiff acquired, and which was necessary in order

to fix the damages. One expert witness, Elmer F. Karpa, testified for plaintiff. He conducts a real estate brokerage and appraisal business and a loan business at Bakersfield. He had been buying and selling land in the San Joaquin Valley since 1920, and had been acting as a broker since 1926. He had taken a university extension course in appraising and had a wide and varied experience as an appraiser and upon voir dire examination testified to having taken the usual means of investigation and examination to familiarize himself with values. There was nothing unsound in the basis of his opinions and his conclusions appeared to have been the result of careful study. His testimony was not without probative value and the jury were warranted in accepting his appraisal of $17.50 per acre as the market value of the land, in preference to the valuation of $50 per acre given by defendant's expert, who based his opinion upon the hypothetical existence of active drilling in the vicinity, although no well was being drilled.

[5-7] Appellant requested separate instructions to the effect that the testimony of an accomplice should be viewed with distrust and the testimony of oral admissions of a party with caution. White had admitted upon cross-examination that he had just served a term of imprisonment upon conviction of a felony, and appellant requested an instruction to the effect that the jury might consider that fact in judging of his credibility and the weight to be given to his testimony. The instructions were refused and no instruction was given which purported to cover the same rules of evidence. Section 2061, subdivision 4, of the Code of Civil Procedure provides that cautionary instructions such as those requested be given in proper cases respecting the testimony of accomplices and testimony of oral admissions of a party. In People v. Dail, 1943, 22 Cal.2d 642, 140 P.2d 828, it was held that such instructions should be given in proper cases and that the failure to give them might constitute reversible error. The court disapproved of earlier cases which had held subdivisions 3 and 4 of the section to be unconstitutional and other cases in which such instructions had been said to state mere common places with which all jurors were familiar, and which had held the failure to give them to be harmless error, if error at all. The evidence, as related to the second and third transactions especially, called for proper instructions as to the rules by which the testimony of White should be weighed. His testimony was not only that of an accomplice but of one who had been convicted of a felony as well. The jury should have been instructed in accordance with the provisions of section 2051 of the Code of Civil Procedure, that the fact of his conviction should be taken into consideration in judging of his credibility. There is no rule of human experience which furnishes a pattern for the appraisal of the veracity of every man who has been convicted of a felony and the law does not provide one. Neither does it allow the fact to be ignored, for it declares that it is one to be considered. We would not undertake to say how a jury would go about it to reach a conclusion as to the degree of credibility which a witness loses through proof of his conviction of a felony, but the law declares, in effect, that it has some weight and leaves it to the jury to determine the effect of it. That perhaps would not be more difficult for a jury to do than it would be to determine the weight of a disputable presumption as opposed to the reasonable and logical testimony of witnesses, and this is held to require no psychic powers. In all events, the code specifies how a witness may be impeached and it is not for the court to say that this law is meaningless.

[8] The instruction as to oral admissions would have been pertinent in weighing the testimony of the witnesses Blank and Manns. The first of these testified to appellant's statement that White had made away with $8,000 of plaintiff's money without accounting to him for it and that appellant expected half of the profits. That statement might or might not have been considered as relating to a pre-existing agreement as to the second and third sales; $8,000 would be the approximate sum which White would have retained for himself as profits in the later sales after he had divided with appellant the profits from the first one. And Blank, it will be remembered, was not a friendly witness. The statement of appellant, testified to by the witness Manns as having been made in connection with White's income tax return, is given reference to the later transactions only because the witness used the word "moneys" in his own statement and in that of appellant. It is clear from a reading of his testimony that his account was no more than a report of the conversation in his

own language. He was not asked to give his exact words or those of appellant. The word "moneys" was expressed by way of narration and not quotation, and an entirely different interpretation could have been placed upon it if the witness had happened to use the word in the singular. It could then have been understood to refer only to the first transaction. The testimony of both witnesses illustrates the necessity for caution in the consideration of testimony of oral admissions. Each of the requested instructions was of vital importance to appellant and the failure to give them was prejudicial error. Nevertheless, due to the particular circumstances of the case, in which each of the three transactions was severable from the others, and to the evidence which clearly distinguished the first transaction from the other two, we do not regard the failure to give the instructions as a ground for an unconditional reversal of the judgment. It is true that the credibility of defendant White was involved in the whole case. His testimony implicated appellant in all of the transactions. It was strongly corroborated as to the first transaction but scarcely corroborated at all as to the others. The evidence, other than that furnished by his testimony, was convincing as to appellant's guilty participation in the sale of the 40 acres, but there was no evidence at all of his connection with the second and third sales except the testimony of White and certain equivocal oral admissions by appellant which might or might not have been considered as relating to the later sales. We consider it entirely improbable that the verdict as to the first transaction would have been different if the three instructions had been given. There is, in our opinion, a strong probability that plaintiff would succeed in establishing appellant's responsibility in the first transaction, however often the issue might be tried, even though no weight whatever were given to the testimony of White. Plaintiff's testimony, however, did not connect appellant with the second and third sales; he did not negotiate with Blank for the purchase of those parcels and it did not appear that he retained an interest in the 16 acres in the settlement with White after the first sale. Mrs. Conger did not consult appellant with reference to the later purchases. It may be conceded that it would have been unreasonable to suppose that appellant would knowingly have allowed White to keep all of the profits in the later transactions if he had known of them at the time, but it is quite reasonable to suppose that White would have concealed those transactions from appellant and kept all the profits for himself if he had been able to do so. We conclude it to be not improbable that if the instructions had been given, the jury would have decided that the evidence was not sufficient to establish appellant's connection with the second and third sales. Our view as to a proper disposition of the appeal under the circumstances will be expressed later.

[9] Appellant complains of the modification of another instruction which he requested. It stated some of the features of the law with respect to the qualification of real estate subdivisions for public sale and to the duties of the commissioner with respect to examination and report upon such subdivisions. The purpose sought to be accomplished by the offered instruction is obscure. Portions of the instruction were stricken out and others added, including a statement from the report that a copy of it must be delivered to each prospective purchaser and attached to the deposit receipt or printed thereon, and the court also added: "You will further remember in considering this matter, that there is no testimony that a copy of this report was ever furnished Mrs. Conger or that she had any knowledge of its existence." The matters to which this instruction related were quite foreign to any issue in the case. It was wholly irrelevant whether the real estate commissioner had put out a report on the subdivision. Defendants were not the subdividers nor owners of the subdivision. There was an implication in the matter added by the court that a copy of the report should have been given to Mrs. Conger and it was stated that this had not been done. Appellant justly complains that these statements were improper, but while we agree that they should not have been made, we think no harm could have resulted from them. The issues in the case were clearly defined. The representations upon which plaintiff relied were specifically pleaded and they were stated with great particularity in the instructions. The jury were told that unless plaintiff proved by a preponderance of evidence that one or more of such specific representations had been made and that it was a material representation, the verdict must be for the defendants. Appellant cannot complain that the entire subject mat-

ter of the instruction was foreign to the issues, for he requested the instruction. The instructions were carefully drawn as a whole and the issues were stated so thoroughly that we think the jury would not have been misled by the mere suggestion of a false issue. In view of the disposition to be made of the appeal it is unnecessary to discuss other instructions criticized by appellant.

[10, 11] The jury included in its verdict interest at seven percent upon each of the sums paid by plaintiff from the date of payment to the time of trial. Appellant contends that this was improper because there had been no rescission of the purchases and he relies upon the rules which govern in rescission cases. These, however, are not in point. The award of interest was proper under section 3288 of the Civil Code, which reads as follows: "In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury." The allowance of interest in fraud cases was approved in Desmond v. Standard Bond & Mtg. Co., 1928, 91 Cal.App. 201, 266 P. 1005; Isaacs v. Frank Meline Co., 1934, 2 Cal.App.2d 341, 37 P.2d 1045. We are aware of no case in which it has been held improper to allow interest, where the recovery was for fraud, since the adoption of the original code section. It should run from the date when the money was paid or the property lost, because the duty to compensate plaintiff for her losses arose then, and no demand was necessary.

[12, 13] Appellant makes the additional point that his demurrer should have been sustained on the theory that three causes of action were stated as a single cause of action. We do not construe the complaint as stating more than one cause of action. A conspiracy was alleged between White and appellant to defraud plaintiff by selling her speculative oil properties. All of the acts of defendants were alleged to have been done in pursuance of this common purpose and design. The same representations were relied upon as a basis of the charges of fraud in each sale. The transactions were interwoven so that it would have been impossible for plaintiff to prove fraud in the second or third purchases without first proving the fraud in the first one. The three transactions were so closely related as to time and as to the manner of their accomplishment as to indicate that each activity was a part of the original plan and not a new one. That, at least, was the theory of the complaint, which alleged the development of the scheme step by step, and the proof followed the same pattern. The complaint stated but a single cause of action for fraud. In an action for damages for fraud, a complaint which alleges a series of fraudulent acts committed in the execution of an entire scheme to divest plaintiff of his property states a single cause of action. Raynor v. Mintzer, 1885, 67 Cal. 159, 7 P. 431; Divani v. Donovan, 1931, 214 Cal. 447, 6 P.2d 247.

[14-16] The final point for consideration is a charge of misconduct of the jury. One of the jurors took from a blackboard into the jury room a large sheet of paper upon which plaintiff's attorney had entered his computation of damages, consisting of the sums paid by plaintiff in moneys and property, the value of the property she received, computations of interest, and the figure of $5,000 claimed as exemplary damages. Computations of interest and other such matters which summarize the testimony given by witnesses may be placed in evidence as exhibits and the jury may be allowed to take them into the jury room. Computations made by counsel and used in argument are not evidence and if reduced to writing, except by jurors, their use in the jury room is unauthorized. Sec. 612, Code of Civ.Proc. The action of the juror was improper but the use of the figures by the jury would not necessarily have been prejudicial to appellant. The three transactions were stated separately, which was one of the things appellant was insisting upon. However, the verdict was in the exact amount of the total of the computations, and the memorandum no doubt was used in arriving at that amount. If objection had been made to the action of the juror, the court should have refused to allow the paper to be taken to the jury room, but it appears that no objection was made until after the verdict had been returned. The point was urged on motion for new trial and appellant's attorney stated by affidavit, "That upon the jury retiring to deliberate, a member of said jury detached the said sheet of paper from the blackboard and took the same into the jury room and said sheet of paper was used by said jury in their deliberations." In an answering affidavit plaintiff's counsel stated that as the jury retired one of the jurors took the

paper "in full view of the court, the defendant Harry White and counsel for the defendant James M. Gordon and counsel for the plaintiff" and that no objection was made by counsel for appellant until after the verdict had been returned. The settled statement on appeal states the facts with reference to the incident as they were stated in the affidavit of plaintiff's attorney. It is to be presumed that the trial court on motion for new trial was of the opinion that the incident was observed by appellant's counsel and that he had an opportunity to make a timely objection. If one had been made, the irregularity could have been averted and we think the objection came too late.

[17] It is our opinion that plaintiff should not be deprived of the benefit of the judgment insofar as it relates to the first transaction by reason of the failure to give the requested instructions. Appellant has shown no prejudicial error or no just reason for complaint on account of the relief awarded plaintiff in that transaction. At the same time, the judgment should not be allowed to stand insofar as it imposes liability upon appellant in connection with the other transactions, for as to those, we regard the failure to give the instructions as prejudicial. For these reasons, and because it appears problematical whether plaintiff would prevail upon a retrial as to the second and third transactions, if the jury were instructed as appellant requested, we believe that plaintiff should be allowed to elect whether she will accept the judgment insofar as it awards her damages on account of her purchase of the forty acres, or retry the action as to all of the transactions. There is no uncertainty as to the amount which was awarded to her as damage suffered in the first transaction. She paid $5400 in cash, plus the sixteen acres which she conveyed, and which were valued at $400 in arriving at the verdict, a total of $5800; the land which she received was valued at $17.50 per acre, or a total of $700, and interest was computed on the difference, $5100, from the date of the transaction to the date of trial. The total amounted to $6152.99. The same result is reached by taking from the total amount of the judgment $5000 as exemplary damages and the principal payments, with interest thereon, in the second and third purchases. Upon this same theory and for obvious reasons, if plaintiff should elect not to retry the case, the exemplary damages should be reduced from $5000 to $2500, since the recovery will relate to only one transaction instead of three, although it will still represent substantially one-half of plaintiff's total losses.

The judgment is reversed and the action is remanded for a new trial, but upon the condition that if plaintiff shall, within 30 days after the filing of this decision, file with the clerk of this court two copies of a written consent to a remission of the excess of the judgment above the sum of $8,652.99, the judgment shall stand as affirmed in that amount; appellant to recover costs. (Rule 24b, Rules on Appeal.)

DESMOND, P. J., and PARKER, WOOD, J., concur.

### Supplemental Opinion

PER CURIAM.

A consent to remission of the excess of the judgment above the sum of $8,652.99 having been filed herein, pursuant to the terms of the opinion filed in the above entitled cause on April 30, 1945, it is hereby ordered that the judgment be reduced to the sum of $8,652.99, and as so modified the judgment is affirmed. Appellant to recover costs.

DESMOND, P. J. and SHINN, PARKER and WOOD, JJ., concur.




69 Cal.App.2d 112

## CARTER et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al. (ARROYO DITCH CO., Intervener).

Civ. 7133; Sac. 5694.

District Court of Appeal, Third District, California.

May 4, 1945.

**1. Boundaries ⇐3(3)**

In determining common corner of four sections, monuments left by United States survey on the ground is best evidence as to where the corner should be, and any monument so established can only be antagonized by evidence of other monuments.

**2. Boundaries ⇐4**

As between different monuments marking section boundaries, those best identified should prevail independent of anything in field notes of original or any subsequent survey.

3. Boundaries ⇐7

Where it is doubtful which of two monuments is true government corner, other things being equal, that one is to be so considered which most nearly conforms to field notes.

4. Boundaries ⇐40(1)

Where determinative issue in action to recover money deposited in bank as gold mining royalties was true common corner of four sections, determination of which issue would determine whether gold was taken from plaintiff's land or from intervenor's land, and two monuments purporting to mark corner were found, location of true corner was for trier of facts upon conflicting evidence.

5. Boundaries ⇐37(3)

In action to obtain funds deposited in bank as royalties for gold mined on disputed land, preponderance of evidence sustained intervenor's claim that section corner monument, which would establish disputed land as that of intervenor, was true corner monument, and that monument which would establish disputed land as that of the plaintiff was merely a witness monument.

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Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Charles M. Carter and others against Bank of America National Trust & Savings Association and others, to recover a sum on deposit with named defendants as royalty payments, wherein the Arroyo Ditch Company intervened. Judgment for intervenor and plaintiffs appeal.

Affirmed.

M. F. Ryan, of Los Angeles, and B. G. Westover, of Oakland, for appellants.

G. D. Schilling, of San Francisco, and R. I. McCarthy, of Los Angeles, for Bank of America, defendant.

Henry S. Lyon, of Placerville, and Thos. R. White, of San Francisco, for intervenor, respondent.

ADAMS, Presiding Justice.

Plaintiffs brought this action to recover the sum of $1295.03 on deposit with defendant The Bank of America National Trust and Savings Association. The complaint alleged that plaintiffs, in 1940, had leased to the Greenhorn Dredging Company, a copartnership, what was described as the North Star Mining Claim, being the S½ of the SW¼ of the SE¼ and the S½ of the S½ of the SW¼ of Section 17, and the S½ of the SE¼ of the SE¼ of Section 18, all in T. 9 N., R. 12 E., M.D.B. & M.; that the lease provided for royalty payments to plaintiffs, and that the $1295.03 which they sought to recover represented royalty payments, which, pursuant to the terms of the lease, had been deposited by lessees with the Placerville branch of defendant bank, for the account of plaintiffs.

Arroyo Ditch Company, a corporation, filed a complaint in intervention, setting up a lease from the Greenhorn Dredging Company to the Arroyo Mining Company, which lease, it was alleged, had been assigned to intervenor; and it claimed that the $1295.03 in controversy represented royalties from gold that had been mined from land demised under the aforesaid lease and not from land leased by plaintiffs. It asserted (Par. X) that plaintiffs wrongfully claimed adversely to them because of a dispute and an uncertainty as to the location and position of the southerly boundary of sections 17 and 18 and the northerly boundary of sections 19 and 20, T. 9 N., R. 12 E., M.D.B. & M. Plaintiffs answered the complaint in intervention, admitting its allegations in part but denying those contained in paragraph X as above set forth. Apparently no answer was filed by defendant bank, but it was stipulated by its counsel and counsel for plaintiffs and the intervenor, that the moneys in controversy should be held by said bank, to be paid by it to whomever should be found by the court to be entitled thereto.

The cause was tried by the court sitting without a jury, and it was stipulated that if the location of the line between section 17 and section 20 was as contended by intervenor, the gold had been taken from property held by Arroyo Ditch Company, but if the location of the line was as contended by plaintiffs the gold had been taken from land belonging to plaintiffs. The trial court found that the line was as contended by intervenor and entered judgment in its favor.

On this appeal the sole question is whether there is sufficient substantial evidence to sustain the trial court's finding that "the section corner common to sections 17, 18, 19 and 20, Township 9 North, Range 12 East, M.D.B. & M., is situated N 00° 3′ West 2631.6 feet from the quarter corner between Sections 19 and 20 and was surveyed by Alexander McKay in 1869, and from the said corner the section line extends easterly South 89° 48′ East and Westerly North 89° 52′ West 2610.9 feet to the quarter cor-

ner between sections 18 and 19, and that the North Star Mining Claim does not extend south of said line as in this paragraph described, and said corner and said line are in accordance with the official map and field notes of said section."

We are unable to see that this appeal presents anything but a question of fact as to what constitutes the true corner of sections 17, 18, 19 and 20, which question, on conflicting evidence, the trial court has decided in favor of respondent.

[1-3] Appellants cite section 2077, subd. 2, of the Code of Civil Procedure to the effect that when permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount. They also quote from 8 Am.Jur. on Boundaries, section 55, page 785, regarding the preference for artificial monuments over other calls; section 60, page 788, to the effect that calls in a survey for marked lines and corners, being based upon monuments, prevail over calls such as those for courses and distances; and section 61, page 788, stating that a corner established by the government surveyors with reference to which patents have been issued should be accepted as the true corner and given controlling effect without regard to whether or not it was originally located with mathematical exactness, and that an established corner between sections must govern even against other surveys or evidences tending to prove that such corner should be located elsewhere. Some other authorities to the like effect are cited, but they are all beside the point, for the question in this case is which of two mounds constitutes, in fact, the true monument marking the disputed corner. The decision in the early case of Hubbard v. Dusy, 80 Cal. 281, 22 P. 214, is applicable here. There the location of a township line was in dispute. The court gave to the jury two instructions as follows:

"Monuments left by the United States survey on the grounds are the best evidence as to where the land should be, and any monument so established can only be antagonized by evidence of other monuments. As between different monuments, the jury should look to the evidence identifying them, and those monuments best identified should prevail, independent of anything even in the field-notes of the original or any subsequent survey."

"I further instruct you, in case there are two lines of monuments, or supposed monuments, so located as to render it doubtful which is the true line of government monuments, then, other things being equal, the monuments, or line of monuments, most nearly conforming to the field-notes would be most likely to be, and would be considered to be, the true government corner or corners."

On appeal it was contended that such instructions were erroneous, but the court held that they correctly stated the law bearing on the case.

[4, 5] The record before us shows that plaintiff Carter located a mound of stones with an old wooden stake inscribed 17, 18, 19 and 20, which he claims constitutes the original monument. Elmer J. Kent, County Surveyor of El Dorado County, a witness for intervenor, located a different mound of stones with a rotted stake, also marked 17, 18, 19 and 20, which he took to be the original monument; and he was of the opinion that what Carter claimed to be the corner monument was merely a witness corner which had been established subsequent to the original survey. Both he and Walter H. Ralph, a civil engineer and surveyor called by respondent, testified that Carter's corner did not correspond to the requirements or the usual markings of a government corner, while the corner monument found by Kent more nearly corresponded with the field notes. Ralph testified that the corner claimed by Carter fell 300 feet or 400 feet short according to the field notes, when measured from the established corner directly south; also that if Carter's corner were adopted, a line run easterly therefrom, instead of ending at a point 700 feet north of the river, as called for in the field notes, would end in the center of the river—that is, it would deviate 700 feet from the line called for by the field notes, while a line run by Ralph east from the corner found by Kent came to the exact location called for in the field notes.

The location of the true corner thus became a matter for determination by the trial court upon conflicting evidence. It was stated by it in an opinion delivered orally:

"Where is that corner? As I said that area is more or less in a rugged country. There is a precipitous mountain stream going down through there. As to the location, we have to measure that by the positive evidence. The positive evidence is by Kent, that he found the corner, and that his corner coincides with the field notes of the United States. The field notes are a part of the survey. Every engineer and every sur-

veyor knows that. The testimony was that this corresponds with the field notes. Different statements are made in United States reports about quarter corners and it is said that the old surveys are frequently not accurate. Nevertheless, in a case of this kind, the entire picture has to be brought in, and here we have some testimony that a certain quarter corner confirms Kent's views. Ralph takes the same position. This case has to be decided by a preponderance of the evidence,—determining the rights of these parties on the turning point of the common corner of these four sections. On that positive testimony that the corner must be where Kent found it, then comes the question whether any value is to be attached to the corner that Mr. Carter assumed."

It was then concluded that Carter's corner was a witness corner, same being in a position where it would be natural to place such a corner; and the court's conclusion was that the preponderance of the evidence supported the contentions of respondent. That conclusion must be the conclusion of this court. The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.




## SPEEGLE v. BOARD OF FIRE UNDERWRITERS OF THE PACIFIC et al. *

No. 12720.

District Court of Appeal, First District, Division 2, California.

April 30, 1945.

Rehearing Denied May 29, 1945.

Hearing Granted June 28, 1945.

**1. Torts ⇐12**

Unjustifiable interference with contractual relations by third party is actionable.

**2. Contracts ⇐215(1)**

A contract for no specified period of time is terminable at either party's will.

**3. Master and servant ⇐8(1)**

"Permanent employment", provided for by contract, means only that employment is to continue indefinitely and until either party wishes to sever relation for some good reason.

See Words and Phrases, Permanent Edition, for all other definitions of "Permanent Employment".

**4. Master and servant ⇐20**

A contract for permanent employment, based on sufficient consideration, is enforceable according to its terms and may not be terminated at employer's will without good cause.

**5. Principal and agent ⇐41**

Where agency for indefinite term and without valuable consideration is terminable at will by principal, agent has no interest or right which he can assert as basis for recovery of damages for principal's revocation of agency.

**6. Principal and agent ⇐33**

An agency contract for indefinite period is revocable by principal at any time, without liability to agent for loss or damage caused by loss of compensation provided for him by contract, unless agency was given for valuable consideration. Civ. Code, §§ 2228, 2356.

**7. Contracts ⇐333(5)**

A written contract may be pleaded in haec verba or according to its legal effect.

**8. Torts ⇐26(1)**

In action against associations of fire underwriters and local insurance agents, various fire insurance companies, and individuals or firms engaged in insurance business, to recover damages for causing and inducing breach and termination of plaintiff's insurance agency contracts, complaint failing to allege term or duration of contracts, but merely alleging general practice and usage that such agencies should be permanent and not cancellable, except for good and lawful cause, as between parties thereto, was demurrable as alleging contracts terminable at either party's will.

**9. Customs and usages ⇐11**

Evidence of usage and custom may be introduced as instrument of interpretation of contract, but may not be used to create contract. Code Civ.Proc. § 1870.

**10. Principal and agent ⇐35**

The consideration, necessary to support promise for definite term as agent, is one moving from agent to principal when

* Subsequent opinion 172 P.2d 867.

agency contract is made and consideration in addition to services to be rendered.

**11. Contracts ⇐54(1)**

The sufficiency of purported or claimed consideration for contract must be determined from facts of transaction as they existed when contract was made, rather than by subsequent developments.

**12. Torts ⇐26(1)**

In action to recover damages for causing and inducing breaches and termination of plaintiff's insurance agency contracts, complaint alleging that plaintiff continuously conducted and built up general insurance agency business and placed insurance with companies which were members of defendant underwriters' associations, as well as other companies, was demurrable as pleading no consideration, moving from agent to principals, in addition to services to be rendered, when agency contracts were made.

**13. Torts ⇐4**

Bad motive, by itself, is not a tort, and malicious motives cannot make that a wrong which in its own essence is lawful, though they can make a bad act worse.

**14. Pleading ⇐8(3)**

Words in legal pleadings, charging defendant with having wrongfully done act complained of, are only words of vituperation and amount to nothing, unless cause of action is otherwise alleged.

**15. Pleading ⇐8(3)**

Language in pleading, however strong and vituperative, does not allege, nor help to allege, breach of contract, if not otherwise pleaded.

**16. Torts ⇐12**

An association of fire underwriters, for its own reasons and acting entirely for its own economic advantage, had right, at any time, to terminate insurance broker's agency contracts with insurance companies, which were members of association, unless broker complied with conditions that he immediately terminate his agency representation of other companies and discontinue his broker's license, though he had acted as both agent and broker, including representation of non-members, for 12 years, and agency contracts contained nothing to contrary.

**17. Conspiracy ⇐18**

The language of pleading as to concert of action, confederation, and conspiracy cannot charge actionable wrong, if not otherwise charged.

**18. Conspiracy ⇐1**

A conspiracy, in and of itself, is not actionable.

**19. Conspiracy ⇐1, 18**

Allegations of complaint that defendants conspired to do certain acts are insufficient, unless it appears that some right of plaintiff has been violated by defendants' alleged wrongful acts, for conspiracy cannot be made subject of civil action unless something is done which would give right of action without conspiracy.

**20. Conspiracy ⇐18**

A complaint, alleging that defendant underwriters and local insurance agents' associations and fire insurance companies, acting in concert, caused and induced termination of plaintiff's agency contracts with defendant insurance companies, and that plaintiff built up his insurance business with defendants' knowledge and acquiescence and in reliance on such contracts, knowledge, and acquiescence, was insufficient as against demurrer to charge conspiracy.

**21. Courts ⇐91(1)**

Where District Court of Appeal held act prohibiting combinations in restraint of trade unconstitutional and Supreme Court denied hearing after argument on appeal to another District Court of Appeal from judgment for defendants in another case, appellant's point that complaint therein stated cause of action under such act cannot be considered. St.1941, p. 1834 et seq., §§ 16700–16758.

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Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by Xum H. Speegle, individually and doing business under the firm name and style of Xum H. Speegle Company, against the Board of Fire Underwriters of the Pacific, an unincorporated association, and others, to recover damages for causing and inducing breach and termination of plaintiff's insurance agency contracts. Judgment for defendants, and plaintiff appeals.

Affirmed.

Bohnett, Hill, Cottrell & Boccardo, of San Jose, and Edward R. Solinsky and Philip C. Boardman, both of San Francisco, for appellant.

Joseph T. O'Connor, Long & Levit, and Orrick, Dahlquist, Neff, Brown & Herrington, all of San Francisco, for respondents Board of Fire Underwriters of the Pacific and insurance companies.

Bardin & Harrington, of Salinas, for respondents Salinas Ass'n of Local Insurance Agents, J. H. Ansberry, Bruce E. Baird Co., Joseph H. Carty Agency, Davies & Co., Geo. S. Gould, E. W. Palmtag, Pedroni-Edwards, Jack I. Prader, Salinas Valley Realty Co., Oran Shannon, and Williamson Realty Co.

GOODELL, Justice.

This appeal is from a judgment in favor of the defendants entered after an order had been made sustaining, without leave to amend, their demurrers to the second amended complaint.

By this action the plaintiff seeks damages against some of the defendants for inducing other defendants to terminate agency contracts existing between themselves and the plaintiff.

There are two groups of defendants. One group, headed by the Board of Fire Underwriters of the Pacific, an unincorporated association, is composed of the Board itself, and fourteen insurance companies and one association (Board members), all of which appear jointly and severally on one demurrer. The other, headed by The Salinas Association of Local Insurance Agents, an unincorporated association, is composed of the Salinas Association itself and twelve individuals or firms, all engaged in the insurance business in Salinas, nine of whom appear jointly and severally on the other demurrer. Each one of this group is an agent of the Board.

The complaint shows that for some years the plaintiff has been engaged as an insurance agent and broker in Salinas, and between the year 1927, when he got his agent's license, and 1939, when the break came, he held agency contracts with the insurance company defendants as well as with non-board companies. It alleges that on March 6, 1939, the Board, the Salinas Association, and the defendant insurance companies, acting in concert, caused, brought about and induced the termination of the plaintiff's agency contracts with the defendants Newark Fire Insurance Co., Fireman's Fund Indemnity Co. and Fireman's Fund Insurance Co. and ever since then those three companies have refused to deal further with plaintiff or to accept further business tendered by him. It also alleges that on July 26, 1939, the Board sought to impose two conditions upon the plaintiff under the threat that in case of non-compliance the Board would bring about a termination of his agency contracts with the twelve remaining defendant insurance companies. Those conditions were: "(1) That plaintiff immediately terminate any agency representation of companies other than members of the Board whether or not held for lines other than fire; (2) that plaintiff discontinue his broker's license." It alleges that plaintiff refused to comply and on July 26, 1939, the Board, the Salinas Association and the defendant insurance companies caused to be brought about, and induced, the breach and termination of the plaintiff's agency contracts with said twelve defendant insurance companies, and ever since then those twelve companies have refused to deal further with plaintiff or to accept business tendered by him. Other averments will be discussed later.

[1] That a third party's unjustifiable interference with contractual relations is actionable is now well settled in this state. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631; California Grape Control Board v. California Produce Corporation, 4 Cal.App.2d 242, 40 P.2d 846; Remillard-Dandini Co. v. Dandini, 46 Cal.App.2d 678, 116 P.2d 641.

The appellant contends that his pleading brings the case within this rule in that it shows the breach of *permanent* agency contracts, brought about and induced by the defendants. The defendants contend that the complaint shows merely principal and agent contractual relations with no definite time specified for their existence and therefore terminable at the will of either party; moreover, they contend that to plead a "permanent" relation is only to plead one for an indefinite time and hence terminable at will.

[2] By the demurrer it is admitted that the agency contracts were cancelled and terminated by the respective principals. The question presented for decision is whether such cancellation amounted, in legal effect, to a *breach* of them. If not, it would seem to follow that no action could possibly lie against third parties for *inducing* such termination. The first inquiry would therefore seem to be whether, under the law of this state, *an agency contract* with no definite time specified for its duration may be terminated at the will of either

party. The defendants rely on the case of Bentley v. Mountain, 51 Cal.App.2d 95, 124 P.2d 91, decided by this court, which was not an agency case but one involving a collective bargaining contract between a labor union plaintiff and shop-keeper defendants, calling for the display of union shop cards (indicating, of course, that the place was a union shop) in their windows. In addition to suing for *breaches* of the contracts themselves, the plaintiff sued for *inducing the breaches* of them and of other similar contracts. When the shop keepers ceased to maintain union shops and to display union shop cards, the union sought an injunction. A demurrer to the complaint was sustained without leave to amend and on appeal that order was upheld on the ground that the contract was for no specified period of time and was therefore terminable at the will of either party. In that opinion Adkins v. Model Laundry Co., 92 Cal.App. 575, 581, 268 P. 939, was cited in support of the rule. The Adkins case did not involve an agency contract but was a laundry route case. It, in turn, relied on and followed Otten v. Spreckels, 183 Cal. 252, 259, 191 P. 11, which was an agency case and will be discussed presently.

[3] The defendants also rely upon Lord v. Goldberg, 81 Cal. 596, 22 P. 1126, 1128, 15 Am.St.Rep. 82, which was an action brought by an employee to recover damages for his wrongful dismissal. A judgment in plaintiff's favor was reversed on the ground that the findings were not justified by the evidence. On appeal the court held that the plaintiff had voluntarily left the employ of the defendants and had not been dismissed. After so holding the court said: "But, however this may be, it is clear that plaintiff's employment was not intended to be for life, or for any fixed or certain period. It was to be 'permanent,' but that only meant that it was to continue indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation."

[4] The appellant, in seeking to distinguish the instant case from the Bentley, Adkins and Lord cases, contends that "A contract of employment resting on a consideration, which by its terms is 'permanent' is not terminable at will," and directs our attention to what we said with respect to Lord v. Goldberg in the recent case of Millsap v. National Funding Corp., 57 Cal. App.2d 772, 773, 775, 135 P.2d 407, 409, as follows: "While the Supreme Court in Lord v. Goldberg, * * * used language indicating that a contract for permanent employment is in legal effect only a contract for indefinite employment terminable at the will of either party, the later cases of Seifert v. Arnold Bros., Inc., 138 Cal.App. 324, 31 P.2d 1059; Brown v. National Electric Works, 168 Cal. 336, 143 P. 606 and Davidson v. Laughlin, 138 Cal. 320, 71 P. 345, 5 L.R.A.,N.S., 579, make it clear that a contract for permanent employment based upon sufficient consideration is enforceable according to its terms and may not be terminated at the will of the employer without good cause." In Lord v. Goldberg, the question of a consideration for the employment was not raised or decided. In the Seifert case the parties agreed that in consideration of plaintiff purchasing from defendants a used automobile, the defendants would employ plaintiff at $80 a month, the employment to be steady as long as his services were satisfactory. He bought the car and entered their used car department. In a short time he was let out and sued for damages for wrongful discharge. The court found that the defendants had bound themselves to keep him on for a reasonable time but had not done so and that his services had been satisfactory. In affirming the judgment for plaintiff the court said that the contract was "based on a consideration *in addition to services to be rendered.*" [138 Cal.App. 324, 31 P.2d 1060.] (Emphasis ours.) In Brown v. National Electric Works, supra, the defendant agreed to give the plaintiff steady employment if he would purchase $5,000 of stock in the defendant corporation, which he did. The plaintiff was discharged without cause after a short time. It was held that there was an implied contract, arising from the valuable consideration, to continue the employment for a reasonable time; that the discharge in three months was a breach of such contract, and that the plaintiff was entitled to rescind and recover the $5,000 which he had paid for the stock. Davidson v. Laughlin, supra, was a case where the defendant was erecting a building and the plaintiff was working for him. During the construction period the defendant promised that when the building was finished he would employ plaintiff permanently as agent of the building at $150 a month, in consideration of which the plaintiff agreed to work during construction at a reduced rate of $60 a month. A few days after completion the defendant dismissed plaintiff from the

promised position and he sued for and was awarded the difference between $60 and $150 a month for the time he had worked during construction. The defendant contended that the rule followed by the trial court did not apply because the contract for permanent employment was for an indefinite time only and could be terminated by either party upon reasonable notice. It was held that the lower court was correct in awarding judgment to the plaintiff. In the Millsap case the plaintiff, on being offered employment by the defendant, stated that she was then employed and would not change unless the new position would be permanent. The defendant agreed that it would be, whereupon she went to work for the defendant. She was discharged in a short time and sued, claiming a contract for permanent employment based upon a consideration, namely, the legal detriment she had suffered in giving up her old position. The court found that it was a sufficient consideration and it found, further, as in the case of Brown v. National Electric Works supra, that in the bargain which the parties had made there was an implied promise to keep her on for a reasonable time; that two years was such reasonable time, and that her dismissal without cause within that time breached the contract. On appeal this court held that such findings were justified by the evidence. In each of these four cases, it will be noted, the employee suffered a legal detriment at the time of entering upon the employment. They could have no bearing upon this case unless the complaint pleaded that the defendants had promised that the agency contracts would exist for a definite term and it was claimed by the other side that there was no consideration for such promise.

[5, 6] Otten v. Spreckels, supra, was an agency case where Otten alleged that he had paid Spreckels $3,000 as a consideration for the agency but (to quote from the opinion [183 Cal. 252, 191 P. 12]), "It was admitted * * * that no consideration for the contract passed between the parties, other than their respective stipulations therein." What that case holds is well summed up in Adkins v. Model Laundry Co., supra [92 Cal.App. 575, 268 P. 941], as follows: "In the case of Otten v. Spreckels, 183 Cal. 252, 259, 191 P. 11, 13, which was a suit for damages for breach of contract in discharging an agent employed to take charge of a newspaper route, who was paid commissions upon the newspapers which he sold judgment in favor of the agent was reversed, and the court said: '* * * Where the agency is revocable at will, as in this case, he has no interest or right which he can assert against his principal who revokes it, as the basis for damages for such revocation. * * * The agency being terminable at will by the principal and being for an indefinite term *and without a valuable consideration,* its revocation was not a breach of the contract. The plaintiff has no cause of action and the judgment should have been for the defendant.'" (Emphasis ours.) Otten v. Spreckels is a companion case of Boehm v. Spreckels, 183 Cal. 239, 191 P. 5, and what was held in the latter case is best summed up by Mr. Justice Shaw, the author of both opinions, in the Otten case (page 257 of 183 Cal., page 13 of 191 P.) as follows: "We have there held that such a contract creates an agency only; that it does not vest in the agent any interest in the subject of the agency; that the agency is not coupled with an interest; *that it is for an indefinite period, and hence that it is revocable by the principal at any time. We further held that, unless such agency was given for a valuable consideration, it could be revoked by the principal without liability to the agent for any loss or damage to him that might be caused by loss of the compensation provided for him by the contract of agency.*" (Emphasis ours.) The opinion in the Otten case then proceeds to discuss the subject of consideration as follows: *"The agency in the present case was not given for a valuable consideration.* It cannot seriously be contended that the effect of the stipulations of the respective parties, as being a consideration sufficient to support it as a contract, is sufficient to take it out of the rule of section 2356 of the Civil Code that an agency may be terminated by the principal, or to bring it within the rule that *if an agency is given for a valuable consideration* the principal will be liable in damages if he revokes it before the agent has had a reasonable time to enjoy his agency so as to some extent to reimburse himself for his outlays in getting it or in preparing to perform the duties imposed on him thereby. All of the cases on that subject involve *the payment of some money by the agent to secure the agency, or the incurring of preliminary expenses by him in preparing to execute the powers given him.* No reason can be given for the proposition that his agreement to faithfully perform the duties required of

him by his contract of employment will, as a valuable consideration, make this rule applicable. The law would make him subject to that obligation without any stipulation. 2 Cor.Jur. p. 692; Civ. Code, § 2228; Calmon v. Sarraille, 142 Cal. [638], 641, 76 P. 486." (Emphasis ours.)

An examination of the plaintiff's averments should be made in the light of these rules, with a view to determining whether they show a contract for a definite period based on a consideration of the kind and character discussed in these cases.

The only parts of plaintiff's complaint which attempt to plead anything in the nature of a consideration are paragraphs VI, VII, VIII and IX, in substance as follows: That plaintiff ever since the issuance of his agent's and broker's licenses has continuously carried on, conducted and built up a general insurance agency and brokerage business, including the class of insurance written by Board member defendants, and as known to them, has placed insurance with such Board companies as well as with non-board companies when such insurance could be placed to the advantage and best interest of the insured under the competitive conditions existing in such business.

That in the course of his business plaintiff has entered into contracts in writing with defendant Board members, and with each of them, whereby they appointed him their agent respectively with authority to solicit, and accept proposals for insurance risks in Salinas and vicinity under which he would receive commissions on contracts and their renewals, and that his agency contracts contained no provisions restricting his activities as agent and no provision that he should represent only Board, as distinguished from non-board, companies, and at all times the Board and the Salinas Association knew of such agency contracts. That a general practice and usage exists in the insurance business in connection with the appointment of agents with authority to solicit and receive applications for insurance that the agent had the continuing privilege of placing an application with any company, Board or non-board, as might be requested by the applicant or for his best interest, and that the insurance company had no interest in the application obtained by the agent until it was presented to the company and it had been accepted, and that such practice and usage is no breach of an agency agreement; that it is likewise a general practice and usage that the agent may also become a broker in relation to companies for which he is not an agent, and may, for compensation, transact insurance business of all classes, other than life, for persons other than an insurer for whom he is acting as agent, and that such broker may place an application for insurance secured by him as broker with any company, board or non-board, as may be requested by the applicant, or to his advantage, and that such brokerage business and activity of an agent is no breach of an agency agreement; that it is also the general practice and usage that an agency shall be of a permanent and independent nature and that the agency agreement will not be cancelled except for good and lawful cause as between the parties thereto and that in consideration of care given to the insured by the agent in the exercise of his agency he shall be entitled to the usual commission on all renewal premiums; that each of said practices and usages entered into and became a part of the agency contracts by which the defendant insurance companies appointed plaintiff their agent, respectively, and were known to the Board, its members, and to the Salinas Association and its members, and that plaintiff entered into all such agency contracts with knowledge of and in reliance on said practices and usages, all of which were generally recognized and followed by the Board, and the Salinas Association, except as later alleged, and that plaintiff was thereby influenced to enter into such agency contracts and to engage in and build his agency and brokerage business. That through plaintiff's diligent, careful and constant work and effort since 1927, and the expenditure of large sums of money he built up and became the owner of a very substantial insurance business, all in reliance on the agency agreements aforesaid, on said practices and usages, and in reliance on the permanancy of the business relationship and his rights thereunder to commissions on renewals of insurance written; that plaintiff's business, considering past earnings and probable future earnings was of the fair and reasonable value of $200,000 as of March 1, 1939.

[7-9] The foregoing summary shows that the agency contracts are in writing. A written contract may be pleaded in haec verba or according to its legal effect. In the pleading of the legal effect of these writings their term or duration nowhere appears. This omission was pointedly called to the pleader's attention by the de-

murrers to the first amended complaint which specified that it did not appear therefrom "during what periods said contracts were by their terms to be in force; nor whether or not such contracts were terminable at will." Nevertheless, the present pleading is substantially the same as the earlier one except it alleges that a general practice and usage exists "that such agency shall be of a permanent and independent nature and that the agency agreement will not be cancelled except for good and lawful cause as between the parties thereto." It does not allege that the written contract *says this,* but it does allege "that each of said practices and usages * * * entered into and became a part of the said agency contracts". With respect to the allegation of permanency, we advert to Lord v. Goldberg, supra: "It was to be 'permanent,' but that only meant that it was to continue indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation." See also Bouvier's Law Dict., Rawle's Third Revision, Vol. 3, p. 2568; 18 R.C.L. p. 509, sec. 20. If that be the rule (and it has never been questioned in California) then the most that can be said (if the allegations of general practice and usage are assumed to be well pleaded) is that the complaint alleges contracts terminable at the will of either party. But as was said in Hanley v. March & McLennan–J. B. F. Davis & Son, 46 Cal.App.2d 787, 798, 117 P.2d 69, 74, "* * * usage and custom may be introduced as an instrument of interpretation but may not be used to create a contract. This thought is thus expressed in section 1870 of the Code of Civil Procedure as follows: 'In conformity with the preceding provisions, evidence may be given upon a trial of the following facts: * * * 12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation; * * * '. See, Rottman v. Hevener, 54 Cal.App. 485, 202 P. 334. * * *" See, also, on the subject of pleading custom and usage, Boehm v. Spreckels, 183 Cal. 239, 244, 191 P. 5.

[10-12] Counsel for appellant have this to say on the subject of consideration: "In this case the plaintiff expended his own time and money in carrying out the terms of his agency agreement. He may or may not be compensated. Should his work and expense result in a failure to obtain an application for insurance, or should the insurance company reject the risk, he will receive no compensation and be out his expense. When the insurance company grants an agency agreement, and when the agent accepts it, this is done in consideration of the future efforts and expenditures of the agent for which he may or may not be compensated. This is also the general usage, custom and practice of the insurance industry. The employment of the agent, therefore, becomes one resting upon a consideration running from the agent to and for the benefit of the insurance company. The agent has changed his position on the strength of the agency agreement and the usages and practices of the industry and undertaken to expend his own time and money, in the expectancy that the insurance company will accept the result of his work." This does not square with what was said in Otten v. Spreckels, quoted earlier, where the court pointed out that the consideration which is necessary to support a promise for a definite term as agent is one moving from the agent to the principal at the time the agency contract is entered into. It does not square with the Seifert case, where it is said that the consideration is "in addition to services to be rendered," nor is it such a consideration as is spoken of in the Millsap, Brown and Davidson cases, relied on by appellant. See also, 6 Cal.Jur. p. 167, sec. 116, where the rule is thus stated: "The sufficiency of a purported or claimed consideration for a contract must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments * * *". A careful examination of the complaint shows that no such consideration is pleaded.

[13-15] The complaint charges, in rather strong language, that the defendants acted with the intent to injure the plaintiff and destroy his business. In the Rossier case, supra [18 Cal.2d 33, 112 P.2d 633], it is said: "The presence or absence of ill-will, sometimes referred to as 'malice', is immaterial, except as it indicates whether or not an interest is actually being protected," citing Boyson v. Thorn, 98 Cal. 578, 33 P. 492, 494, 21 L.R.A. 233. In the latter case the court quotes Cooley on Torts, 2d Ed. p. 832 which concisely states the rule followed by the California cases as follows: "Bad motive, by itself, then, is no tort. Malicious motives make a bad

act worse, but they cannot make that a wrong which in its own essence is lawful. When in legal pleadings the defendant is charged with having wrongfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." The language in the pleading, however strong and vituperative, does not allege, or help to allege, a breach if a breach is not pleaded without it.

[16] In paragraph XIV of the first count it is alleged that the conditions imposed upon plaintiff by defendants were not part of the agency contracts but were imposed "with the object and purpose, through coercion and oppression, of dominating, controlling, injuring, impairing or destroying plaintiff's business * * * and said conditions were unlawful and imposed illegal and unlawful restraint and restriction upon plaintiff in the exercise of his lawful business" and that the failure of plaintiff to yield to them afforded no lawful ground or justification for the cancellation and breach of the agency contracts. In this connection it is argued by appellant that he had a lawful right to act as both agent and broker; that from 1927 to 1939 he had so acted, including the representation of non-board companies, and that there was nothing in the agency contracts to the contrary. That may be conceded, but still it does not follow that the principal, for reasons of its own, and acting entirely in its own interests and for its own economic advantage, could not at any time object to carrying on *future* relations with the plaintiff if he persisted in representing non-board companies, which were in competition with Board companies. The principal would have the same right to impose the condition with respect to plaintiff's broker's license. Each party was free to end the relation at any time and therefore could impose conditions (unless they were illegal) respecting its continuance. If, for instance, the agent's territory from 1927 to 1939 had included only Monterey County, he could have imposed on his principal in 1939, or at any other time, the condition that unless he be given the agency for Santa Cruz and San Benito Counties as well, he would terminate his existing agency contract as to Monterey County. The rights of the parties were reciprocal.

[17-20] With respect to the allegations of a conspiracy: It has been held that the language of a pleading as to concert of action, confederation and conspiracy cannot charge an actionable wrong if an actionable wrong is not otherwise charged. The following taken from Bentley v. Mountain, supra [51 Cal.App.2d 95, 124 P.2d 93], is apposite: "Plaintiff alleged a 'conspiracy' between defendants but conspiracy, in and of itself, is not actionable. In Richmond Terminal Corp. v. Parr Terminal Co., 116 Cal.App. 368, 2 P.2d 579, the complaint alleged that defendants had conspired to do certain acts. This court there said at page 369 of 116 Cal.App., at page 579 of 2 P.2d, 'Such allegations are insufficient unless it appears that some right of plaintiff has been violated by some alleged wrongful act or acts of defendants for "conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action."' See, also, Bowman v. Wohlke, 166 Cal. 121, 125, 135 P. 37, Ann.Cas.1915B, 1011; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601. As above indicated there are no allegations of fact in the amended complaint before us which show that any of the acts of the defendants violated any right of plaintiff * * *." In their opening brief counsel for appellant say: "It is not material to the second cause of action, or to the first cause of action for that matter, that the agency contracts held by the plaintiff were contracts terminable at will. The defendants, acting in concert, had no right to impose their joint will on the plaintiff and induce the breach and cancellation of all of the insurance agency contracts, even if it be assumed * * * that the agency contracts were for an indefinite period and were terminable at will." This statement does everything but concede flatly that the agency contracts were terminable at will. But it does more; it makes the claim that concerted action of the defendants alone and by itself is actionable. The cases just cited hold directly the other way.

It should be noted that the second count of the complaint is almost a duplication of the first count. The only differences are that in alleging the building up of plaintiff's insurance business with the knowledge of each of the defendants the second count adds that it was also with the acquiescence of each of them. And in alleging that plaintiff's expenditure of work, effort and money in the building up of his business was in reliance upon the agency agreements, plaintiff also alleges that it was also

in reliance on defendants' knowledge and acquiescence. And to his allegations of reliance plaintiff added in the second count that such reliance on his part was known to said defendants and each of them. In our view of the case the second count adds nothing, substantially, to the first.

The three cases cited at the outset, namely, the Rossier, Grape Control and Dandini cases, which lay down the general rule that a third party's unjustifiable interference with contractual relations is actionable, are relied on by appellant, but they are not specifically in point herein. The Rossier case is not in point because there the interference by Rossier and Matheson consisted of inducing Coker to breach a contract which bound him to stay out of the ice business in certain territory as long as his vendee, or his vendee's successors, were engaged in such business therein. The contract was not for an indefinite term. In the Grape Control case, the contract covered "all grapes produced, owned or controlled by said growers during the calendar years 1930-1939." The interference was in 1931. The Remillard-Dandini case was a suit to enjoin interferences by the defendant with subsisting obligations of the corporation including contracts for the furnishing of supplies and materials which the corporation badly needed. Three other cases are relied on by appellant. Patterson Glass Co. v. Thomas, 41 Cal.App. 559, 183 P. 190, is distinguishable from the case at bar in that the contracts were for definite periods, namely, some for the season of 1917–18 and others were terminable only on seven days notice. Such distinction is pointed out at length in Bentley v. Mountain, supra. The facts of the Parkinson case, Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165, are altogether different from those in the instant case. This brings us to the case of Traux v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas. 1917B, 283. Neither that case nor the authorities which it cites from outside states are to be reconciled with the California cases cited herein on the subject of contracts terminable at will. The cases from other jurisdictions are not, of course controlling here. It is our duty to follow the cases decided by our own courts.

[21] The appellant's final point is that the "complaint states a cause of action against defendants under the Cartwright Act" (Bus. & Prof. Code, secs. 16700-16758, St.1941, p. 1834 et seq.).

The complaint alleges in paragraphs II and III, and elsewhere, that the Board is an association of a large number of insurance companies; that the agreement of association of members has for its object an association and confederation which could, should and would, through coercion and oppressive methods, and otherwise, dominate and control, to their economic advantage, the class of insurance written by its members, fix the terms, conditions and rates for such insurance, the terms upon which its members may employ their respective agents, and likewise dominate and control the business and business methods of such agents by and through such coercion, oppression, domination and control limiting and restricting and restraining fair competition. However, after this case had been argued the District Court of Appeal, Second District, in the case of Ward v. Auctioneer's Association, 153 P.2d 765 (following Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146) held that the Cartwright Act was unconstitutional. A hearing by our Supreme Court was denied. That decision therefore removes the point from further consideration on this appeal.

The respondents contend that it is essential to a good cause of action for inducing a breach that a third person shall have induced it and that here, because of the identity of the Board with its constituent company members, whatever the Board did was the act of the insurance companies themselves and not the act of a stranger or third party. The conclusion at which we have arrived that the complaint fails to show that the agency contracts were breached, and therefore that no action will lie for inducement, renders unnecessary any discussion of this point.

In appellant's closing brief we are reminded that: "The agency agreements here under consideration, and their revocation, are governed by the law of agency. (Civil Code, sections 2355-2356.)" Throughout the consideration of this case we have been mindful of this, and the authorities which have been cited in support of our conclusion are, for the most part, either agency cases themselves or cases whose lineage is traceable directly to agency cases. It is not necessary to go beyond the rules

which they announce and we have striven herein to stay strictly within their range.

We are satisfied that the demurrers were properly sustained.

The judgment is affirmed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.




68 Cal.App.2d 825

## RADISICH v. FRANCO-ITALIAN PACKING CO.

**Civ. 14446.**

**District Court of Appeal, Second District, Division 3, California.**

**April 24, 1945.**

**Hearing Denied June 21, 1945.**

**1. Seamen ⇐29(5)**

In action under the Jones Act for death of seaman resulting from injuries on fishing vessel, evidence as to correspondence between defendant packing company and owner of vessel relative to use of vessel, and as to defendant's proprietary action over vessel and exclusive control over the master and crew, justified finding that packing company was the owner pro hac vice of vessel at time of accident resulting in seaman's death. Jones Act, 46 U.S.C.A. § 688.

**2. Seamen ⇐29(5)**

In action under Jones Act for death of seaman resulting from injuries on fishing vessel, where correspondence between vessel owner and defendant packing company established that the parties had agreed upon the actual transfer of control of the vessel to the packing company as owner pro hac vice, excluding testimony as to alleged conversation between owner and officer of defendant company relative to control of vessel was not error. Jones Act, 46 U.S.C.A. § 688.

**3. Negligence ⇐121(2)**

Where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury, thereby making the principle of res ipsa loquitur applicable, the burden of proceeding shifts to defendant, who must adduce evidence to meet plaintiff's prima facie case.

**4. Seamen ⇐29(5)**

In action under Jones Act for death of seaman resulting from injuries when caught in winch on board fishing vessel, evidence that the deck control lever would not operate at time of accident, and as to delay which ensued due to necessity of stopping engine below deck, warranted recovery under doctrine of res ipsa loquitur against packing company as owner pro hac vice. Jones Act, 46 U.S.C.A. § 688.

**5. Seamen ⇐29(5)**

Whether seaman, whose death resulted from injuries sustained when caught in a winch on defendant's fishing boat, was guilty of contributory negligence, was question for jury. Jones Act, 46 U.S.C.A. § 688.

**6. Seamen ⇐29(4)**

That member of crew of fishing vessel was guilty of contributory negligence in getting too close to a winch, resulting in injuries and death when deck control lever failed to function immediately, was not a bar to recovery under the Jones Act, since under the act damages must be diminished in proportion to amount of negligence attributable to employee. Jones Act, 46 U.S.C.A. § 688.

**7. Seamen ⇐29(5)**

Complaint, in action under Jones Act, setting out the various duties owed to deceased seaman in providing a safe and seaworthy vessel, etc., and alleging that while seaman was assisting in cleaning of nets his apron was caught and drawn into the drum of the ship's winch causing injuries resulting in his death, did not allege specific acts of negligence which would prevent plaintiff from relying on doctrine of res ipsa loquitur. Jones Act, 46 U.S.C.A. § 688.

**8. Seamen ⇐29(5)**

In action under Jones Act for death of seaman, that the complaint alleged negligence both generally and specifically did not prevent plaintiff from relying on doctrine of res ipsa loquitur. Jones Act, 46 U.S.C.A. § 688.

**9. Trial ⇐109**

Where opening statement of plaintiff's attorney, in action under Jones Act for death of seaman, and plaintiff's evidence went no further than to explain the events

leading up to the accident, and no attempt was made to show the underlying cause of the accident, plaintiff was not prevented from relying upon doctrine of res ipsa loquitur. Jones Act, 46 U.S.C.A. § 688.

**10. Seamen ⇐29(5)**

Instruction on the law relative to doctrine of res ipsa loquitur, as applied to action under Jones Act for death of seaman resulting from injuries sustained on fishing vessel, was proper.

**11. Negligence ⇐121(2)**

The duty cast upon defendant to overcome a prima facie case made by application of res ipsa loquitur doctrine does not change the rule as to burden of proof.

**12. Appeal and error ⇐1064(1)**

Any inconsistencies in court's instruction relative to doctrine of res ipsa loquitur, as applicable to action under Jones Act for death of seaman, was not prejudicial. Jones Act, 46 U.S.C.A. § 688.

**13. Appeal and error ⇐1068(4)**

Where plaintiff's attorney, in action under Jones Act for death of seaman, adhered to his declared intention to jury not to attempt to show any pecuniary loss other than occasioned by loss of earnings and court properly instructed jury not to consider mental anguish or suffering or loss of companionship in considering damages, and verdict was not excessive, any error in the giving of general instructions purporting to allow consideration of the support, society, care, and comfort which plaintiff widow might have expected was not prejudicial. Jones Act, 46 U.S.C.A. § 688.

**14. Appeal and error ⇐1064(1)**

A judgment will not be reversed because of the giving or refusing of instructions which do not harm appellant.

**15. Appeal and error ⇐1064(1)**

To justify a reversal, it must appear from a consideration of all the evidence that any error in the giving or refusal of instructions resulted in a miscarriage of justice.

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Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action under the Jones Act, 46 U.S.C.A. § 688, by Anka Radisich, administratrix of the estate of Philip Radisich, deceased, against Franco-Italian Packing Company to recover for the death of plaintiff's husband. Verdict and judgment for plaintiff, and defendant appeals.

Affirmed.

Overton, Lyman & Plumb and L. K. Vermille, all of Los Angeles, for appellant.

David A. Fall, of San Pedro, for respondent.

DESMOND, Presiding Justice.

The defendant, Franco-Italian Packing Company, hereinafter referred to as the Company, appeals from a judgment entered upon a jury verdict awarding the plaintiff, the surviving widow of Philip Radisich, the sum of $8,000 damages for his death, which occurred when he was 53 years old. The action was brought under the provisions of the Jones Act, 46 U.S.C.A. § 688, against the Company, as owner pro hac vice of the purse seiner, "Chinook," and Luca Joncich, the master of the vessel. As to the latter defendant, it was dismissed upon motion of plaintiff just prior to the submission of the case to the jury.

Appellant claims that the judgment should be reversed for various reasons: 1. That there was no employer-employee relationship existing between the Company and Philip Radisich; 2. that not only was there no proof of negligence on the part of the Company but "the accident was caused solely by the fault and negligence of deceased, who was an experienced fisherman, getting too close to the winch"; 3. that the court erred in refusing to allow the introduction of testimony relative to an agreement between the boat owner, Nick Mardesich, and the Company as to control of the boat upon which Radisich was killed; 4. that the court erred in giving instructions to the jury on "res ipsa loquitur," in giving conflicting and contradictory instructions on inference of negligence and, also, in giving erroneous instructions to the jury concerning the award of damages. The merit or lack of merit of these contentions must be determined by the record, including a study of pertinent exhibits.

Nick Mardesich of Bellingham, Washington, hereinafter called the Owner, was the registered owner of the "Chinook," and in May and June of 1940 had considerable correspondence with the Company, through his attorney, concerning a proposal that the vessel be employed in fishing off the coast of Southern California from November,

1940, to April, 1941. As the result of these negotiations the Company obtained the "Chinook" in the following November in the early part of the sardine fishing season. On November 19, 1940, Mr. Norton, assistant secretary for the Company, wrote the attorney for the Owner at Bellingham, Washington, the following letter:

"Dear Mr. Greene:

"This will introduce Mr. Louis Joncich, who we are sending to bring down the good ship 'Chinook.'

"Will you please see that Mr. Joncich is assisted in every possible way in obtaining necessary supplies, etc., for his trip here, Speed is important as sardines are running plentifully now, and every day means a lot of money.

"Draw on us thru California Bank, Terminal Island for ballast which we wired about and groceries, etc. Fuel will be furnished by Union Oil Company."

Shortly after this letter was presented, Mr. Joncich and the Owner went together to the customs office and entered Joncich's name as captain of the vessel. Joncich then engaged a crew of nine additional men. Among these was the deceased.

The "Chinook" was of the smaller type fishing vessel, being 56 feet in length and 15 feet in breadth with a draft of 7 feet. Between the pilot house, located near the bow of the vessel, and one of the vessel's hatches, was a winch, with a double niggerhead, one spool of which, called the "forward" niggerhead, faced the pilot house, and the other, called the "aft" niggerhead, faced the center of the hatch opening. The distance between the hatch and the aft niggerhead was approximately 6 or 7 inches. The accident occurred on February 25, 1941, about 20 minutes after 12 noon, while the "Chinook" was on the lee side of Santa Barbara Island, and the crew was engaged in washing its nets. The deceased, following orders of the master, was working back and forth on the starboard side of the vessel from the fore corner of the hatch to a point close to the aft niggerhead. Jerry Rodich, the engineer of the vessel, worked near the aft corner of same hatch, also on the starboard side. The cook of the vessel, Earl O'Neil, was stationed at the forward niggerhead and worked just "abow" the deceased. The master was washing the net with a hose, standing 8 or 10 feet "astern" of the hatch, between it and a turntable. Part of the net was in the hold of the vessel, part of it on the turntable, and part of it in the air, held by a line that went to the forward niggerhead. The cook, O'Neil, "operated both the winch and took care of taking the line off of the niggerhead," during the raising of the net, and he testified that he "wrapped the rope about three times around the niggerhead and pulled on the loose end of it, and the net would go up to the top of the boom and as they washed it down, I let it slip down a few feet at a time." The deceased and Rodich were putting a sling around the net [i. e. a rope encircling the net so that it could be lifted from the hold] and fastening to the sling a hook which was attached to the line going directly to the forward niggerhead. Rodich had just handed the sling to Radisich when the latter's apron caught in the aft niggerhead and he "screamed frantically * * * 'Stop the winch.'" Twice he uttered this cry. It was stipulated between counsel that if Rodich were asked the question whether he talked to the deceased shortly before the accident, he would testify that within a few minutes before it occurred, he said to the deceased, "Better stay away from the winch," and the deceased replied, "I know what I am doing. I am an experienced fisherman." O'Neil, the cook, upon hearing Radisich's cry, grabbed the handle of the winch's deck control lever, which was located on the starboard side of the winch, close to the forward niggerhead, and tried with all his strength to stop the winch, even going down on his knees, but could not pull the handle of the lever loose, although Rodich pushed on it at the same time. To operate the deck control lever it was necessary ordinarily merely "to push it left or right," but on this occasion it would not operate by hand or until Rodich, the engineer, stopped the engine. Meantime, the deceased was twisted around and pulled underneath the niggerhead, between the deck and the niggerhead and the hatch coaming, his body being thrown at least twice to the deck of the boat, killing him almost instantly.

[1] Appellant, in support of its contention that the Company was not the owner pro hac vice of the "Chinook" and, therefore, not liable for the death of Radisich, argues that the correspondence between the Company and the Owner did not indicate a charter of demise under which the entire ship was surrendered to defendant,

but merely a fishing contract. Although in the instant case there was no formal document, called a charter party and signed by the parties, the jury nevertheless could determine whether the vessel was actually "chartered" by considering the correspondence between the parties, together with the Company's subsequent proprietary action over the vessel, its hiring of, and exclusive control over the master and the crew, and its bearing the loss on this unprofitable venture. That all these circumstances evinced an intent to transfer complete control and possession of the vessel to the Company during the sardine season amply justified the jury's implied finding that the Company was the owner pro hac vice of the vessel at the time of the accident.

The correspondence discloses that in the early part of 1940, the owner was in financial difficulties with his creditors, certain of whom had libeled the "Chinook" in the state of Washington and threatened a sale. However, after an exchange of letters and telegrams between the Owner and various creditors, including the Company, a sale was averted and the Owner's debts refinanced, the Company agreeing to extend for three years a mortgage which it held on the vessel, upon the promise of the Owner and the other creditors that the vessel would fish for it in California during the sardine season commencing in November and ending in April of the following year. The Company was to extend the "usual credit for outfitting and insurance" and was to return the boat to Bellingham, Washington "in April [of] each year" during the mortgage extension. As payment for the use of the boat it was agreed between all parties that the boat would receive two shares of the season's catch, to be paid not to the Owner but to a trustee for the creditors. The Company was to provide the sardine seine. We have already quoted the letter presented by Joncich when he went to Bellingham to take charge as skipper or master and to bring the vessel to California, all costs and expenses being advanced by the Company. Joncich, acting under instructions from the Company, chose his crew, some being hired in the North and some in California. Since ballast was needed for the vessel on its trip down the coast, the Company ordered for its own use and paid for some 20,000 feet of lumber as a deck load, which thus served a double purpose, "as ballast" for the vessel and as cargo for the Company. When the "Chinook" arrived in San Pedro she was placed in dry dock for damage caused to the propeller on the way down, for which damage the insurance carrier was notified, and presumably paid the bill. Also while the vessel was in dry dock, the Company, upon its own initiative and order, installed in the vessel a large water pump owned by it and, in addition, ordered certain changes made to the hatches, changing it from a three hatch to a two hatch vessel, making one of the hatches smaller "because the niggerhead was in the way," and raising its coaming "to prevent the sea from washing down into the hold." There is evidence that the bill for these alterations, dated December 21, 1940, was sent to the "Chinook" and owners, % the Company, covering work done for the period "12/6/40 to 12/21/40," and the Owner testified that he "did not pay any bills after the new captain took over." The jury trying this case three years after the alterations were made would have been warranted in concluding that the bill was paid by the Company since the changes were made at its request and upon its order, even though the office manager of the Company could not say whether or not the bill was ever paid.

Joncich gave positive testimony to the effect that he had been hired by the president of the Company to skipper the vessel and could be fired by him alone; that he had been instructed by him to hire the crew, had received and had been advanced by the Company all expenses in connection with bringing the vessel from Washington to California, and had been further instructed to bring to the Company cannery all the fish which might be caught. Joncich and the Owner both denied that the latter had hired the former or had any control over him. In view of the somewhat evasive testimony offered by the Company's officers to contradict Joncich's statements, the question of whether he was in the employ of the Owner or of the Company, as owner pro hac vice, was properly left to the determination of the jury. The Norland (Loe v. Goldstein et al.), 9 Cir., 1939, 101 F.2d 967, 971. The record is devoid of any evidence indicating that the Owner retained any command, possession or control over the vessel, its crew, or its fishing venture after it had been turned over to the Company as owner pro hac vice, his only interest in the venture being

to reduce the indebtedness owed his creditors by receipt of two shares from the season's catch as payment for the use of the vessel.

In accordance with the usual custom in the fishing industry, the catch was to be divided into shares. After operating expense, such as the cost of fuel, ice and moorage, was deducted, the balance of money derived from the sale of fish to the Company would be distributed according to the shares: the boat or Owner to receive its two shares; the Company two for its seine; and each member of the crew one, with an additional one-half share to the master as a bonus, all of these shares to the fishermen being in the nature of wages. See United States v. Laflin, 9 Cir., 1928, 24 F.2d 683, 685. The evidence further revealed that in arriving at the amount due on shares the repair bill was not deducted as an expense and the loss sustained on the venture was borne solely by the Company, the Owner not being charged with any portion of it.

[2] Appellant's contention that the court erred in sustaining objections to conversations bearing upon the control of the boat and its officers relates to two occasions when the Owner came to California, one of which allegedly took place "in the summer of 1940" and the other in December, 1940, after the negotiations for the delivery of the "Chinook" had been completed and an actual transfer of the boat had been made. We find no error on the part of the court in excluding this testimony, since the correspondence discloses that these two matters, allegedly covered in the conversations to which objection was sustained, i. e. the disapproval by the Owner of the contemplated hiring by the Company of a certain skipper in whom he had no confidence and the Owner's alleged insistence that all the fish be delivered to the Company and not distributed to several canneries on a quota basis, had been considered and agreed upon by the parties prior to the actual transfer of control of the vessel to the Company, as owner pro hac vice. The correspondence reveals that the Company had accepted the Owner's suggestion concerning a skipper; further, that it was the Company that insisted that all the fish be delivered to its cannery because it agreed at the very start of negotiations to extend its mortgage only if the "Chinook" would "fish for us." Under these conditions there was nothing to indicate that the Company was not the owner pro hac vice at the time of the accident and subject, therefore, to the same burden of liability for torts that attaches to an owner operating his own vessel.

[3, 4] Appellant urges as a ground for reversal that there was no proof of negligence on the part of defendant Company and that the doctrine of res ipsa loquitur was not applicable in this case. We do not accept that view. In Lejeune v. General Petroleum Corporation, 1932, 128 Cal.App. 404, 18 P.2d 429, is found a discussion of the applicability of the doctrine of res ipsa loquitur in actions brought under the Jones Act. This case also cites with approval the case of Michener v. Hutton, 203 Cal. 604, at page 412, 265 P. 238, at page 239, 59 A.L.R. 480, and quotes from it as follows: "The courts of this state have long since adopted the rule as expressed in 1 Shearman and Redfield on Negligence (6th Ed.) p. 132, viz.: 'Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of proper care.' [Cases cited.] Of course, to justify the application of this doctrine in any case, the circumstances of the accident must be such as, unexplained, afford reasonable evidence of want of care in a respect for which the defendant is liable in the particular action. * * * One who seeks to recover damages for injuries alleged to have been incurred by reason of another's negligence must establish by a preponderance of the evidence that the latter's negligence has occasioned him loss. *However, where the facts are such as to give rise to an inference of negligence from the inherent nature and character of the act causing the injury,* or, in other words, to give application to the principle of res ipsa loquitur, the burden of proceeding is shifted to the defendant and if he would escape an adverse finding he must adduce evidence to meet the plaintiff's prima facie case." [Italics added.] In the case at bar, there was evidence from which the jury was warranted in concluding that the deck control lever was defective because it would not operate at the time of the accident and was, therefore, unsafe; further, that its failure to work immediately after decedent's cry of "Stop the winch," and the

delay which ensued due to the necessity of stopping the engine below deck, constituted the proximate cause of the injury and death. Three witnesses, who testified concerning the events which occurred just prior to decedent's death, were O'Neil, the cook, Rodich, the engineer, and Joncich, the master. Since the jury returned a verdict in favor of the plaintiff, it must be assumed that they believed the following testimony of O'Neil, as contained in his deposition:

"Q. What is the first indication you had there was anything wrong? A. A man hollered 'Stop the winch.'

"Q. What did you see? * * * A. I seen him stoop over and knock his apron loose.

"Q. Now, when you heard this 'Stop the winch,' was it just a conversational tone of voice? A. No. * * * He screamed frantically * * * 'Stop the winch.'

"Q. What did you do? A. I stepped one step, grabbed the handle and tried to stop it, and dropped my net.

"Q. Were you able to stop the winch? A. No, I couldn't pull the handle loose.

"Q. What did other members of the crew do? A. Everybody stood spellbound but Jerry, the engineer. He was on the right side on the stern so he could see the man tangled up in the winch, and he wasn't very many steps from the handle where I was. He was piling the lead line, which is close to the handle, and he stepped over there and pushed on the handle while I was pulling it, and couldn't get it off, so he ran down to the engine room and stopped the engine.

"Q. What degree of force did you use to try to throw the winch out of gear? * * * A. All the strength I had, trying. I was down on my knees.

"Q. How much time elapsed, if any, from the time that you heard the cry 'Stop the winch' until you tried to throw the winch out of gear? A. Oh, probably not more than a second or two, at the outside.

"Q. Did you move at once, or was there a delay there at all? A. Not a second. * * *

"Q. Now, where was Mr. Radisich standing at the time that you heard him cry 'Stop the winch'? A. He was at all times, we were washing the nets, standing on the starboard side, between the corner and the niggerhead. * * * The corner of the hatch and the niggerhead. * * *

"Q. Was he [deceased] at that point in compliance with some direction of the skipper, if you know? Did you and, including Mr Radisich, take your places and do your jobs there pursuant to the order of the skipper? A. Absolutely. * * *

"Q. Was the winch stopped until the engineer went below and shut off the engine? * * * A. Not until the engine was shut off. * * *

"Q. How did Mr. Radisich meet his death? A. Catching his apron on the niggerhead, twisting him around, and pulling him underneath, between the deck and the niggerhead and the hatch combing [sic].

"Q. Did you hear Mr. Radisich's body strike the deck? A. Yes.

"Q. Was that after or before the time that you endeavored to shut off the winch? A. While I was trying to shut off the winch."

[5, 6] It is evident from the foregoing testimony that the winch was under the control of the employees of the Company. One of the purposes of the deck control lever of the winch was to stop the operation of the winch on deck and when it was in a safe condition and properly managed it so operated; the fact that it did not operate on this occasion gave rise to an inference that the winch was not in a safe condition, which, in the absence of an explanation by the Company, "afforded reasonable evidence * * * that the accident arose from want of proper care" on the part of the Company. Several witnesses on behalf of the Company stated that there had been no trouble with the winch prior to decedent's death, but no explanation concerning the cause of the failure of the deck control lever to operate was offered by the Company. Whether the testimony of these witnesses was sufficient to overcome plaintiff's prima facie case was a question for the jury. Lejeune v. General Petroleum Corp., supra, 128 Cal.App. at page 415, 18 P.2d 429. The court stated in the case of Soto v. Spring Valley Water Co., 1918, 39 Cal.App. 187, at page 190, 178 P. 305, at page 306: "No reasonable inference seems possible, except that this apparatus, had it been properly operated, would have been safe, and that its improper operation was due to the negligence of somebody or to some defect in the machinery, undisclosed to and undiscoverable by the deceased, and known, if known to anybody, to the defendant's employés. * * * It

may be added that in this case the real moving cause of this accident is not shown. It is true that it appears that the scraper, for some reason, was dragged too far by the cable, thus wrecking the timbers, but this is only the result of some other cause, which must have been the underlying reason for the accident. This underlying cause is not proven, but it does seem to us that nothing could be clearer than that somebody's carelessness must have caused it." Whether or not the deceased in the instant case was guilty of contributory negligence, or exercised such care as a prudent man in his situation would ordinarily have exercised for the protection of his life, was also a question for the jury under the circumstances and evidence before it. Davies v. Oceanic Steamship Co., 1891, 89 Cal. 280, 285, 26 P. 827. Even though the jury might have considered that the deceased had been guilty of contributory negligence in getting too close to the winch, that would not have been a bar to a recovery under the Jones Act for, as the jury was instructed, "* * * the damages shall be diminished * * * in proportion to the amount of negligence attributable to such employee." 45 U.S.C.A. § 53.

[7, 8] Appellant argues further that the court erred in instructing the jury on the doctrine of res ipsa loquitur in this case because (a) the complaint did not allege general acts of negligence but alleged specifically the negligence complained of, (b) the opening statement of counsel indicated that it was not the intention of plaintiff to rely upon the doctrine, and (c) the evidence fully explained how the accident occurred and the proximate cause thereof. In support of its argument that the complaint did not allege general acts of negligence, our attention is called specifically to Paragraphs X, XI, and XII of the complaint. The complaint contained but one cause of action. Paragraph X, which merely set out the various duties owed to plaintiff by defendant in providing a safe and seaworthy vessel, alleges, "That it was the duty of the defendant Franco-Italian Packing Company, a corporation, to provide Philip Radisich, deceased, with a safe and seaworthy vessel and appliances, and to keep the same in a safe condition; to furnish said Philip Radisich, deceased, with a safe place to work; to furnish him with reasonably safe and seaworthy tools and appliances and keep the same in a safe condition; to furnish said decedent with a sufficient number of competent co-employees and superior officers; to promulgate and enforce proper and safe rules for the safe conduct of said work and to warn said decedent of the dangers arising and to be encountered therein." Paragraph XI alleged that by reason of the negligent failure of defendant, and of its agents, employees and servants, to perform the foregoing duties, "while the deceased was engaged in his duties on board said vessel, while it was upon the high seas of the Pacific Ocean on the lee side of Santa Barbara Island, off the coast of the State of California, and while he was assisting in the cleaning of a net thereupon, his apron was caught ~~in a rope~~ and drawn into the drum of the ship's winch throwing said Philip Radisich, deceased, against the deck of said vessel five or six times, inflicting injuries upon him which proximately caused his death within a few minutes thereafter." The italicized and crossed-out portion just quoted was ordered stricken upon motion of plaintiff during the progress of the trial. The foregoing paragraph is but a general allegation of negligence on the part of the defendant for it does not attempt to set out or explain in any manner the "underlying cause" of the accident or the specific manner in which it occurred. Soto v. Spring Valley Water Co., supra, 39 Cal.App. at page 190, 178 P. 305; Vertson v. City of Los Angeles, 1931, 116 Cal.App. 114, 123, 124, 2 P.2d 411; Armstrong v. Wallace, 1935, 8 Cal.App.2d 429, 435, 47 P.2d 740; Bourguignon v. Peninsular R. Co., 1919, 40 Cal.App. 689, 691, 181 P. 669; Atkinson v. United Railroads of San Francisco, 1925, 71 Cal.App. 82, 88–95, 234 P. 863; Lippert v. Pacific Sugar Corporation, 1917, 33 Cal. App. 198, 208, 164 P. 810; Seney v. Pickwick Stages, 1927, 82 Cal.App. 226, 229, 255 P. 279. Paragraph XII, however, goes further and alleges negligence specifically, to wit, that the injuries which caused the death of decedent were directly caused by the negligence of defendant, its agents, servants and employees, in that they failed and neglected (1) to supply decedent with a safe place to work, (2) failed to supply deceased with a sufficient number of co-employees and superior officers, and that the employees and officers supplied were negligent, (3) failed to supply the vessel with safe equipment but "did supply a frayed and worn-out rope for a fall from the ship's winch," maintained a "defective and unguarded winch, all of which rendered the

place where deceased was ordered to work unsafe," (4) failed to properly superintend and supervise the work going on at the time decedent was injured, and (5) failed to promulgate and enforce safe rules "for the safe conduct of said work and to warn deceased of the impending dangers." Where a plaintiff pleads negligence both generally and specifically the doctrine of res ipsa loquitur may be relied upon. Vertson v. Los Angeles, supra, 116 Cal.App. 114, 123, 2 P.2d 411; Ellis v. Jewett, 18 Cal. App.2d 629, 635, 64 P.2d 432; Mudrick v. Market Street R. Co., 11 Cal.2d 724, 729, 81 P.2d 950, 118 A.L.R. 533; McComas v. Al G. Barnes Shows Co., 1932, 215 Cal. 685, 697, 12 P.2d 630; Leet v. Union Pac. R. Co., 25 Cal.2d 605, 155 P.2d 42, and additional cases cited therein.

[9] We find no basis for appellant's contention that plaintiff's counsel in his opening statement indicated that plaintiff would not rely upon the doctrine. He merely enumerated the various events and actions of the fishermen aboard the vessel and the events just immediately preceding and following the death of the decedent; he described the action of the cook and the engineer and the turning off of the engine before the winch could be stopped. No attempt was made by him at that time, or at any time during the trial, by evidence or otherwise, to explain why, or in what particulars, the deck control lever did not operate or what particular negligence defendant was guilty of in maintaining a deck control lever which would not operate promptly or properly.

Nor can we agree with appellant's contention that the evidence fully explained how the accident occurred. The evidence, as also the attorney's opening statement, went no further than to explain to the jury the events leading up to the accident, the failure of the deck control lever to stop the winch, and the shutting off the engine in order to stop the winch. The evidence adduced by plaintiff was in proof of her general allegation of negligence; no attempt was made by her to prove any of the specific allegations of negligence set forth in her complaint, nor was any attempt made in this case to show the "underlying cause" of the accident, i. e. why the deck control lever failed to operate after the call "Stop the winch" was made. See Soto v. Spring Valley Co., supra, 39 Cal.App. at page 190, 178 P. 305.

[10] Appellant contends that the court erred in giving the following instructions, arguing that they are "wholly inconsistent and clearly contradictory":

(a) "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of defendant. * * *"

(b) "The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent."

(c) "The burden is upon the plaintiff to prove by a preponderance of evidence that defendant was negligent and that such negligence was a proximate cause of injury to the plaintiff. To establish contributory negligence, the burden is upon the defendant to prove by a preponderance of evidence that the deceased was negligent and that such negligence contributed in some degree as a proximate cause of the injury."

Instruction (a), as given by the court, added to the language quoted by appellant the following: "That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise ordinary care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part." This instruction was followed by another to the effect that the provisions of Instruction (a) constituted an exception to the general rule that the mere happening of an accident does not support an inference of negligence and that under certain exceptional circumstances the exception to the rule was authorized, setting forth the circumstances. These two instructions presented a correct statement of the doctrine of res ipsa loquitur.

[11] The jury was also correctly informed by Instruction (c), for it is elementary that the duty cast upon a defendant to overcome a prima facie case made by the application of the res ipsa loquitur doctrine in no way changes the rule as to the burden of proof. 19 Cal.Jur. 718; see also, Holt v. Yellow Cab Co., 1932, 124 Cal. App. 385–389, 390, 12 P.2d 472.

[12] Instruction (b) states the general principle that the mere fact that an accident happened, considered alone, does not

support an inference of negligence (White v. Spreckels, 1909, 10 Cal.App. 287, 294, 101 P. 920), but it also goes further by stating specifically that such happening would not "support an inference that *some party, or any party, to this action was negligent*" [italics ours]; and while it may be argued that Instruction (a), stating, as it does, that "from the happening of the accident involved in this case * * * there arises an inference that the proximate cause * * * was * * * some negligent conduct on the part of defendant," and Instruction (b), stating that "the mere fact that an accident happened * * * does not support an inference that *some party* * * * *to this action was negligent*," were conflicting, we are unable to perceive how the jury was misled thereby, or how any prejudice to appellant resulted since the doctrine of res ipsa loquitur did apply and any suggestion that it did not would have been to defendant's advantage.

[13] Nor do we agree with appellant's contention that reversible error arose when the court instructed the jury as follows:

"If, under the court's instructions, you find that plaintiff is entitled to a verdict, you will award her such sum as, under all the circumstances of the case, may be just compensation for the pecuniary loss she has suffered by reason of the death of Philip Radisich."

"*In determining that pecuniary loss, you may consider not only the financial support, if any, which plaintiff would have received from the deceased except for his death, but also the pecuniary value of the society, comfort, care, protection, and right to receive support, if any, which plaintiff has lost by reason of the death.* In weighing these matters, you may consider the age of the deceased and of plaintiff, the physical condition of deceased and of plaintiff as it existed at the time of the death and immediately prior thereto; their respective expectancies of life as shown by the evidence; the disposition of the deceased, whether it was kindly, affectionate or otherwise; whether or not he showed an inclination to contribute to the support of the plaintiff; the earning capacity of the deceased; *and such other facts shown by the evidence as throw light upon the pecuniary value of the support, society, care, comfort and protection which the plaintiff reasonably might have expected to receive from the deceased had he lived.*" (Italics by appellant.)

Under the interpretations which have been given to the provisions of the Federal Employers' Liability Act, embraced in the Jones Act, the italicized portions of the instruction if they had stood alone might be open to objection, but we do not believe that the defendant in this case suffered therefrom for immediately thereafter the court, also at the request of plaintiff's attorney, gave the jury the following instruction: "You are instructed that if your verdict is in favor of the Plaintiff, the damages to which the plaintiff is entitled to recover from defendant, is the financial loss, if any, resulting from being deprived of a reasonable expectation of pecuniary benefits. *You may not consider mental anguish, or suffering or loss of companionship in your consideration of damages or any suffering of the deceased.*" (Italics ours.) Furthermore, the record also indicates that the attorney for the plaintiff, in his opening statement to the jury, said: "I believe we will not show or attempt to show any damages by reason of loss of companionship or because of mental anguish, because under the particular Act that we are bringing this action I think the Court will instruct you in the event that you determine that the plaintiff is entitled to a verdict, you are not to fix any damages for those particular items."

In view of the fact that the plaintiff's attorney adhered to his declared intention and did not show or attempt to show any pecuniary loss other than that occasioned by the loss of earnings, we do not believe that the jury was misled in any manner by the giving of the questioned instructions. Certainly the amount awarded does not indicate that any improper rule of damages was adopted by the jury in arriving at its verdict.

[14, 15] Having in mind all the instructions and the entire record in this case we are not persuaded that the jury erred in its conclusion. "A judgment will not be reversed because of the giving or refusing of instructions which do not harm the appellant. To justify a reversal, under the constitution it must appear, from a consideration of all the evidence, that any error in this respect resulted in a miscarriage of justice." 2 Cal.Jur. 1026. Since, to us, there appears no miscarriage of justice in the verdict rendered by the jury, the judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.

Hearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

26 Cal.2d 333

## KING v. PACIFIC STATES SAVINGS & LOAN CO.

S. F. 17051.

Supreme Court of California.
May 8, 1945.

**1. Building and loan associations ⇐41(7)**

In action against building and loan association for difference between face value of investment certificates issued thereby and amounts received for certificates sold by plaintiff's assignors at discount, evidence did not support charges that defendant engaged in deliberate illegal scheme to acquire certificates at discount while insolvent and coerced or induced assignors by fraudulent representations to surrender certificates for less than face value thereof. St.1933, p. 1089 et seq.; St.1935, p. 798 et seq.

**2. Appeal and error ⇐1096(3)**

Evidence and findings as to building and loan association's scheme to defraud its certificate holders by purchasing at discount and canceling certificates, in proceeding wherein building and loan commissioner's seizure of association's business and assets was upheld by Supreme Court on other grounds did not warrant reversal of subsequent judgment for association in pending action by such holders' assignees for difference between face value of certificates and amounts received therefor by assignors. St.1931, p. 483 et seq., as amended.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge Assigned.

Action by Wesley King against the Pacific States Savings & Loan Company for money had and received. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 148 P.2d 149.

Raymond Perry and Alden Ames, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., John J. Dailey, Roy D. Reese, and Lenore D. Underwood, Deputy Attys. Gen., B. E. Ahlport, of Los Angeles, and W. G. Harmon, of San Francisco, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the defendant in an action for money had and received. Plaintiff is the assignee of the claims of thirty-eight persons who were formerly holders of investment certificates issued by the defendant, a corporation organized and existing under the laws of this state relating to building and loan associations.

The action was commenced on December 1, 1937. The trial was not completed until the latter part of 1939. In the meantime, on March 4, 1939, the business and assets of the defendant were seized by the Building and Loan Commissioner pursuant to the powers conferred upon him by the Building and Loan Act, Stats. 1931, pp. 483–545, as amended; Deering's Gen. Laws, Act 986. The present action was continued against the commissioner without further formality of pleading. The order of seizure was affirmed in a separate proceeding brought for the purpose of testing its validity. Pacific States Sav. & Loan Co. v. Hise, 25 Cal.2d 822, 155 P.2d 809.

The complaint herein is in the form of a series of common counts for money had and received, each setting forth a different claim and its assignment to the plaintiff. The total of the claims is $35,797.60, representing the difference between the face value of the certificates and the amount theretofore received for them when sold by the plaintiff's assignors at a discount.

The defendant answered denying the indebtedness and alleging, among other things, that the sums referred to in the several counts and sought to be recovered constitute a part of certain amounts which were paid by the plaintiff's predecessors in interest to the defendant in consideration of the issuance to them of investment certificates pursuant to the laws of the state relating to building and loan associations; that those certificates were duly issued to and accepted by plaintiff's predecessors in interest who thereafter and prior to the commencement of this action sold, assigned and transferred them together with all of their rights thereunder; that prior to the commencement of this action said certificates were acquired by Pacific States Auxiliary Corporation which, in turn, sold, assigned and delivered them to the defendant and that they were thereupon cancelled by the defendant; that said certificates were thereby extinguished and that

all rights and liabilities thereunder on the part of the defendant were released and terminated. The answer also alleged that in reliance upon the assignments by plaintiff's predecessors and similar assignments by other holders of investment certificates, defendant made transfers of certain of its properties and assets, entered into obligations and otherwise changed its financial position with the result that plaintiff is estopped from asserting the claims here sued on.

The cause was tried on a stipulation of facts and additional evidence introduced at the hearings. At the conclusion of the trial the court found in accordance with the foregoing allegations of the answer and gave judgment for the defendant.

[1] Examination of the record satisfies us that the evidence does not support the charge made on this appeal that defendant had engaged in a "deliberate and illegal scheme * * * to acquire its investment certificates at a discount" at a time when it assertedly was insolvent. The stipulation of facts does not substantiate the charge. In addition to other matters, it recites "That if said assignors were called as witnesses they would testify that at a date or dates after February 1, 1934, and prior to the dates of the execution of the respective alleged assignments, they called at the office of the Pacific States Savings and Loan Company, and were then and there informed by said company that no funds could at that time be withdrawn under their certificates respectively.

"Said assignors sold their certificates because they needed the money and were afraid of losing their investments if they did not sell.

"Said assignors were further informed that if they wished to sell their certificates they could do so, and it was stated that they could only be sold at a discount."

The contention of the plaintiff that this stipulation of facts requires a finding that plaintiff's assignors "were the victims of coercion" when they sold their certificates at a discount, cannot be sustained. It must be assumed that the stipulation states the truth, namely, that plaintiff's assignors "were afraid of losing their investments," that "they needed money," and that they sold them in order to obtain the needed money even though it was necessary to sell "at a discount." These facts do not compel a finding of fraud and there is no other evidence in the record indicating that plaintiff's assignors were coerced or induced through false and fraudulent representations made to them by defendant or its agents to surrender their certificates for less than face value. The statement that the certificates "could only be sold at a discount" was true. Widespread economic conditions had depressed values generally. The information given that "no funds could at that time be withdrawn under their certificates" was in conformity with the facts and the provisions of the Building and Loan Act. The amendments of 1933 and 1935, Stats.1933, ch. 431, p. 1089 et seq.; Stats.1935, ch. 163, p. 798 et seq., which applied to the emergency period of the depression years, declared that the right of certificate holders to withdraw and receive payment was secondary to the duty of the association to provide a reasonable reserve for the payment of taxes, insurance, repairs, etc., provided, however, that an association "on notice" should not pay any dividends on its stock. There is no evidence that dividends were paid, or that distribution of profits was made to stockholders by the defendant.

The record fails to disclose evidence of fraud, either actual or constructive, to support plaintiff's charge. The record reflects the following: Prior to April, 1933, there had been much trafficking in certificates on the part of numerous brokers and speculators and to such an extent as to develop a so-called "racket" in those activities. Thereafter the defendant furnished names of some of its certificate holders to responsible brokers for the reason that prior to that time it was apparent that the names of many of its investors were in the possession of unlisted brokers, and an abuse in dealing with their certificates had become so pronounced that the defendant decided that it would be preferable, both for the company and its investors, to have as an acknowledged and approved dealer in certificates a brokerage firm of unquestioned integrity and responsibility. Accordingly, at that time, about April, 1933, the defendant furnished to Schwabacher & Company, members of the New York Stock Exchange, the names of such certificate holders as had frequently been disturbing their accounts or pressing demands for funds. The defendant approved a letter which Schwabacher & Company sent to this special list of certificate holders in which that

firm expressly stated that it believed that the Pacific States Savings was a well-managed institution and that its certificates were intrinsically worth more than that firm was offering on an immediate cash conversion basis. In February, 1934, after the suspension of withdrawals had been announced, the Pacific State's Auxiliary Corporation, a subsidiary of the defendant, applied to the Commissioner of Corporations for a broker's license to deal exclusively in outstanding investment certificates of the defendant. In the application, the Auxiliary Corporation expressly stipulated that it would not take any profit in any of its dealings in such certificates, and there is no evidence indicating that it did not fully and strictly live up to this agreement. After it obtained its broker's license, the Auxiliary Corporation furnished names of investors to a selected list of brokers pledged to pay investors no less than the current price paid directly by the Auxiliary Corporation. Those brokers pledged themselves to the effect that in any case when a certificate was traded for any other security the latter would be of a comparable market value, and that in no case would they make any misrepresentations or spread any false rumors concerning the defendant.

[2] In attempted support of the charge that the defendant was engaged in a scheme to defraud its certificate holders, plaintiff refers to certain evidence and findings in the above mentioned proceeding of Pacific States Sav. & L. Co. v. Hise, 25 Cal.2d 822, 155 P.2d 809, supra, wherein the seizure of the defendant company by the Building and Loan Commissioner was challenged. In affirming the order of seizure in that proceeding it was not necessary to consider or determine the sufficiency of that evidence or the propriety of the findings based thereon. The seizure was upheld on other and unrelated grounds. The findings and the evidence in that proceeding are not, under familiar rules on appeal, of such compelling force as to warrant a reversal in this case. The evidence in this case is sufficient to support the findings and conclusions of the trial court that the sale of the certificates by plaintiff's assignors, followed by the cancellation of the same by the defendant corporation, was not fraudulent and that no liability in damages or otherwise accrued to the defendant thereunder. This conclusion makes it unnecessary to express an opinion upon the merits of the defense of estoppel or of other contentions of the defendant.

The judgment is affirmed.

EDMONDS, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

GIBSON, C. J., did not participate herein.

CARTER, Justice (dissenting).

I dissent. It has been made to appear to me sufficiently that the acquisition by defendant of its outstanding investment certificates was the result of a deliberate, illegal scheme to acquire such certificates at a discount, and that in so doing, defendant resorted to fraudulent misrepresentation and coercion. This acquisition of certificates at a discount was one of the component parts of a policy and plan evolved by defendant during the early years of the depression at a time when its financial structure was in a critical condition. The plan consisted of using its funds, assets, and the proceeds of the sale of its assets, for the purchase and acquisition of its own investment certificates at prices substantially less than the price at which such certificates had been issued and sold to investors by it. The design and purpose of this plan was to create a value for the capital stock of defendant, for the benefit of defendant (and the group in control), and at the expense and to the detriment of its certificate holders. Pursuant to this plan it was to defendant's benefit to acquire as many as possible of the outstanding investment certificates at a discounted price. It did this mainly, through Pacific States Auxiliary Corporation, an alter ego of defendant and Robert S. Odell, defendant's president. Defendant's outstanding certificate liability was reduced from approximately $91,000,000 in 1931 to $46,000,000 in 1939. Not all of the facts surrounding the plan, its formulation and execution are revealed by the record in this case. However, the end sought to be attained is sufficiently clear, also the eagerness on the part of defendant to obtain the certificates (at a discount only), and the implications that were made to appear, contrary to known facts, that if the certificate holders did not care to sell at the discounted prices, they would get nothing.

What the record in this case reveals is not all that we have before us. Pacific

States Sav. & L. Co. v. Hise, 25 Cal.2d 822, 155 P.2d 809, decided January 31, 1945, was an action brought by defendant challenging the right claimed by the state Building and Loan Commissioner in seizing its business and assets. The case was argued before this court on the same day as the instant case and submission of the latter was deferred, upon agreement of the parties, until after the filing of additional briefs in the Hise case, and its submission.

Defendant here was plaintiff in the case of Pacific States Sav. & L. Co. v. Hise, supra, and in that case was determinedly endeavoring to regain supervision and control over its own affairs. The defendant, Building and Loan Commissioner, represented by the state attorney general (who now represents defendant in this action), likewise considered the issues vital, and on behalf of stockholders, investment certificate holders and the public in general, just as earnestly resisted plaintiff's efforts. The case took over two years to try (the instant action took three weeks). The record presents a detailed outline of the whole system, manner and method of Pacific States operations over a period of years. Included among the findings of the trial court are findings to the effect that misrepresentation and coercion were resorted to by defendant in the acquisition of its outstanding investment certificates. The findings and judgment in that case are in direct conflict and wholly irreconcilable with the judgment which is affirmed as the result of the majority opinion in this case. It is true that in affirming the judgment for defendant in the Hise case, we did so upon a consideration of conduct on the part of the Pacific States Company, and grounds other than are involved in this case. But we did not disapprove the findings pertaining to fraud and coercion, and by our affirmance in each case we now have two inconsistent judgments involving the same events. Under such circumstances the rule that a reviewing court is bound by the findings of the trial court on conflicting evidence does not apply. It is the proper duty of this court to eliminate the confusion and irregularity and determine the legal effect of the evidence in both cases so as to reach a harmonious result. Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 55 P.2d 847; Colburn Biological Institute v. Shaeffer, 12 Cal.2d 168, 82 P.2d 938; Ferroni v. Pacific Finance Corporation, 21 Cal.2d 773, 780, 135 P.2d 569. Moreover, as shown by the deferment of submission above referred to, it was the general understanding of court and counsel that the two cases be considered together and in the light of each other. The majority opinion now takes an incongruous position. It impliedly recognizes the propriety of looking to the findings and evidence in the Hise case and then applies the usual test as to the sufficiency of the evidence in the instant case to support the findings and conclusions of the trial court. But, as above mentioned (aside from the submission of the cases together), the substantiality of the evidence is not the test where conflicting judgments arising out of the same events are before the court. Southern Pacific Co. v. City of Los Angeles, supra. The entire evidence should be re-weighed and a determination made as to which of the conflicting judgments is correct and should stand.

The findings of misrepresentation and coercion in the Hise case are supported by ample evidence adduced during the long trial, and show the formulation and existence of a plan or scheme whereby the group in control of defendant company, headed by Robert S. Odell, president thereof, sought to and did freeze out a large number of small investment certificate holders. The outstanding certificate liability was reduced approximately $45,000,000 in the eight years from 1931-1939. By means of financial manipulations defendant purposely placed itself in a position where it had insufficient liquid assets to pay in full investment certificate holders who wished to withdraw. These certificate holders were thereby forced to sell their certificates at a discount in a market controlled by defendant. In addition, an aggressive campaign was carried on to induce other certificate holders to sell at the discounted price as well as to exchange definite term certificates for indefinite term certificates, and to exchange certificates bearing a fixed rate of interest for certificates bearing no fixed rate of interest.

Defendant had been warned by the Building and Loan Commissioner as to the illegality of the practice of purchasing its outstanding certificates at a discount when it had on file withdrawal notices on Pacific States savings. Acquisition was therefore made through Pacific States Auxiliary Corporation or State Guaranty, a corporation. Pacific States Auxiliary was or-

ganized to act, and has always acted, as an instrumentality or agency of defendant, of State Guaranty, and of their officers and directors. All of its outstanding stock has been held since the date of its organization by State Guaranty, and through the medium of State Guaranty, it has at all times been dominated and controlled by Odell. State Guaranty was organized for the purpose of acquiring and holding the guarantee capital stock of defendant. At all times since shortly after its organization in 1937 it has been controlled and dominated by Odell, president of defendant corporation. These corporate shells and particularly Auxiliary, purchased defendant's outstanding certificates with money derived from the sale of defendant's property (acquired through foreclosure of trust deeds) and would then turn the certificates over to defendant for cancellation.

The record in the Hise case further reveals that defendant in order to remove the possibility of cash coming in or being on hand out of which certificate holders who had filed notices of withdrawal might claim or insist on payment, sold through Auxiliary or other affiliated agencies, small holdings and individual properties for which there was a market owing to improved economic conditions. The cash obtained was immediately used by the agencies making the sales to acquire for defendant large holdings for which there was no ready or immediate sale,—for example, the Plaza and Clift Hotels, the Santa Barbara Biltmore, the Central Tower (formerly the Claus Spreckels Bldg.), and also some ranch properties in Nevada, known as the "Taylor Ranch" consisting of 98,000 acres owned in fee and approximately 266,000 acres of leasehold interest. In addition, large scale capital expenditures were made for the improvement of these properties, for example, $626,569.22 was spent upon the Clift Hotel in San Francisco and $209,212.86 on the Plaza Hotel.

Directly bearing upon the question of fraud and coercion, the record in the Hise case reveals that defendant, in order to delude certificate holders and obtain as many as possible of the outstanding certificates at a discount resorted to various devices, threats and misrepresentations. The certificate holders were personally contacted by means of numerous agents and representatives employed and paid by defendant. As a result of the advice and persuasive efforts of these agents and representatives (contrary to the facts as to the status of the company in many instances, and always in derogation of the future outlook for the certificates) numerous sales were consummated. Stock brokers throughout the state were furnished what had been considered 'confidential information" containing the names of certificate holders and the amount of their respective holdings for the purpose of having such brokers solicit the holders and induce them to sell their certificates at the discounted prices. Such brokers and their agents did, by making use of information furnished them by defendant and otherwise, induce and persuade many certificate holders to sell. These brokers were paid an additional 2 per cent in addition to the regular commission of ½ per cent on their sales. The market price for certificates was dependent upon the amount of losses suffered upon the sale of foreclosed properties. Therefore, while these efforts were being carried out on behalf of defendant to acquire certificates, the poorest properties were sold first.

Pacific States' inter-office correspondence, covering a period of years, emphatically evinces the control over the market for its certificates exercised by defendant and the advantage taken of the holders by the agents and representatives of the company. Many letters were placed in evidence showing that "follow-up methods" were pursued by agents of the company. While some of the efforts were directed at securing consents to conversion, the correspondence illustrates that solicitation for conversion was in the alternative and when it developed that a consent could not be obtained, defendant's agents resorted to sale tactics. On March 25, 1936, T. A. Goldstein, vice president of defendant in charge of advertising and publicity, wrote to R. R. Buthenuth, savings department employee then in Fresno, as follows: "It is quite apparent that some of the contact men have not been severe enough with investors in endeavoring to convert or acquire certificates on notice. In fact some of the contact men in this vicinity have admitted as much. On the whole your record has been very good indeed but I wonder if there were not several occasions where you might have put over the deal if you had been a little more forceful." On April 26, 1932, Van Brunt, vice president of defendant, wrote Odell that he had had

no success in purchases of certificates at $40 and would try to obtain them at less than $50, but that "it would be rather detrimental to our next month's purchases if we go back to a price of $50; we might be in the same position we were in a month ago where the public wanted up to $55 and we cooled them down. I don't want to lose the advantage gained." On April 28, 1932, Van Brunt wrote Odell that business was quite good at the price of $50, but that he wanted to start the month at $45 and stay at that figure all the time. On May 1, 1932, Van Brunt wrote that certificate holders thought they could get $50 and it would take the better part of the coming month "to get them out of this idea." On July 7, 1934, G. R. White (vice president of defendant in charge of real estate) wrote Van Brunt a letter directing that "after you have read this letter, I would appreciate your destroying it, and under no condition have it filed." In this letter White stated "our certificate price" is based upon real estate losses. He directed the sale of two-year-old properties regardless of the percentage of loss "in an effort to increase our percentage of loss, so that our certificate price will not run away." On August 13, 1934, White again wrote Van Brunt a letter marked "Confidential" "Please destroy this note." In this letter, White stated that "our losses instead of increasing are being reduced, which is just the opposite from what we should have * * * bring this figure down to a point where it should be."

The extent to which proceeds from sales of real property were used to acquire certificates was shown by instructions given in a bulletin by White to Van Brunt and others, instructing that on all term sales where net cash was over $100 to "convert the cash that we receive into certificates," and to prepare the usual request for approval. On March 12, 1935, White instructed the real estate department that in the future on term deals where the net cash was $250 or more, "this cash is to be converted into certificates." The legality of the purchases was sought to be upheld, of course, upon the pretense that the property was sold by Auxiliary and not by defendant; that defendant exchanged the property with Auxiliary for certificates.

It is manifest from the foregoing correspondence that defendant manipulated and controlled the market for its certificates and that in so doing unfair advantage was taken of certificate holders. Much other correspondence was put in evidence. Part of it, particularly relied upon by the defendant Building and Loan Commissioner and his counsel, the attorney general, to show that "high pressure" methods were used in the acquisition of certificates at a discount, was summarized for us by the attorney general and his deputies in the brief of the respondent in that action. In part the summarization is as follows:

"Employees were instructed to urge upon certificate holders who had notices on file or were pressing for funds or whose attitude was bitter, to submit a tender, 'Every certificate holder should be encouraged to submit an offer, but we particularly desire them from the dissatisfied investors.' 'Pass this along in a discreet manner to the force at the Los Angeles office'; (Goldstein to Allison June 26, 1935). Distress claimants were urged to file a tender; and while no price was to be indicated to investors, it was to be pointed out that the lowest prices were the ones which would be purchased. Van Zandt (savings department employee) wrote Goldstein on August 3, 1935, that it 'has been my effort to give the certificate holder the idea that they would be better off by selling than to attempt to meet their obligations by small monthly withdrawals.'

"On March 3, 1936, Goldstein wrote R. R. Buthenuth (savings department employee) that 'while you have done fairly well in obtaining disposal of matured certificates to the Auxiliary Corporation may I personally urge that you give this every possible effort.' Mr. Kellogg is at present leading the pack.

"Numerous devices were resorted to to produce sales. On March 4, 1936, Goldstein wrote Kellogg that he should explain to the certificate holder that Auxiliary was receiving more certificates than it has funds for, consequently has reduced its offer, and to leave the thought that the offer may be still further reduced; that this 'will have a good psychological effect.' On December 1, 1936, a Goldstein circular suggested reminding the customers that their last chance to dispose of certificates through Auxiliary was drawing near. In one case, Goldstein at the request of an employee wrote a telegram for his use, to indicate no collusion between them, in which he said that the funds for the purchase of certificates were coming from the

Auxiliary trust fund and that the funds for purchase might soon be exhausted.

"In a bulletin to numerous employees, Goldstein said: 'Have one final heart-to-heart straight from the shoulder talk with every 'blue card person' in your district. Hit it strong and hit it now.'

"On March 30, 1936, Goldstein to Van Zandt: 'There is every indication that those who have filed notices take the attitude that they are holding the whip hand when approached by our representatives. I do not think that we are going to have any great deal of success until this one attitude is overcome and this can be accomplished only by stressing one point, and one point alone—that you are there as a warning rather than a trader. You have to make the certificate holder feel that he is putting himself in jeopardy by his present condition and that for his own interest he better do something about it.

"On March 11, 1936, Van Zandt wrote Goldstein as to one prospect who had been cheered by seeing Mr. Falch (A. E. Falch, secretary of defendant and president of Auxiliary: 'If Andy is going around spreading cheer and hope, it sort of stymies our efforts to knock them off the tree. Think Andy should be called off until we have done our act.' On March 24, 1936, Goldstein wrote Van Zandt: 'A little more dynamite please.' 'Perhaps you had better get a little heavier with these people. Lay down the law in emphatic language. Keep following them up until you wear them down.' "

I cannot agree with the majority opinion that the foregoing and other evidence in the Hise case is not "of such compelling force as to warrant a reversal in this case." The evidence of illegality of the transactions by virtue of which investors parted with their certificates, alone, is sufficient to establish plaintiff's right to recover that which he seeks, the difference between the face value of the certificates and the amount actually received by his assignors. In effect, defendant purchased hundreds of thousands of dollars worth of its outstanding investment certificates at a discount while it had withdrawal notices on file. This constituted a violation of section 6.02 of the Building & Loan Association Act. Pacific States Auxiliary Corporation at all times was merely an agent or dummy. The acts of defendant in stripping itself of cash and preventing the receipt of cash that otherwise would have been available for the protection of all investment certificate holders, were in themselves illegal acts and did not receive the approval of the Building and Loan Commissioner with knowledge of all the facts. As to the matters of fraud and coercion, to me the conclusion is inescapable that defendant violated the fiduciary duty owed by it to its investors in a most flagrant manner. I am in full accord with the findings of the trial court in the Hise case, and the argument of the attorney general that was made in support thereof upon this issue. Much of the evidence introduced in this case was subsequently introduced in the Hise case. Manifestly, however, plaintiff did not have access to all of the material evidence introduced in that case. I am convinced of the truth of plaintiff's charges as to the conduct of defendant company in the management of its affairs and the manner in which it acquired, and plaintiff's assignors disposed of, the investment certificates here concerned. The findings in the Hise case should prevail and the judgment in the instant action be reversed.




26 Cal.2d 328

## BARRETT v. BROWN.

L. A. 18929.

Supreme Court of California.

May 8, 1945.

Rehearing Denied May 31, 1945.

**1. Statutes ⇐63**
**Taxation ⇐688, 734(7)**

Where only such portion of delinquent tax list as covered property in city of Lynwood in Los Angeles County was published in a Lynwood newspaper pursuant to special statutory provisions later held unconstitutional, sale of Lynwood property did not deprive owner of any constitutional right and tax title was valid, in view of curative act. Pol.Code, § 3766; St.1943, p. 1993.

**2. Taxation ⇐688**

Since the method of publishing delinquent tax lists is of legislative direction generally, it is subject to the curative power of the Legislature.

3. Taxation ⇐688, 769, 770

Alleged irregularities in affidavits, and statement of erroneous amount in publication of delinquent tax list as the least acceptable bid, and omission from recitals in tax deed of date of sale, were cured by curative act, and also by a corrected tax deed, and hence tax title was properly held valid. St.1943, p. 1993.

In Bank.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Lynn Warwick Barrett against Leonard H. Brown to quiet title to land formerly owned by plaintiff and sold to defendant at tax sale. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 153 P.2d 411.

Edwin J. Miller, of Los Angeles, for appellant.

Raphael L. Dechter, of Los Angeles, for respondent.

Robert W. Kenny, Atty. Gen., and John L. Nourse and E. G. Benard, Deputy Attys. Gen., as amici curiae on behalf of respondent.

SHENK, Justice.

In November, 1942, the plaintiff commenced an action to quiet title to a parcel of land in Los Angeles County which had been sold for delinquent taxes. The defendant, Leonard Brown, hereinafter referred to as the defendant, bought the property at the delinquent tax sale and relied on a tax deed of date July 20, 1942. The trial court found in his favor and entered judgment accordingly. The plaintiff has appealed.

The plaintiff's ownership of the property prior to the tax sale was not questioned. The outcome of the appeal depends upon the correctness of the trial court's finding and conclusion that, by virtue of the tax sale and deed, the plaintiff no longer owned the property and that the defendant was the owner thereof.

The plaintiff relied on certain irregularities in the tax sale proceedings to establish a continuation of his title. The property was sold for delinquent 1936 taxes. At the time of the publication of the delinquent tax list in 1937, section 3766 of the Political Code contained a general provision that the publication be made once a week for three successive weeks in some newspaper of general circulation published in the county. Special provisions were included by an amendment adopted in 1935 (Stats.1935, p. 1572) which applied only to counties of the first class, requiring that the portion of the delinquent tax list, covering property in the unincorporated area and in cities in which there was no newspaper of general circulation, be published in a newspaper of general circulation published in the county seat, but that the portion of the delinquent tax list, covering property in a city (other than the county seat) in which there was a newspaper of general circulation, be published in the city or town where the property was located.

The real property here involved is located in the city of Lynwood in Los Angeles County. The Lynwood Press, a newspaper of general circulation, is published in that city. In 1937 that portion of the delinquent tax list covering property located in Lynwood was published in that newspaper and was not published in any other newspaper in the county. The portion of the delinquent tax list covering property located in unincorporated territory, in cities where there was no newspaper of general circulation, and in the county seat, was published in a newspaper of general circulation published in the county seat.

Los Angeles is the only county of the first class, and admittedly the publication of the 1937 delinquent tax list was in accordance with the foregoing special provisions of the Political Code. In 1939 the Legislature adopted the Revenue and Taxation Code. St.1939, p. 1274 et seq. The foregoing general provisions of former section 3766 of the Political Code were incorporated in section 3356 of the Revenue and Taxation Code; and the foregoing special provisions relating to counties of the first class only were included in section 3391 et seq. of that code.

In May, 1941, this court decided Consolidated Printing & Publishing Co. v. Allen, 18 Cal.2d 63, 112 P.2d 884. In that mandamus proceeding the petitioner succeeded in preventing the award of contracts for the publication of the 1940 delinquent tax list in Los Angeles County in accordance with the special provisions of section 3391 et seq. of the Revenue and Taxation Code, and in requiring the publication of the list in accordance with the general provisions of section 3356 of that code. We held that there was no natural or intrinsic reason why Los An-

geles County should be classified apart from other counties in the state for tax purposes, and that therefore the Legislature exceeded its powers in enacting special provisions relating to the publication of the delinquent tax list in Los Angeles County; also that the enactment of the special provisions in relation to collection of taxes was forbidden by subdivision 10 of section 25 of article IV of the state Constitution.

[1] The plaintiff relies on our decision in that case to support his conclusion that the publication of the 1937 delinquent tax list in Los Angeles County pursuant to the special provisions resulted in a void tax deed and that he is still the owner of the property. The conclusion of the plaintiff is not, however, corollary to the holding in the Allen case. The Allen case did not involve a published delinquent tax list or the validity of tax titles. It was concerned solely with the power of the Legislature to enact the special provisions relating to classification of counties in tax matters. Here there was an actual publication of a portion of the delinquent tax list which included the plaintiff's property. This publication was in a newspaper of general circulation published in the county and in the city in which the plaintiff's property was located. The publication was complete in every respect except that it did not include all of the property in the county delinquent for nonpayment of taxes and sought to be sold at the same time. As above stated the publication of the entire delinquent list was split between more than one newspaper of general circulation published in the county. We may assume the application of the general provision as a prerequisite step in tax sale proceedings. We may also assume that the defective publication, without more, would have been fatal under the in invitum rule. But in 1943 the Legislature enacted a curative act entitled: "An act to validate certain acts of counties, cities and counties and of their officers relating to taxation of property." Stats.1943, p. 1993. The content and effectiveness of that act and its application in pending litigation have been considered in the recent cases of Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531; Chambers v. Duvall, Cal., 156 P.2d 921; and City of Compton v. Boland, Cal., 158 P.2d 397. It was thereby determined that, assuming certain jurisdictional steps to have been taken, the details in the mode or manner of pursuing those steps may be changed by the Legislature within constitutional bounds and that if such steps have been defectively pursued the irregularities may be cured by the validating act. In City of Compton v. Boland, supra, it was said: "If the notice is adequate to comply with due process the Legislature may make changes in the mode or manner of giving notice, or the details of the matter to be contained therein." There is no question that notice of the delinquency of the tax on the plaintiff's property was contained in a newspaper of general circulation published in the county in accordance with the general provision of the statute. The fact that other property was not included in the publication does not vitally disparage the fact of notice to the plaintiff; nor has the plaintiff been deprived of any constitutional right. Cases of so-called "split" publication or publication in a supplement to, rather than in the newspaper itself, where a curative act was not involved, are not in point. Such cases deal with the question of the intent of the Legislature regarding publication.

[2] The intent of the Legislature by the general provision to require publication of the entire delinquent list in one newspaper may not be disputed. We have here the question of the effect of the validating act in respect to the sale of property included in the publication of a portion of the delinquent list, when another portion of the delinquent list was omitted from that publication or was published in another newspaper. Our decisions in the foregoing cited cases are determinative of the question and, since the method of publication is of legislative direction generally, it is also subject to the curative power of the Legislature. The effect of the validating act in this case is to bring the publication of the 1937 delinquent list in Los Angeles County under the general provision of section 3766 of the Political Code (now Rev. & Tax.Code, § 3356), and to cure the irregularity in the method pursued thereunder.

[3] The plaintiff contends that the defendant's tax title is ineffective because of alleged irregularities in the form and execution of affidavits, the statement of an erroneous amount in the publication of the 1942 delinquent tax list as the least acceptable bid, and the omission from the recitals in the tax deed of the date of the sale by the tax collector to the defendant. Rev. & Tax.Code, § 3480(d). A corrected tax deed was executed and admitted in evidence at the trial. The alleged irregularities, if they

were such, were cured by the provisions of the 1943 curative act; also by the execution and delivery of the corrected deed containing the required recitals in accordance with the facts. Fox v. Townsend, 152 Cal. 51, 91 P. 1004, 1007; Webster v. Somer, 159 Cal. 459, 462, 114 P. 575; Morton v. Sloan, 96 Cal.App. 747, 752, 275 P. 223; see, also, Smart v. Peek, 213 Cal. 452, 458, 2 P.2d 380; Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 405, 60 P.2d 825.

Other contentions do not require discussion. An examination of the record shows that there was no prejudicial error in the admission or rejection of evidence; that the findings are sufficient to cover the issues presented by the pleadings, and that the evidence supports the findings which in turn support the judgment.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., concurred.

Rehearing denied; CARTER, J., dissenting.




69 Cal.App.2d 151

**ENGEBRECHT v. SHELTON et al.**

**Civ. 3157.**

**District Court of Appeal, Fourth District, California.**

**May 9, 1945.**

**1. Reformation of Instruments ⇐45(8)**

Evidence that, through mutual mistake, purchase-money note secured by trust deed on realty provided for payment of principal and interest in monthly installments of $35 or more, which was insufficient to pay interest as it accrued, justified reformation of note to conform to agreement that monthly payments were applicable on principal only and that interest should be paid annually. Civ.Code, § 3399.

**2. Reformation of Instruments ⇐47**

Mutual mistake, whereby note secured by trust deed on realty provided for payment of principal and interest in stipulated monthly installments instead of providing for installment payment of principal only and annual payment of interest, did not justify reformation of note so as to state a different principal amount equivalent to principal and accrued interest at date of judgment and provide for payment of principal and interest in larger monthly installments until specified date when entire balance should become due. Civ.Code, § 3399.

**3. Appeal and error ⇐1152**

Judgment reforming note secured by trust deed on realty in a manner not supported by the evidence or findings of fact as to agreement which through mutual mistake was not reflected in the note as executed need not be reversed, but the judgment and conclusions of law could be modified to conform to the findings of fact, where such findings and evidence of plaintiff clearly showed terms of agreement. Civ.Code, § 3399.

**4. Reformation of Instruments ⇐47**

Where note through mutual mistake provided for monthly payments in an amount insufficient to pay interest as it accrued to be applied on both principal and interest instead of principal only, reformation of note to provide for payment of principal and interest in larger monthly installments until specified date when entire balance should become due could not be justified on ground that, since note fixed no time for payment of principal, trial court had power under statute to fix a reasonable time for performance, since, under agreement for payment of principal only in installments, time of performance of obligation was fixed. Civ.Code, §§ 1657, 3399.

**5. Appeal and error ⇐1009(1)**

Whether failure to discover a mistake in note until almost four years after its execution was inexcusable negligence so as to bar reformation was a question of fact for trial court. Civ.Code, § 3399.

**6. Reformation of Instruments ⇐25**

Mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at instance of party who executed it carelessly. Civ. Code, § 3399.

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Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Herman C. Engebrecht against J. W. Shelton and others for reformation of a promissory note and deed of trust. From a judgment of reformation, defendants appeal.

Judgment modified and as modified affirmed.

Ralph Robinson, of Fresno, for appellants.

Irvine P. Aten and G. L. Aynesworth, both of Fresno, for respondent.

MARKS, Justice.

This is an appeal from a judgment reforming a promissory note and deed of trust.

Plaintiff was the owner of real property in Fresno which was leased to defendants for a term of ten years from June, 1938, at a monthly rental of $25 for the first five years and $30 per month thereafter.

Negotiations for the sale of the property to defendants were started which resulted in a sale for $10,000, payable $50 cash, and the balance in instalments. Deferred payments were secured by a deed of trust on the property.

Plaintiff testified that the note and deed of trust were prepared by a real estate agent engaged by defendant, J. W. Shelton. The note as prepared and executed contained the following:

"In installments as herein stated for value received, we, * * * promise to pay to Herman C. Engebrecht, * * * Nine Thousand Nine Hundred Fifty and No/100 Dollars with interest from date on unpaid principal at the rate of five (5%) per cent per annum; principal and interest payable in installments of—Thirty-Five and No/100 ($35.00) Dollars or more on the fifteenth of each and every month, beginning on the fifteenth of April, 1940, and continuing until said principal and interest have been paid. Each payment shall be credited first, on interest then due; and the remainder on principal; and interest shall thereupon cease upon the principal so credited. * * *"

Plaintiff testified, and the trial court found in exact accordance with his evidence, that the parties mutually agreed that defendants would pay plaintiff "$10,000.00 for said property in the following manner: $50.00 in cash, the sum of $35.00 per month, payable in monthly installments, interest on deferred payments at the rate of five per cent per annum, payable annually * * *." There is the further finding that the note containing the provisions already quoted was executed through "mutual omission, inadvertence, and mistake of the parties"; that plaintiff did not discover the mistake until February, 1944.

Defendants made the down payment and the instalments of $35 per month until this action was instituted, but declined to pay more for various reasons though requested to do so by plaintiff.

[1] Besides the testimony of plaintiff there is strong evidence of mutual mistake in the note itself. It contains the direct promise of defendants to pay plaintiff $9950. Under the method of payment set forth, that sum would never be paid except by the voluntary acts of defendants as the $35 per month was not sufficient to pay the interest as it accrued. At the time of the judgment there was $10,314.60, principal and accrued interest, unpaid. Under these circumstances the trial court was fully justified in concluding that the note as executed was the result of the mutual mistake of the parties and did not conform to their agreement. Thus a reformation of the note to conform to that agreement would have been proper. This is especially true as the note itself contained conflicting and repugnate provisions. Sec. 3399, Civil Code; Strauss v. Bruce, 139 Cal.App. 62, 33 P.2d 71; Tieso v. Tieso, 67 Cal.App.2d 872, 155 P.2d 659, 662.

The trial court drew the conclusion of law that because of the mutual mistake of the parties the promissory note and the copy thereof in the deed of trust should be reformed so that the note and copy would read in part as follows:

"$10,314.60 Fresno, California, October 9, 1944.

"In installments as herein stated, for value received, we, J. W. Shelton and Eloda Shelton, husband and wife, jointly and severally Promise to pay to Herman C. Engebrecht, a single man, or order, at Fresno, California, the principal sum of Ten Thousand Three Hundred Fourteen and 60/100 Dollars, with interest from date on unpaid principal at the rate of five (5%) per cent per annum; principal and interest payable in installments of Forty-Two and 95/100 ($42.95) Dollars or more on the 9th day of each and every month, beginning on the 9th day of November, 1944, and continuing until the 9th day of November, 1950, when the entire balance

shall become due and paid. Each payment shall be credited first, on interest then due; and the remainder on principal; and interest shall thereupon cease upon the principal so credited. * * *"

By the judgment the promissory note and the copy in the deed of trust was reformed in the language just quoted from the conclusions of law.

[2, 3] It is apparent that the conclusions of law and the judgment are not supported by the evidence or by the findings of fact but conflict with both. As the evidence of plaintiff and the findings of fact already quoted are clear on the terms of the agreement between the parties, we need not reverse the judgment but may modify it and the conclusions of law to conform to the findings of fact.

[4] Plaintiff seeks to support the judgment in its present form by arguing that as the note as executed fixed no time for the payment of the principal, the trial court was empowered to fix a reasonable time for performance under the provisions of section 1657 of the Civil Code. While this may be true of the written note, that instrument was executed by mutual mistake and should have been reformed in accordance with the intention and agreement of the parties as found by the trial court. Under this agreement $35 per month was to be paid on the principal which would ultimately pay it. Thus under the agreement of the parties defendants would pay the principal debt in a considerable number of years so the time of performance of the obligation of the contract was fixed by the parties and will be fixed by the note as reformed.

Defendants urge that the cause of action was barred by the statute of limitations.

The note and deed of trust were dated March 9, 1940. They were recorded and plaintiff had them in his possession for several years before the action was instituted on June 23, 1944.

[5, 6] Plaintiff testified, and the trial court found, that he discovered the mistake in February, 1944. As was said in Tieso v. Tieso, supra:

"Whether the failure to discover a mistake in a written document is inexcusable negligence so as to bar a party from the right to reformation is a question of fact for the trial court. 'It has been frequently decided that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation at the instance of the party who executes it thus carelessly.' California Packing Corporation v. Larsen, 187 Cal. 610, 614, 203 P. 102, 104; Los Angeles & R. R. Co. v. New Liverpool S. Co., 150 Cal. 21, 27, 87 P. 1029; Hanlon v. Western Loan & Bldg. Co., 46 Cal.App.2d 580, 597, 598, 116 P.2d 465."

The conclusions of law and the judgment are modified by striking from each the copy of the promissory note set forth in each of them and in lieu thereof inserting the following in each instrument:

"$9950.00 Fresno, California, March 9, 1940.

"In instalments as herein stated, for value received, we jointly and severally promise to pay to Herman C. Engebrecht, or order, at Fresno, California, Nine Thousand Nine Hundred Fifty and no/100 Dollars with interest from date on unpaid principal at the rate of five (5%) per cent per annum, payable annually. Principal payable in instalments of $35.00 or more per month, beginning on the 9th day of April, 1940, and monthly thereafter on the 9th day of each and every succeeding month until fully paid. Should default be made in the payment of any instalment of principal or interest when due, the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in lawful money of the United States. If suit or action be instituted in any court to collect any sum due and unpaid on this note, we promise to pay such sum as the court may adjudge reasonable as attorney's fees in said suit or action. This note is secured by a deed of trust to Home Title Company, a corporation.

"J. W. Shelton
"Eloda Shelton."

As so modified, the judgment is affirmed. Neither party will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

69 Cal.App.2d 176

## PEOPLE v. FERRATO.

Cr. 3852.

District Court of Appeal, Second District, Division 3, California.

May 15, 1945.

1. Robbery ⇐24(3)

In prosecution for second-degree robbery committed in broad daylight in parking lot, evidence of identification of defendant as perpetrator of crime justified conviction.

2. Criminal law ⇐742(1)

Jurors are judges of credibility of witnesses produced on question of alibi.

3. Criminal law ⇐572

Evidence supported conviction for second-degree robbery as against contention that evidence of alibi should have raised reasonable doubt as to defendant's guilt.

4. Criminal law ⇐1144(15)

Court was not required to presume that verdict finding defendant guilty of second-degree robbery committed in broad daylight in parking lot was result of passion or prejudice on ground of improbability of offense having been committed at time and place alleged, where there was nothing inherently improbable about robbery or circumstances attending it.

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Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Victor G. Ferrato was convicted of second-degree robbery, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

The defendant was convicted by a jury of second-degree robbery and appeals from the judgment and sentence as well as from the order of the court denying his motion for new trial.

His claim that a reversal is in order rests upon three points: that he was not sufficiently identified as the perpetrator of the crime charged against him, that his attempted proof of an alibi should have raised a reasonable doubt as to his guilt, and by reason of inherent improbability this court should presume that the verdict was the result of passion or prejudice.

The crime of which the defendant was convicted occurred in broad daylight on February 21, 1944. The complaining witness, a Mrs. Reader, testified that at 4 o'clock p. m., she and her niece, Mrs. Simmons, had gone by automobile from her place of business on Central Avenue to a bank located at Avalon and Slauson Boulevards in the city of Los Angeles for the purpose of obtaining money with which to cash pay roll checks. The two women entered the bank and obtained the sum of $26,000. Part of it they concealed upon their persons but the sum of approximately $6,000 was placed in a manila envelope and was carried from the bank by Mrs. Reader. She and her niece went to the parking lot where their automobile had been left and entered it from the left-hand side, Mrs. Reader moving under the steering wheel and over to the right side of the car. She was followed by Mrs. Simmons who took her place behind the steering wheel. But, before she could close the door, the defendant slipped into the front seat of the car and pushed her over against her aunt, having his right hand in his pocket jammed up against Mrs. Simmons' side and his left hand held toward Mrs. Reader across Mrs. Simmons' lap, at the same time saying, "Girls, this is serious; hand that over," indicating the package which Mrs. Reader held in her arm. She testified that unconsciously she clutched the package to her and that the defendant said, "Hand that over if you don't want this girl killed." After that he reached and took the package out of Mrs. Reader's hand, left the car and ran in the rear of a nearby filling station where he disappeared. He was arrested two days later in Las Vegas, Nevada, and returned to Los Angeles where he was arraigned in the superior court on March 22d. Meanwhile, he had given bail and had returned to his apartment at Huntington Park.

At his trial he testified that his place of residence was approximately three miles from Slauson Avenue and Avalon Boulevard; that he was at home on February

21, 1944; that he got up that day about 10 o'clock in the morning, talked on the telephone in the hall of the apartment house where he lived to his employer, Gus Kallas, then returned to his apartment and went to bed and to sleep. He woke, according to his testimony, when the telephone rang about 4 or 4:10 o'clock and Mrs. Baker called him at that time. He stated that when he talked with Gus that morning he made arrangements to meet him at the home of his father and mother at 5 o'clock in the afternoon for the purpose of collecting $180 which Gus owed him; that he had been working for Gus, learning to tend bar, and decided to go to Las Vegas to obtain employment there; that Gus had let him off on February 21st and, after seeing him at the home of his parents and collecting the money that was due him, he left in his sister's automobile after 5 o'clock of the same day, and went to Las Vegas with a man named Cook. He denied that he had committed the robbery and stated that he had never seen Mrs. Reader or Mrs. Simmons until they appeared to testify against him at the preliminary hearing.

[1] We have carefully examined the record in this case and find that while there were various inconsistencies or minor contradictions in the stories told by Mrs. Reader and her niece, on the two occasions when they appeared as witnesses against the defendant, first at the preliminary hearing and later at the trial in the superior court, these variances in their recitals were not such as to warrant a disbelief in the essential truth of their statements. They both testified that at the time of the robbery they noticed that the defendant had "flecks" in his eyes, which were described as "dark brown". The defendant produced as a witness an eye specialist who testified that he had examined the defendant and found that his eyes were normal, without flecks, spots or streaks. In this connection, we may note that the jury saw the defendant and had an opportunity to determine whether his eyes were in any way peculiar and, judging from the verdict, they must have decided that they had a peculiar characteristic which Mrs. Reader described as "flecks"; or, else they may have concluded that in the excitement of the robbery on the afternoon of February 21st his eyes sparkled in a peculiar way. The man who robbed Mrs. Reader had worn no hat and was under direct observation of both women and, so far as the record shows, they never faltered or hesitated in their identification of this defendant as the guilty man. Mrs. Simmons was recalled as a rebuttal witness in behalf of the People and testified that she had been in the court room during the time the defendant had been on the witness stand, sitting approximately 25 feet from him in a position where she could see his face and watch his mannerisms; that she heard the defendant speak and testified that it was the same voice that she heard belonging to the man who got into the car on the afternoon of February 21st; that she noticed something about his manner of speaking that was similar to the manner that she observed concerning him that afternoon, namely, that he did not talk with his mouth open. Mrs. Reader, as a rebuttal witness, testified that the voice she heard in the court room during the trial, while the defendant was on the witness stand and while she was observing him, was the same voice she heard on the afternoon of February 21st. We conclude from our study of the record that the contention of the defendant that he was not sufficiently identified as the perpetrator of the crime is not well grounded.

[2, 3] In regard to the appellant's claim that his offered defense of an alibi should have raised a reasonable doubt as to his guilt, we can only say that there is nothing in the record to sustain that claim. No alibi can be successfully established unless the jurors believe the witnesses who undertake to show that the defendant was absent from the scene of the crime at the time it was committed. Jurors are judges of the credibility of the witnesses produced and it is apparent from the verdict rendered in this case that they did not accept as accurate the testimony of the witnesses who undertook to establish an alibi for the defendant. There was nothing so convincing about the testimony of any of these witnesses as to compel a reasonable doubt to arise in the mind of a juror. In fact, the statement of Mrs. Baker that she awakened the appellant at 4 o'clock p. m., or shortly thereafter, on February 21st must have carried very little weight with the jury, as definitely fixing that important date, in view of the following colloquy when she was under cross-examination:

"Q. Did you have any way of keeping track of the dates on which you saw him and the date that you did not see him? A. Yes.

"Q. How did you do that? A. Because I remember all of the tenants that I see and all of the dates that I see them, for I don't see them very often, because, after all, he pays his rent on the 11th and he comes over every month on the 11th, and I saw him on the 11th, and then I very seldom see him unless I answer the telephone or something like that, or if I happen to see him in the hall there. And if I happen to see him in the hall I will remember what date it is.

"Q. You have 32 apartments occupied by— A. Yes.

"Q. —different numbers of people, I suppose, from two to four, or one to four? A. No, there is not over two in each apartment. I won't allow it.

"Q. And you can tell us on what date and what hour you have seen each one of those tenants; is that correct? A. Most of my tenants I see every day.

"Q. Just answer the question, please. A. No."

As stated in People v. Quinn, 1931, 111 Cal.App. 614, 621, 295 P. 1042, 1044, cited by appellant, "The authorities in this state are unanimous in the declaration of the law that as to the 'defense' of alibi, if the defendant introduces sufficient evidence to raise a reasonable doubt as to his guilt, he is entitled to an acquittal." This is merely applying to a claimed alibi the old rule that to warrant a conviction the jury must be satisfied beyond a reasonable doubt of the guilt of the accused. It can not in any manner be made to read that the suggestion of an alibi necessarily creates or should create a reasonable doubt in the minds of jurors. That, of course, must depend upon the character of the testimony adduced. And the appellant in this case failed to introduce sufficient evidence to raise the reasonable doubt which would have availed to acquit him.

[4] The last remaining contention of the appellant that the court should presume that the verdict was the result of passion or prejudice because of the inherent improbability of the offense having been committed by defendant at the time and place alleged, is a contention and nothing more. No plausible argument can be advanced to sustain that claim for there was nothing inherently improbable about this robbery or the circumstances attending it.

The judgment and order are affirmed.

SHINN and PARKER WOOD, JJ., concur.




69 Cal.App.2d 156

**ENCINAS et al. v. LOWTHIAN FREIGHT LINES, Inc., et al.**

**Civ. 12790.**

District Court of Appeal, First District, Division 1, California.

May 10, 1945.

Hearing Denied July 5, 1945.

**1. Statutes ⇐228**

The office of a "proviso" is to except from operation of statute something which might otherwise have been within its terms, or to qualify or restrain its generality.

See Words and Phrases, Permanent Edition, for all other definitions of "Proviso".

**2. Marriage ⇐19**

In statute increasing age of majority of females, office of proviso that the section should be subject to code provisions on marriage was to make clear that age at which females could marry without parent's or guardian's consent was not increased. Civ.Code, § 25.

**3. Infants ⇐1**

The Legislature may fix different ages of majority for different purposes.

**4. Statutes ⇐228**

Courts should construe a proviso so as to make it effective in carrying out legislative intent.

**5. Marriage ⇐5, 19**

The net effect of amended statutes governing marriage was to continue in force the previous law that any male or female over age of majority could marry freely, to continue requirement that minors have consent of parents or guardians, and to add a minimum age below which minors could not marry even with such consent. Civ.Code, §§ 25, 56, 69, 79.

6. Marriage ⇐25(1)

The statute authorizing unmarried persons, not minors, who have been living together, to be married without license, is applicable to females over 18 though under 21, regardless of parental consent. Civ.Code, § 79; Code Civ.Proc. § 1859.

7. Statutes ⇐181(1), 184

In construing any statute, primary consideration is to determine legislative purpose and intent. Code Civ.Proc. § 1859.

8. Marriage ⇐25(1)

The obvious public policy of statute authorizing unmarried persons who have been living together to be married without license is to shield parties and their children from publicity of marriage recorded in ordinary manner, and thereby encourage legalization of relationship. Civ.Code, § 79; Code Civ.Proc. § 1859.

9. Marriage ⇐25(1)

That husband began living with second wife before divorce from first wife became final did not invalidate subsequent marriage without license to second wife, authorized by statute between unmarried persons who have been living together, and hence second wife and her son could recover for husband's death. Civ.Code, §§ 25, 79; Code Civ.Proc. § 377.

10. Bastards ⇐12

A marriage without license, authorized by statute, between unmarried persons who had been living together, legitimated their child who was born before the marriage. Civ.Code, § 215.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Herman Robert Encinas, Jr., a minor, by Bernice Encinas, his guardian ad litem, and another against Lowthian Freight Lines, Inc., and another, for wrongful death of Herman Encinas. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Bronson, Bronson & McKinnon and Herbert Chamberlin, all of San Francisco, for appellants.

Nathan Goldwater and Leo Murcell, both of Oakland, for respondents.

DOOLING, Justice pro tem.

Respondents, as surviving widow and infant son of Herman Encinas, recovered a judgment after a jury trial for the wrongful death of Herman Encinas under section 377 of the Code of Civil Procedure.

The trial court instructed the jury as a matter of law that at the time of the death of Herman Encinas the plaintiff Bernice Encinas was his lawful wife and that she and their minor son were his lawful heirs. The sole attack of appellants is directed at this instruction.

In 1936 the decedent had married one Dorothy Encinas and, while they separated twelve days after marriage, they continued to be husband and wife until the entry of a final decree of divorce on December 30, 1940. In April, 1940, the plaintiff Bernice Encinas commenced to live with the decedent as his wife, and they so lived together continuously until the decedent's death on December 5, 1941. Their son, the minor plaintiff, was born July 24, 1940.

On February 16, 1941, the decedent and the plaintiff Bernice appeared before the pastor of a Lutheran church and before such pastor a marriage ceremony was performed without a license in the form prescribed by section 79 of the Civil Code. At that time the plaintiff Bernice Encinas was over twenty years of age but under twenty-one, and the validity of the marriage is attacked on the ground that she was then a minor.

Civil Code section 79 (approved February 6, 1878, Amendments to the Codes 1877–8, p. 75) reads as follows: "When unmarried persons, *not minors*, have been living together as man and wife, they may, without a license, be married by any clergyman. A certificate of such marriage must, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made." (Italics added.)

The italicized words "not minors" in this code section expressly limit the class of persons authorized to be married without a license to those who have attained their majority, and since the amendment of section 25 of the Civil Code in 1927 (Stats.1927, p. 1119) the age of majority of males and females alike has been fixed at twenty-one. The section as so amended,

however, contains certain provisos, and upon the proper construction of the first of these provisos hinges the determination of this appeal. Civil Code section 25 as amended in 1927 reads: "Minors are all persons under twenty-one years of age; provided, that this section shall be subject to the provisions of the titles of this code on marriage and shall not be construed as repealing or limiting the provisions of section 204 of this code; provided, further, that upon the lawful marriage of any female of the age of eighteen years or over but under the age of twenty-one years, such female shall be deemed an adult person for the purpose of entering into any engagement or transaction respecting property or any contract, the same as if such person was over twenty-one years of age."

Civil Code section 25 was again amended in 1931 (Stats.1931, p. 1941) but only to amplify the last proviso thereof. The primary question presented here involves the correct construction to be placed on the first proviso: "provided, that this section shall be subject to the provisions of the titles of this code on marriage * * *." It is respondents' position that the purpose and effect of this proviso is to make a female over the age of eighteen years an adult for the purpose of contracting marriage. It is appellants' position that the proviso had no such effect.

In this regard respondents lean heavily on the provisions of section 56 of the Civil Code as those provisions read at the time of the amendment of section 25 of the Civil Code in 1927. Section 56 of the Civil Code then read (Stats.1921, p. 333): "Any unmarried male of the age of twenty-one years or upwards and any unmarried female of the age of eighteen years or upwards, and not otherwise disqualified, is capable of consenting to and consummating marriage; provided, that any male under the age of twenty-one years and over the age of eighteen years and any female under the age of eighteen years and over the age of sixteen years, with the consent in writing of the parents of the person under age, or one of such parents, or of his or her guardian, where such written consent is filed by the clerk issuing the marriage license, as provided in section sixty-nine of the Civil Code, is capable of consenting to and consummating marriage."

Since prior to the amendment of section 25 of the Civil Code in 1927 the age of majority of males was twenty-one and that of females eighteen years, the practical effect of sections 56, 69 and 79 of the Civil Code, as they then read, was that any adult, male or female, was capable of contracting marriage freely and without the consent of parent or guardian, either with a license as required by section 69 or without one under section 79 where the parties had been living together as husband and wife; but no minor, male or female, was authorized to contract a marriage without a license being issued with the consent of a parent or guardian. Such was the situation when the Legislature amended section 25 to increase the age of majority of females to twenty-one.

The Legislature was then confronted with the problem whether to increase the age at which females could marry freely without a parent's or guardian's consent to twenty-one years or to leave it at eighteen as theretofore. In the face of this problem they inserted in the amended section 25 the proviso "that this section shall be subject to the provisions of the titles of this code on marriage * * *."

[1, 2] The office of a proviso is to except from the operation of the statute something which might otherwise have been within its terms, or to qualify or restrain its generality. Johnson v. Board of Supervisors, 208 Cal. 282, 285, 281 P. 57; Dupuy v. Board of Education, 106 Cal.App. 533, 538, 289 P. 689; 59 C.J. 1087; 50 Am.Jur. 457. The office of the proviso here under consideration is patently to make clear that while the Legislature was increasing the age of majority of females to twenty-one years generally, it was not increasing the age at which females could contract marriage without a parent's or guardian's consent.

[3, 4] It is settled that the Legislature may fix different ages of majority for different purposes (In re Herrera, 23 Cal. 2d 206, 213, 143 P.2d 345; 14 Cal.Jur. 113) and it is our duty to construe the proviso under discussion so as to make it effective in carrying out the legislative intent. We can conceive of no other legislative purpose in adopting the proviso in question than to qualify the generality of the amendment increasing the age of majority of females to twenty-one by leav-

ing the age of female majority at eighteen years for the purpose of contracting marriage.

Appellants contend, however, that to so hold is to confuse the age of majority with the age of consent to marriage. Not only were the two synonymous at the time of the amendment of section 25 of the Civil Code in 1927 as noticed above, but it had been the consistent legislative policy of our state from the first session of our Legislature in 1850 to permit adults, male and female, to consent to marriage freely and to permit minors to marry only with the consent of parents or guardian. During all of that period the age at which persons were emancipated from the control of parents and guardians for the purpose of consenting to marriage was the age of majority as fixed by law.

At the first session of the Legislature in 1850 "An Act Regulating Marriages" was adopted. Stats.1850, p. 424. Section 7 of that act provided: "No Judge, Justice of the Peace, Clergyman, Preacher of the Gospel, or other person, shall join in marriage any male under the age of twenty-one years, or female under the age of eighteen years, without the consent of the parent or guardian, or other person under whose care and government such minor may be."

This section was twice amended, in 1862 to require the procuring of a marriage license (Stats.1862, p. 450) and in 1863 to authorize the marriage without a license of persons living together as husband and wife (Stats.1863, p. 244), but the same age provisions were continued in force.

In 1872 upon the adoption of the codes section 56 of the Civil Code read: "Any unmarried male of the age of eighteen years or upwards, and any unmarried female of the age of fifteen years or upwards, and not otherwise disqualified, are capable of consenting to and consummating marriage."

At the same time section 69 of the Civil Code governing the issuance of licenses to marry provided in subdivision 4 thereof that the license must show: "If the male is under the age of twenty-one, or the female under the age of eighteen years, the consent of the father, mother, or guardian, if any such, is given * *."

[5] The net effect of these two sections was to continue in force the previous law that any male or female over the age of majority could marry freely; to continue the requirement that minors must have the consent of parents or guardian, and to add a minimum age below which minors could not legally marry even with such consent.

Thus stood the law when in 1878 section 79 was added to the Civil Code. In providing in that section that unmarried persons *not minors* who had been living together as husband and wife might be married without a license the Legislature fitted a consistent piece into the existing pattern of the law. The law already provided in effect that unmarried persons *not minors* might be married with a license without the consent of any third party, but that no minor could be married without the consent of parent or guardian. Section 79 simply followed this existing pattern by limiting its provisions to persons not minors.

When section 56 was amended in 1921 to the form quoted earlier in this opinion it in no wise changed the law in so far as it fixed the age of majority of both males and females as the age at which persons could lawfully contract a marriage without obtaining a parent's or guardian's consent. It simply made the law clearer in that regard by expressly integrating section 56 with section 69. However, when the Legislature came to amend section 25 in 1927, they did find in section 56 a clear statement that "Any unmarried male of the age of twenty-one years or upwards and any unmarried female of the age of eighteen years or upwards * * * is capable of consenting to and consummating marriage * * *"; those ages were respectively the ages of majority of males and females as fixed by section 25 which they were proposing to amend; and they were faced with the question whether, in amending the age of majority of females from eighteen to twenty-one, they should also make twenty-one the age of female majority for the purpose of freely contracting marriage or leave the age of female majority at eighteen for that limited purpose. The legislative decision on that question was embodied in the proviso that the section "shall be subject to the provisions of the titles of this code on marriage * * *."

This conclusion finds additional support in the proviso of section 25 making married women over eighteen years of age

adult persons for the purpose of entering into contracts and transactions concerning property. The two are consistent with one another. It is logical to provide that if a female is an adult for the purpose of contracting marriage at eighteen she should be an adult for business purposes after having contracted a marriage. It seems not so logical to say that a female is not an adult for the purpose of contracting marriage at eighteen, but having contracted a marriage as a minor she thereupon immediately becomes an adult for business purposes.

[6-8] Appellants also argue that to permit the application of section 79 to females over the age of eighteen years is to encourage immorality among minors and to interfere with parental control. We fail to see the force of this argument. Concededly any unmarried female over the age of eighteen can contract a marriage with a license without parental consent. The plaintiff in this case, after living with the decedent as his wife, could have done so. We cannot find any unreasonable interference with parental control in extending to her the privilege of being married under section 79 without a license when she could have been married with a license even over her parents' objection. In construing any statute the primary consideration is to determine the legislative purpose and intent. 23 Cal.Jur. 725-727; Code of Civil Procedure, sec. 1859. The obvious public policy behind section 79 of the Civil Code is to shield the parties and their children, if any, from the publicity of a marriage recorded in the ordinary manner, and thereby to encourage unmarried persons who have been living together as man and wife to legalize their relationship. It is promotive of this beneficent legislative purpose to extend the privileges of section 79 to all persons who are capable of contracting marriage without parental consent.

[9] The fact that prior to the decedent's divorce the plaintiff was living with him is a false quantity. After the final decree was entered on December 30, 1940, and until the date of their marriage on February 16, 1941, the decedent and the plaintiff Bernice were unmarried persons living together as man and wife. That clearly satisfied the condition for marriage without a license set out in section 79.

Our conclusion that the plaintiff Bernice was not a minor for the purpose of consenting to marriage makes it unnecessary for us to consider the question whether the marriage of a minor under that section would be absolutely void or only voidable.

[10] While the minor plaintiff was born before the marriage of his parents that marriage legitimated him. Section 215, Civil Code.

We find no error in the instruction attacked, and the judgment is accordingly affirmed.

PETERS, P. J., and WARD, J., concur.

Hearing denied; EDMONDS, J., dissenting.






## RICE v. CALIFORNIA LUTHERAN HOSPITAL et al. *

Civ. 14741.

District Court of Appeal, Second District, Division 1, California.

May 8, 1945.

Rehearing Denied June 6, 1945.

Hearing Granted July 5, 1945.

**1. Appeal and error ⇐1011(1)**

An appellate tribunal will not interfere with judgment arrived at by trier of facts when there exists a substantial conflict in the evidence.

**2. Appeal and error ⇐989**

The rule that an appellate tribunal will not interfere with judgment arrived at by trier of facts when there exists a substantial conflict in the evidence does not relieve an appellate court of its duty of analyzing the evidence in light of reason and human experience, in an effort to solve question as to whether judgment is reasonably and substantially sustained by the evidence.

**3. Judgment ⇐199(3)**

A judgment notwithstanding the verdict is proper whenever, upon the whole evidence, the judge would be compelled to set aside verdict rendered, and an appellate court would be impelled to reverse it upon appeal as unsupported by evidence.

* Subsequent opinion 163 P.2d 860.

**4. Judgment ⇐199(3)**

To warrant court in granting a judgment notwithstanding the verdict, it is not necessary that there be an absence of conflict in the evidence, but, if there be a conflict, court is not deprived of such power unless the conflict is a substantial one.

**5. Judgment ⇐199(3)**

To constitute such a conflict in evidence as will prevent trial court from rendering the decision itself notwithstanding verdict of fact finding body, the conflict in the evidence must be of a substantial character which, when applied to peculiar facts, reasonably supports the verdict rendered.

**6. Trial ⇐139(1)**

Although jurors are sole judges of facts, question as to whether there is substantial evidence in support of plaintiff's case is always a question of law for court.

**7. Evidence ⇐588**

A court is not bound to accept oral testimony as evidence of a fact if such testimony is inherently improbable. Code Civ.Proc. § 1823.

**8. Judgment ⇐199(3)**

On defendants' motion for judgment notwithstanding verdict, testimony must be read in light most advantageous to plaintiff and taken most strongly against defendants.

**9. Appeal and error ⇐934(1)**
**Judgment ⇐199(3)**

The rule that testimony must be read in light most advantageous to plaintiff and taken most strongly against defendant on motion for judgment notwithstanding the verdict does not require trial judge, or appellate court, to accept as true everything which is in testimony of witnesses.

**10. Judgment ⇐199(3)**

If some of plaintiff's particular testimony was so improbable that it was not entitled to consideration as evidence, verdict in favor of plaintiff founded thereon was lacking in evidentiary support and against law, and trial judge was justified in entering judgment for defendant notwithstanding the verdict.

**11. Judgment ⇐199(3)**
**Trial ⇐139(1)**

To justify submission of any question of fact to a jury, or to bind court to a verdict rendered by jury as duly constituted triers of fact, there must be proof of a substantial character that the fact is as alleged.

**12. Hospitals ⇐7**

A hospital was under duty to use reasonable care for safety and well-being of its patients and to take such precautions to shield them from injury as a reasonable person would take under the circumstances.

**13. Hospitals ⇐7**

Hospital employee, in placing hot water within reach of patient recovering from major operation, was not guilty of negligence unless it could be said that an ordinarily prudent person situated as employee was, and knowing what employee knew, would under all circumstances assume probability of injury resulting to patient from so placing water because of patient's weakened condition.

**14. Negligence ⇐1**

Knowledge of facts out of which a duty arises is an essential element in determining existence of any negligence.

**15. Hospitals ⇐8**

Evidence was insufficient for jury as to whether hospital employee was guilty of negligence in placing hot water within reach of patient recovering from major operation, so as to render hospital liable for burns sustained by patient when water spilled on her.

**16. Evidence ⇐586(3)**

Evidence of a negative character is ordinarily not as satisfactory as that of a positive character.

**17. Negligence ⇐121(2)**

One of the essential conditions for application of res ipsa loquitur rule is that the accident must not have been due to any voluntary action or contribution on part of plaintiff.

**18. Hospitals ⇐8**

Patient could not recover from hospital for burns sustained when hot water spilled on her under "res ipsa loquitur" doctrine, where evidence established that spilling of water was caused by patient's voluntary action.

**See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".**

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Davied Ella Rice against the California Lutheran Hospital, the Lutheran Hospital Society of Southern California, and another to recover for injuries allegedly caused by defendants' negligence while plaintiff was a patient in defendants' hospital. From a judgment for defendants notwithstanding the verdict, the plaintiff appeals.

Affirmed.

Sullivan & Lane, George Stahlman, and Robert J. Sullivan, all of Los Angeles, for appellant.

Musick, Burrell & Pinney, Howard Burrell, Anson B. Jackson, Jr., and Clayton Straub, all of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action on account of injuries caused, as alleged, by the carelessness of defendant in allowing plaintiff to be burned upon her arm, breast, left side and hip while she was a patient in the hospital maintained in the City of Los Angeles by defendant Lutheran Hospital Society of Southern California, a corporation.

The cause proceeded to trial before a jury and, at the conclusion of plaintiff's case, defendant moved for a nonsuit upon the ground that plaintiff "has wholly failed in any manner whatsoever to prove or show anything tending to establish any actionable negligence on the part of defendant." This motion was denied by the court. Following the completion of all the evidence offered by both parties, defendant moved the court for a directed verdict upon all the grounds urged in support of the motion for a nonsuit and upon the added grounds of proven contributory negligence, proven assumption of risk, and that the accident occurred while defendant was carrying out orders and directions given by one of plaintiff's physicians. The court also denied this motion. After submission of the cause to the jury, a verdict was returned for plaintiff in the sum of $7,500. Following the rendition of the verdict and before entry of judgment thereon, defendant moved the court for a judgment notwithstanding the verdict, basing such motion upon each and all of the grounds stated in the motions for a nonsuit and a directed verdict. Judgment was stayed pending determination of the last named motion, which was taken under submission by the court. Thereafter, the motion for judgment notwithstanding the verdict was granted and, pursuant thereto, judgment was entered in favor of the defendant. It is the correctness of such ruling that is challenged by plaintiff on this appeal.

For a proper understanding of the questions here involved, an epitome of the factual background which gave rise to this litigation is necessary. The record discloses that plaintiff, a woman approximately 60 years of age, upon the advice of her physician entered the defendant's hospital on October 8, 1942. She was put to bed and two days later was taken to the surgery, or operating room, was placed under an anesthetic and subjected to a major operation which necessitated an incision into the abdomen of approximately four or five inches. The evidence shows that the operation was a success and further reference to it need not be made because no question here involved pertains thereto, nor is any question raised as to the skill or manner in which it was performed by the surgeons. Nothing unusual occurred in the post-operative care of plaintiff until, on Monday, October 12th, her physician directed that she be given some tea to drink. At about 12:30 p.m. of that day, an employee of defendant hospital carried a tray to plaintiff's room. On the tray were a doily, a teapot containing hot water, a cup and saucer, teaspoon and teabag. According to the testimony of defendant's employee, upon entering the room, she placed the tray upon the bedside table which was about a foot away from the bed and, within a minute or two, retired from the room leaving plaintiff alone therein. Just as the nurse, who was making her rounds to make the patients comfortable for consumption of their meals, was coming out of the room adjoining that occupied by plaintiff, she noticed the corridor light over plaintiff's door flash, and, recognizing this as a signal that a patient in that room desired attention, she entered immediately and found that the teapot which had contained the hot water was on the bed with plaintiff, as was also the cup and saucer. The tray was on the table. Observing that the hot water from the teapot, which was large enough to hold two small cups of liquid, had come in contact with plaintiff's person and that there was a "reddened area" on the latter's left arm, breast and side, the nurse immediately called an interne doctor, resident at the hospital and also notified

one of plaintiff's physicians, the former of whom treated and dressed the burns upon plaintiff's body.

There was no direct testimony as to how the hot water was spilled on plaintiff, because, at the trial, the latter, who was the only person in the room at the time of the mishap, testified in substance that, from the time the operation upon her was completed on Saturday, October 10th, until she felt the pain occasioned by the hot water on Monday, October 12th, the only thing she remembered was "a faint recollection of vomiting." In that regard, she testified: "I was asleep all the time, vomiting, and they gave me shots in the arm, shots in the leg, and that is all the recollection I have of what happened." She testified she was fed through a tube, that there was a tube in her abdomen and a rectal tube. Plaintiff further testified that she was not alert mentally on Monday and did not know what was going on about her; that her mind was very weak; and that she was unable to move around in her bed at all up to Monday noon. She also testified that, following the operation and up to the time she was burned, she had no recollection of either of her physicians or any other person visiting her room; that she was asleep most of the time and that whenever she would awaken a hypodermic was administered. She did testify, however, that on Monday about noon she awakened and saw "a form at the foot of the bed looking into the mirror in the dresser"; that this "form", evidently a woman, said something to her but what was said plaintiff did not know. She testified that, a few minutes thereafter, she felt "a terrific heat" on her body. She looked down and saw hot water all over her side and under her arm. According to her testimony, she then screamed and two or three nurses came in.

In short, the gist of plaintiff's testimony was that she was wholly unconscious and had no recollection of anything whatever which occurred while she was in the hospital from the time she was operated on, Saturday, until after she felt the burning sensation on the left side of her body shortly after noon on Monday; that she had no period of consciousness following the burning incident on Monday, except the burning sensation, and that this absence of consciousness continued for "a couple of days after Monday noon."

Another witness, a daughter-in-law of plaintiff, testified that she visited the latter at the hospital on Saturday evening following the operation, that at the time, plaintiff was asleep, and the witness testified she did not disturb her nor have any conversation with her. This witness testified she visited plaintiff again on Sunday evening about seven o'clock and inquired of plaintiff "how she was feeling"; that the only reply the witness received was a "mumbled one" which she could not understand. She remained in the room for a short time but had no other conversation with plaintiff. The next time this witness saw plaintiff was on Monday following the hot water incident. The testimony of this witness contains no reference to appellant's mental condition nor any conversation which occurred during the last named visit.

Dr. Cory C. Ledyard testified that he was plaintiff's physician and that it was upon his advice that she entered defendant's hospital. He testified that the operation commenced at 10:10 a.m. and ended at 11:55 a.m.; that the anesthetic given was nitrous oxide, or "laughing gas", such as is given by inhalation in dental offices to extract teeth, and that, in addition, a spinal anesthetic was administered. The doctor testified that he visited plaintiff on the morning following the operation for about 20 minutes; that, at that time, there was a suction apparatus attached to the drainage tube in the abdomen which required adjustment. He next saw his patient on Monday, October 12th, approximately a half hour before the hot water was delivered to plaintiff's room. Her physician testified that, at that time, he conversed with her; that "she was feeling very well"; that "her color was good, she talked very alertly, she is an alert individual any way, and I couldn't help but be astonished that she was feeling as well as she was and was as bright as she was"; that at ten minutes past ten o'clock that morning plaintiff "received one-third grain of pantopon, which is a derivative of opium; that prior to that, at 2:50 a.m. Monday morning, plaintiff had received one-sixth grain of morphine. This witness testified that the purpose of administering narcotics to a patient following an operation was to relieve pain, and that they do not produce drowsiness. According to her physician, the narcotics administered to plaintiff from the time of the operation on Saturday until Monday noon did not affect her mentality one way or the other and did not cause her to be drowsy. Plaintiff's physician also testified that when he

saw her on Monday morning her condition, both mentally and as far as the surgical wound was concerned, "was good." Her physician testified that he knew and observed plaintiff prior to the operation and before any drugs or narcotics had been administered and that he noticed no difference in her condition of mind and mental alertness on the day of the accident than that which existed prior to the operation and the administration of medication incidental thereto. This witness also testified that he visited plaintiff on Tuesday, October 13th, when for the first time he heard of the burning incident which occurred on the previous day. On this occasion, her physician testified that he had a conversation with plaintiff concerning the burns upon her body, that he made a note in the hospital chart of what she had told him, and which note reads: "The patient feeling very much better, and she says so. Yesterday she pulled over on herself a tray of hot tea and burned her left elbow and breast and thigh. 'I did it myself; I was very foolish to have tried to have pulled the tray over, but they are so busy around here that I wanted to wait on myself.'" Her physician further testified that in his opinion there was nothing whatever in plaintiff's condition, physically, mentally or otherwise, which in his judgment made it dangerous or improper to place a pitcher of hot water on the table beside her bed. That to do so was "just perfectly safe and proper."

Frances Muckenhirn testified that she was an employee of defendant hospital, that her duties were to supervise trays and help carry them from the kitchen to the patients; that on October 12, 1942, she carried a tray to the room occupied by plaintiff. This witness testified that as she was approaching with the tray, plaintiff asked her "Is that for me?" to which she replied "Yes, it is," and that she further said "But you had better call the nurse to help you."

Certain photographs were introduced in evidence, the accuracy of which was established by testimony, and which photographic evidence showed that the bedside table upon which the tray was placed was at least a foot away from and to the left of the bed, and that the surface of the table top was stationary, not less than four to six inches lower than the top of the bed on which plaintiff was lying, making no allowance for pillows.

A Mrs. Jessie S. Ruffner testified she was a registered nurse formerly employed by defendant hospital; that she was one of the nurses who attended plaintiff during the latter's stay in the hospital during October 1942 and took care of her most of the time she was there. This witness testified that when she saw plaintiff on Sunday, October 11th, her mental condition was good and her mind was clear; that she was awake and that they engaged in normal conversations. This witness was not on duty Monday, October 12th, until four o'clock, at which time she noticed that plaintiff's left side and arm were bandaged, whereupon she said "Mrs. Rice, what has happened to you?" to which appellant responded "I burned myself." In response to the inquiry of the witness as to how she had burned herself, appellant replied "I spilled some water on me." Thereupon the witness inquired "Where was the water?" to which plaintiff said "A nurse came in and set a tray with a teapot full of water and a cup and some tea on the bedside table." The witness asked, "Which table?" and appellant replied, "This one," indicating the bedside table to the left of the bed. The witness then asked, "How did you get it?" and appellant replied, "Oh, I just reached over and got it." The witness asked, "Why didn't you call a nurse?" Appellant replied, "You girls are so busy, I hate to bother you," whereupon the witness said, "You make more trouble now than if you had called us," to which appellant replied, "I know that, but it is my own fault. No one is to blame but me."

It was this witness who testified that, in appellant's room, there was a signal system provided, by which the patient could call nurses when wanted; that it consisted of a cord with a push button at the end and when the button was pressed it would light a bulb in the corridor over the room door and also at the nurses' station desk on each floor. The witness testified that on Saturday, Sunday and Monday, October 10th, 11th, and 12th, the push button was placed on plaintiff's pillow and was within easy reach of the latter on occasions when the witness was in the room; that there was also a buzzer which sounded at the time the lights flashed.

Another witness, Miss Emma Schaffer, testified that she is a registered nurse and was employed at defendant's hospital as supervisor of the fourth floor, on which floor the room occupied by plaintiff was

located. She first saw plaintiff on Friday. She also saw her on the following day when the operation was performed, as well as after her return from surgery. The witness talked with the plaintiff on Monday morning about eight o'clock, at which time she inquired as to how she felt, receiving the reply that plaintiff felt better and desired one of the tubes removed. The witness testified she replied that the tube could not be removed until Dr. Chaffin arrived, and that when he did arrive at about nine o'clock he removed the tube. This witness testified there was nothing about plaintiff's appearance to indicate that anything was wrong with her mentality. The witness was also in the room at noon on Monday when Dr. Ledyard was there and she heard and saw plaintiff talking to the doctor. This witness testified that, following the burning incident, and as the bandaging of plaintiff was completed, she asked plaintiff how she spilled the water on herself, to which appellant replied "Well, I tried to help myself as I had always had to do." This witness testified that at no time on Monday when she saw plaintiff, did the latter appear to be drowsy and that her mental condition appeared to be normal. The witness also testified that hypodermics in the amounts and such as were administered to plaintiff merely relieved pain and did not make the patient drowsy. So far as the effect of the narcotics upon plaintiff was concerned, this witness, a registered nurse, testified that they did not seem to affect plaintiff one way or the other.

Another registered nurse, Louella Larson, who assisted in caring for plaintiff at the hospital, testified that on Monday morning, October 12th, she took plaintiff's temperature which was 99, pulse 88 and respiration 20, which she said was perfectly normal; that plaintiff was awake at that time. She further testified that she was present when Dr. Collins was dressing the burns on plaintiff's body; and that at that time her mental condition appeared to be good and not "different from that of any normal person." This witness testified that she distinctly remembered that plaintiff stated that she "pulled" the teapot over onto herself.

Dr. Rafe C. Chaffin, a duly licensed physician and surgeon since 1907, testified he was employed in October 1942 by plaintiff to diagnose her condition and to perform an operation on her. This witness testified that he saw plaintiff immediately after the operation; that there was nothing about her case in the administration of drugs, anesthetics, or anything of the kind which differed from the case of any ordinary abdominal operation. He saw the plaintiff again on Monday morning between eight and nine o'clock. He testified that at that time she was awake; that he talked with her; that she was neither mentally drowsy nor "dopey," but was mentally alert. He testified that she expressed pleasure that the tube, which had been inserted to prevent vomiting by keeping the stomach continuously empty, was to be removed. This witness further testified that he observed no appreciable difference in plaintiff's mental condition at the time he saw her on Monday morning, the 12th, than was existent on the previous Friday, which was the day before the operation. He further testified that on Monday he directed the supervising nurse at the hospital to administer tea to plaintiff. This witness testified positively that in his judgment there was nothing about appellant's condition which made it dangerous to place a pitcher of hot water on the table as was done in the instant case. Dr. Chaffin testified that on the day following the burning incident he talked with plaintiff at considerable length during the course of which conversation he asked her about the burns to which she replied: "That is nothing. You don't worry about it. Wasn't that a foolish thing for me to do? I ought to know better than to spill tea on myself, but I didn't want to bother the nurse. I am always afraid I am causing them trouble so I tried to help myself." The witness remembered this conversation, he testified, because he made a note of it at the time in the hospital chart.

Dr. Chaffin also testified that following her discharge from the hospital plaintiff came to his office, November 17, 1942, for a post-operative examination, that again upon this occasion, in the presence of the doctor and two of his office assistants, plaintiff, in discussing the burns upon her body, stated that she had spilled the tea on herself because she did not want to bother the nurse in the hospital and that it was entirely her own fault, saying "I am old enough to know better than that but still I did it." This witness also testified that in plaintiff's case the narcotics administered simply relaxed her, alleviated pain, but left her mentally alert. This witness

gave it as his opinion that there was nothing whatever about appellant's condition on Monday, October 12th, that caused him to feel that any danger was involved in placing a pitcher of hot water on the bedside table, and for that reason he did not suggest, nor direct, that the tea be served in any but the usual and ordinary manner practiced in that hospital, that on Monday morning "she was entirely conscious and alert and her judgment was normal in every way".

Mrs. Eva White, a registered nurse, and Mrs. Vivian Schwarting, a laboratory or X-ray technician, both employed in the office of Dr. Chaffin, corroborated the latter with reference to the aforesaid conversation which took place at the doctor's office on November 17th.

Dr. Ralph A. Ferguson testified that he is a physician and surgeon licensed to practice in this state; that he assisted in the operation by giving the anesthetic, which was a spinal anesthetic with a supplementary inhalation of nitrous oxide and oxygen; that the mental capacity of the patient on the day following administration of such an anesthetic is not affected. This witness testified that he saw plaintiff about noon on Sunday, the day following the operation, at which time she was awake and alert; that she answered his questions but he could not remember details of his conversation with her. He also saw plaintiff some time Monday afternoon following the hot water incident, at which time he asked her how the burning occurred; and that, in effect, she replied "I very carelessly pulled the pot of tea" or "cup of tea" or "spilled a cup of tea on myself"; that she was "very much awake" at that time and that nothing abnormal appeared to him as to her mental condition; that she conversed in a very normal conversational and intelligent manner.

There was further testimony given by nurses who saw plaintiff in the hospital on the day before, the day of, and the day after the hot water incident. They all testified in substance that she was mentally alert, conversed with them and accepted full responsibility for upsetting the hot liquid upon herself.

The witness who accompanied plaintiff to Dr. Chaffin's office on November 17, 1942, testified that she did not hear any conversation to the effect that the hot water incident was caused through plaintiff's fault, nor did plaintiff say anything with reference to accepting responsibility for the accident.

[1, 2] We have herein narrated the evidence as strongly in plaintiff's favor as the record will permit, and, because of the oft-repeated rule that an appellate tribunal will not interfere with the judgment arrived at by the trier of facts when there exists a substantial conflict in the evidence, we have made an extended review of the evidence. In the case of Herbert v. Lankershim, 9 Cal.2d 409, 471, 71 P.2d 220, 251, it is held that "this rule, however, does not relieve an appellate court of its duty of analyzing the evidence in the light of reason and human experience and giving consideration to the motives and propensities which tend to influence or prompt human action, in an effort to solve the question as to whether the judgment is reasonably and substantially sustained by the evidence."

[3-11] The only question here involved is whether or not defendant, under the evidence, was entitled to have the court enter judgment in its favor notwithstanding the verdict returned by the jury in favor of plaintiff. The action of the trial court was proper and legal unless it can be said that there was *substantial* evidence tending to prove, in favor of the plaintiff, all the controverted facts necessary to establish her case. In short, a judgment notwithstanding the verdict is proper whenever, upon the whole evidence, the judge would be compelled to set aside the verdict rendered, and an appellate court would be impelled to reverse it upon appeal, as unsupported by the evidence. To warrant the court in granting a judgment notwithstanding the verdict it is not necessary that there be an absence of conflict in the evidence, but if there be a conflict, the court is not deprived of this power unless the conflict be a substantial one. To constitute such a conflict in the evidence as will prevent the trial court from rendering the decision itself notwithstanding the verdict of the fact finding body there must be more than a conflict of mere words. The conflict in the evidence must be of a substantial character which, when applied to the peculiar facts of the case, reasonably supports the verdict rendered. The correct rule is thus stated in Morton v. Mooney et al., 97 Mont. 1, 33 P.2d 262, cited with ap-

proval in Herbert v. Lankershim, supra, 9 Cal.2d 472, 71 P.2d 251:

"While the jurors are the sole judges of the facts, *the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court* (Grant v. Chicago, etc., R. Co., 78 Mont. 97, 252 P. 382), and, in determining this question, 'the credulity of courts is not to be deemed commensurate with the facility or vehemence with which the witness swears. "It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment." ' "

In the testimony words may be mere words, but evidence "is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact." Code Civ.Proc. Sec. 1823. While it is true that one of the "means sanctioned by law" is to have the witness appear and give testimony orally, it has nevertheless frequently been held that the court is not bound to accept oral testimony as evidence of a fact if such testimony is inherently improbable. Davis v. Judson, 159 Cal. 121, 130, 113 P. 147; Caldwell v. Weiner, 203 Cal. 543, 546, 264 P. 1100; Staples v. Hawthorne, 208 Cal. 578, 583, 283 P. 67. Cognizant, as we are, of the rules applicable to motions for judgments notwithstanding the verdict—that the testimony must be read in the light most advantageous to plaintiff and taken most strongly against the defendant; that all conflicts must be resolved in favor of plaintiff and that he must be given the benefit of every fact pertinent to the issues involved which can be reasonably deduced from the evidence—we do not mean to hold that the trial judge may pass upon the credibility of a witness in ruling upon a motion for judgment notwithstanding the verdict, but we do hold that the applicable rule does not require the trial judge, nor an appellate court, to accept as true everything which is in the testimony of the witnesses. And we further hold in the instant case that if some of the particular testimony of the plaintiff is so inherently improbable that it is not entitled to consideration as evidence in the case and that the verdict founded thereon is consequently lacking in evidentiary support and against law, then the trial judge was justified in entering judgment for the defendant notwithstanding the verdict in the plaintiff's favor. Neblett v. Elliott, 46 Cal.App.2d 294, 305, 115 P.2d 872. To justify the submission of any question of fact to a jury, or to bind the court to a verdict rendered by a jury as the duly constituted triers of fact, there must be *proof of a substantial character* that the fact is as alleged. In re Estate of Bryson, 191 Cal. 521, 541, 217 P. 525.

Appellant predicates her argument that the court erred in granting defendant's motion to enter judgment in its favor notwithstanding the jury's verdict upon the contentions: First, that there is sufficient evidence to support a finding of negligence on the part of the defendant hospital; that a major abdominal operation was performed upon her on the morning of Saturday, October 10, 1942; that, following such operation and in order to ease her post-operative suffering, sedatives were periodically administered to plaintiff which affected her mentally, produced a condition of drowsiness and unconsciousness, as a result of which she was oblivious to and did not comprehend what was going on around and about her, and because of which she had no recollection of anything that occurred between the time she went to surgery on Saturday morning and the instant when she felt the pain occasioned by the hot water coming in contact with her body at noon on Monday. That notwithstanding plaintiff's helpless and unconscious condition, defendant caused "a dangerous instrumentality," to-wit hot water, to be placed approximately one foot away from her bed; and that "in some fashion" the hot water was spilled upon plaintiff, causing her to suffer third degree burns. Second, that the doctrine of res ipsa loquitur is properly applied to the facts of this case and that proof of the accident carried with it the presumption of negligence.

[12, 13] As to the first point, it must be conceded that defendant was under the legal duty to use reasonable care for the safety and well-being of its patients and to take such precautions to shield them from injury as a reasonable person would take under the circumstances shown to exist. In placing the hot water within reach of plaintiff, the defendant was not guilty of negligence unless it can be said that an ordinarily prudent person situated as the defendant was and knowing what it knew would under all the circumstances assume the probability of injury resulting to plaintiff because of her weakened mental and physical condition. Appellant does not contend that respondent would be liable

had she been mentally alert, in possession of her faculties, and voluntarily assumed to prepare and serve the hot tea to herself, in the course of which conduct she, by reason of such voluntary act, was injured. The question for determination then is whether plaintiff's condition of mind and body was such that no ordinarily careful and prudent person would have placed the hot water in a position where she could have reached it, or by her unconscious act could have spilled it upon herself. Of the relatives and friends of plaintiff who visited her at the hospital, none were called upon to testify, nor did they testify, to any mental infirmity upon her part, nor that she was not mentally alert. She alone furnished the only testimony in the record that she was unconscious during the interval elapsing from the time she left surgery on Saturday until the burning episode which occurred on the following Monday. In that regard, she was asked "It is your claim, if I understand you, Mrs. Rice, that you were entirely unconscious, so far as any recollection is concerned, of anything and everything which occurred while you were in the hospital from the time you were operated on until after you felt this burning sensation shortly after noon Monday, the 12th; is that correct?" to which she answered "That is right." Plaintiff further testified that this condition continued for "a couple of days" after she received the burns. However, on cross-examination, plaintiff admitted a recollection of seeing some one in her room just prior to "feeling this burning sensation," she remembered that this person said something to her, but what it was she could not recall. Plaintiff also remembered that she was violently nauseated during the interval following the surgery and up to Monday, but the uncontradicted testimony of all the doctors and nurses in attendance upon her was that there was some nausea on the day of the operation and the day following, but that the "Lavine tube," which was inserted to relieve nausea, was removed on Monday, October 12th, because the nausea had ceased. This line of testimony was corroborated by entries in the hospital's daily charts. Plaintiff also testified that she remembered intravenous injections were being "constantly" administered, whereas the testimony of those who gave such injections, confirmed by the hospital charts, showed that but two such injections were administered between Sunday morning and Monday noon when the hot water was delivered to plaintiff's room.

[14] It is unnecessary to here state the testimony, heretofore narrated, of all the doctors and nurses who were in direct and constant contact with plaintiff at the hospital. Suffice it to say that this testimony, some of which was given by witnesses produced by plaintiff herself, including her own physician who operated upon her, was that on the day of the accident she was conscious, mentally alert, and appeared to fully comprehend all that was going on around and about her. All of this testimony and the entries made daily in the hospital charts at the time the events therein recorded occurred, showed that after the plaintiff came out of the stupor caused by the anesthetics administered just prior to the operation she was conscious; that her mind was clear and she was quite talkative. And even though we assume the truth of plaintiff's testimony that she knew nothing of how the accident occurred, there is not a scintilla of evidence that at any time, whether asleep or unconscious, plaintiff was tossing about in bed, restless, or waving her arms, that would suggest to the ordinarily prudent doctor, nurse or hospital attendant that serving her tea in the ordinary and usual way in which that was done at the hospital was in any manner hazardous or might result in plaintiff overturning upon herself the contents of the tray placed a foot away from her bed. There is no evidence that defendant was in possession of knowledge of any facts out of which there would arise a duty to serve the tea in any other than the hospital's usual and customary manner. Knowledge of the facts out of which a duty arises is an essential element in determining the existence of any negligence. Smith v. Whittier, 95 Cal. 279, 291, 30 P. 529. One is not bound to anticipate the unusual or what is unlikely to happen, but only what usually happens. Furthermore, the physical facts present in the instant case militate strongly against plaintiff's theory of how the mishap occurred. The uncontradicted evidence shows that the table upon which the tray was placed was approximately a foot away from the bed and several inches lower than the top of the bed clothes covering plaintiff. Following the accident some of the contents of the tray were found on the bed and some on the floor. In his memorandum opinion, ren-

dered at the time he granted defendant's motion for judgment notwithstanding the verdict, the learned trial judge said:

"Against plaintiff's story from which the inference might be drawn that she was either asleep or unconscious is the testimony of the nurse who brought the tray in and against the inference that she was under the influence of drugs at the time of the incident is the testimony of her own doctors that the sedatives given her were not of sufficient strength to produce sleep and that the only effect that they had was to allay pain. *The physical facts shown by the uncontradicted evidence of the location and height of the table are almost conclusive evidence against plaintiff's theory of the happening of the accident.* In other words, if the contents of the tray had been upset by the unconscious waving of plaintiff's arms, the contents of the tray would either have been knocked flat on the tray, or would have fallen on the floor; none of them would have been on the bed. Plaintiff's body as it lay on the bed and the location of the burns on her body point very persuasively to the fact that the contents of the tray were upset while the part of the tray containing the hot water was practically over her left side and I think it is a fair inference that after they were upset she frantically pushed the tray away from her and it fell flat on the table. In my opinion, the theory of plaintiff's case is contrary to any inference that could possibly be drawn to the effect that she was burned by an involuntary act on her part and is utterly inconsistent with the theory upon which plaintiff tried her case. *The plaintiff's doctors and several nurses stated that she told them substantially that plaintiff upset the tray herself in attempting to pull the tray over so she could serve herself some tea without disturbing the nurses. Such explanation of the accident under all the evidence is the only consistent explanation in the record of what happened. Such testimony is also consistent with the notations in the hospital record and is contrary to plaintiff's statement that she knew nothing of how the accident happened, which statement is also contrary to plaintiff's own testimony as to events she relates that happened between the time she recovered from the effect of the anesthetic given her before the operation and the happening of the accident.* The only picture that the evidence presents is that of an aging woman who two days prior to the accident had passed through a major abdominal operation, weak, and lying quietly in bed even when asleep and any explanation of the accident other than that supplied by plaintiff's own statement to her own doctors and to the nurses as related in their testimony is the only reasonable explanation of what happened and *any other theory of what happened does violence to all the substantial evidence and one of the immutable laws of physics which, rather crudely stated, as applied to this case, is that water does not of its uncontrolled action either run up hill or bridge a gap more than a foot wide.*" (Emphasis added.)

[15, 16] We are persuaded that the inferences and conclusions arrived at by the trial judge were justifiable and proper under the evidence and physical facts presented herein. The defendant produced positive and direct testimony concerning plaintiff's mental condition and also testimony as to statements made to various witnesses by plaintiff as to the manner in which the accident occurred, while the most that can be said of plaintiff's testimony is that in the main, it was negative in character. It cannot be questioned that evidence of a negative character is ordinarily never as satisfactory as that of a positive character. When plaintiff's testimony is viewed in the light of the unimpeached oral and documentary evidence presented by the defendant, as well as the physical facts, it does not bear that degree of reasonableness necessary to create a substantial conflict and thereby divest the court of its power to enter a judgment notwithstanding the verdict. Furthermore, under all the facts and circumstances here present, we are impressed that the trial court was justified in declaring the testimony of plaintiff to be inherently improbable. To deprive the court of its right to exercise its power to enter judgment notwithstanding the verdict, an utter absence of conflict in the evidence, as we have heretofore pointed out, is not necessary, but a conflict, if such there was, must be a substantial one. In re Estate of Fleming, 199 Cal. 750, 754, 251 P. 637.

[17, 18] Appellant's second point, which is that the doctrine of res ipsa loquitur applies, cannot be sustained. One of the three essential conditions for the application of the rule is that the accident must not have been due to any voluntary action or contribution on the part of the plaintiff. Ybarra v. Spangard, 25 Cal.2d 486,

154 P.2d 687. In view of our holding that there is in the record no evidence of sufficient substantiality to support plaintiff's contention that the hot water was spilled upon her because of an involuntary action upon her part while unconscious, and that the evidence justified the trial judge in arriving at the inference and conclusion that plaintiff's injury was occasioned by her conscious and voluntary act as related by her to several witnesses to whom, as they testified, she stated following the accident, "Well, I tried to help myself as I always had to do * * * I spilled some water on me," it necessarily follows that the doctrine of res ipsa loquitur is inapplicable. In all of the hospital cases cited by respondent the doctrine was held applicable because, under the facts there present, it was shown that the patient submitted himself to the care and custody of doctors, nurses and hospitals, was rendered unconscious, and his injuries resulted from instrumentalities used in his treatment.

We do not discuss other questions raised for the reason that, upon the considerations discussed, we have concluded that the judgment of the trial court must be sustained. It is so ordered.

Judgment affirmed.

YORK, P. J., and DORAN, J., concur.




## ENGLAND v. CITY OF LONG BEACH et al.*

Civ. 14793.

District Court of Appeal, Second District, Division 1, California.

April 30, 1945.

Rehearing Denied May 21, 1945.

Hearing Granted June 28, 1945.

**1. Municipal corporations ⇐200**

In determining whether city's obligation to pay pension to retired fireman is a general obligation of city or if pension is payable only from pension fund set up in city charter, the charter must be construed as it is, and if no ambiguity exists, any comparison with former charter provisions is no aid to construction, and evidence of what might have been but for outcome of municipal elections thereon cannot be considered. St.1931, p. 2788, § 187(6); St.1935, pp. 2575, 2576, §§ 265, 266.

**2. Municipal corporations ⇐58**

City charter provisions are subject to same rules of construction as legislative enactments.

**3. Municipal corporations ⇐58**

To ascertain meaning or intent of various provisions of city charter, different sections or provisions must be read together with a view to harmonizing them.

**4. Pensions ⇐1**

Pension statutes serving a beneficial purpose are to be liberally construed.

**5. Pensions ⇐1**

That meaning of an ambiguous pension statute which will produce results intended will be adopted in preference to one having contrary effect.

**6. Pensions ⇐1**

The rules of statutory construction as applied to pension laws are of no consequence where language of statute is sufficiently clear or free from obscurity as to reasonably remove all doubt as to meaning of legislative intent.

**7. Municipal corporations ⇐78**

Where city operates under freeholders' charter, matter of fixing of compensation and pensions for policemen and firemen is strictly a "municipal affair" and such a city is exempt from operation of general laws respecting all "municipal affairs" as to which charter speaks. St.1921, pp. 2065, 2068, §§ 2, 25; St.1931, p. 2788, § 187(6); Const. art. 11, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affairs".

**8. Statutes ⇐225½**

A general statutory provision is controlled by one that is special which is treated as an exception to the general provision.

**9. Municipal corporations ⇐187, 200**

Long Beach City Charter, as amended in 1925, to provide that appropriation for pension fund should not exceed two per cent. of general tax levy, and, as amended in 1931, to provide that city should make certain "matching payments" equal to 2 per cent. of estimated pay of members of police and fire department, and that pen-

* Subsequent opinion 163 P.2d 865.

sions should be payable from such fund, clearly indicated that pensions were payable only from such fund, hence obligation to pay such a pension was not a general obligation of city. St.1925, pp. 1333, 1334, § 187(1, 2), St.1931, p. 2788, § 187(6); St.1921, p. 2130, § 262; Const. art. 11, § 8.

**10. Officers ⇐94**

A pension law may be changed so long as the vital contingency has not happened upon which an employee may predicate his right to a pension. St.1931, p. 2788, § 187(6).

**11. Statutes ⇐147**

A material change in wording of a statute plainly indicates that Legislature intended a change in respects in which previous language was amended.

**12. Municipal corporations ⇐187, 200**

The amendment in 1931 of Long Beach City Charter provision that not exceeding 2 per cent. of general tax levy should be paid into pension fund for firemen and policemen by substituting therefor a "matching payments" plan under which city was directed to make payments into pension fund equalling the specified 2 per cent. deductions from such employees' salaries did not indicate any intention to change the special limited obligation to a general obligation of city to pay such pension. St.1925, pp. 1333, 1334, § 187(1, 2); St.1931, p. 2788, § 187(6).

**13. Municipal corporations ⇐887**

The "Cash Basis Fund" created by Long Beach City Charter is intended to be used as a revolving fund for purpose of putting and maintaining payment of running expenses of city on a cash basis, and any money so transferred from cash basis fund must be returned thereto before end of fiscal year, hence money in such fund cannot be used to make up any deficit in relief and pension fund. St.1935, p. 2575, § 265; St. 1931, p. 2788, § 187(6).

**14. Constitutional law ⇐70(1)**

Under Long Beach City Charter provision that, except as specifically provided therein, no money shall be transferred from one fund to another except in cases of extreme emergency so declared by city council and as therein defined, city council cannot be required by mandamus to transfer money from general fund to any other city fund for purpose of balancing an overdraft in pension fund since question whether such emergency exists is a legislative and not judicial question with which courts cannot interfere. St.1935, pp. 2575, 2576, §§ 265, 266; St.1931, p. 2788, § 187(6); St. 1921, p. 2130, § 262.

**15. Mandamus ⇐105**
**Municipal corporations ⇐200**

By no theory of implied powers, liberal construction, or other hypothesis can plain reading of city charter provisions making pensions payable out of a pension fund only be changed to make obligation of city to make such payments a general obligation of city, and court is without power to require city to pay pension where pension fund is inadequate. St.1931, p. 2788, § 187(6); St. 1935, pp. 2575, 2576, §§ 265, 266; Const. art. 11, § 8.

**16. Municipal corporations ⇐58**

Where there is no ambiguity in city charter, there is no room for judicial construction thereof resting merely on a judicial view of expediency of the legislation. St.1931, p. 2788, § 187(6); St.1935, pp. 2575, 2576, §§ 265, 266.

WHITE, J., dissenting.

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Original proceeding by Hyrum C. England for a peremptory writ of mandate against the City of Long Beach and others to command respondents to transfer to the Relief and Pension Fund of the City of Long Beach sufficient moneys from the Cash Basis Fund, or from the surplus now available from other funds, to pay all amounts due under a pension granted petitioner as a retired member of the Fire Department and to require the city manager and city council to include in all future budgets an amount sufficient to pay anticipated pensions, and in all events at least 2 per cent of the general tax levy of the city.

Petition denied.

Kenneth Sperry and J. C. Webb, both of Long Beach, for petitioner.

Irving M. Smith, City Atty., Nowland M. Reid, Asst. City Atty., and Clifford E. Hayes, Deputy City Atty., all of Long Beach, for respondents.

Joseph A. Ball, of Long Beach, amicus curiae, for pensioners of City of Long Beach.

DORAN, Justice.

This is a petition for a peremptory writ of mandate to command respondents to transfer to the Relief and Pension Fund of the City of Long Beach sufficient moneys from the Cash Basis Fund, or from the surplus now available from other funds, to pay all amounts due under a pension granted petitioner on May 1, 1944 as a retired member of the fire department; also to order the city manager and city council to include in all future budgets an amount sufficient to pay anticipated pensions, and in all events at least 2 per cent of the general tax levy of the city. At retirement petitioner had been in the service of the fire department for more than twenty years, and the pension in question amounted to one-half of the salary which was attached to the position, or $117 per month. The monthly pension installments accruing since May 1, 1944 have not been paid to petitioner, amounting to a total of $936, and it is conceded in the respondent's brief that "in the present state of the Relief and Pension Fund no payment will be made to him for many months to come." This situation is due to the condition of the Relief and Pension Fund arising from the fact that monthly payments due to pensioners whose rights have accrued during several years past, have greatly exceeded the revenues paid into this fund in accordance with Paragraph (6) of Section 187 of the city charter. There is now less than $100 in the fund and all pension payments due since September, 1943, remain unpaid. It is further conceded that, if the pensions in question can only be paid from moneys paid into such fund under the provisions of Paragraph (6) of Section 187, "it may reasonably be anticipated that the amount of pensions which accrue each month will shortly be more than double the amount which can be provided for the Relief and Pension Fund under the provisions of said Paragraph (6)." There is no controversy in respect to the amount owing to petitioner, nor as to the liability of the city to pay such sum but the respondents contend that petitioner is not entitled to payment thereof until there is sufficient money in the Relief and Pension Fund for that purpose. It is admitted that the city treasurer has at hand in other funds, "large sums of money exceeding any sums which would be required to pay the pension now due to plaintiff," and to make all other pension payments, providing such money can be legally used for that purpose.

The City Charter of Long Beach was adopted in 1921, p. 2057 et seq., as a freeholder's charter under the provisions of Article XI, Section 8 of the Constitution of the State of California. As originally adopted, Article XVI of said charter, denominated "The Disability, Relief and Pension Fund," provided in Section 187 that "The city council shall have the power to create, by ordinance, a fund to be known as the 'Relief and Pension Fund', and to provide for the payment into said fund a percentage of each month's pay for all the members of the police and fire departments and from all the members of such other departments as may by said ordinance be declared to be entitled to *relief out of said fund.*" (Italics added.) The City Manager was authorized to include in the annual budget an amount *not exceeding 2 per cent of the general tax levy.* The city council having failed to exercise the authority thus granted, Section 187 was amended in 1925, p. 1333, so as to provide for the payment of certain specified retirement and pension benefits. As amended in 1925 a city governmental board was created known as the "Police and Fire Pension Commissioners", which board was given "exclusive control of the administration and the investment of the pension fund or funds which may be established as hereinbefore provided" etc. Sec. 187, Subdiv. (1). In Subdivision (2) of Section 187, as adopted in 1925 it was provided that after a designated period of service a member of the fire or police departments shall, by order of the commission, be retired and "shall thereafter, during his lifetime, be paid in equal monthly installments *from said fund*" etc. (italics added) a certain percentage of his annual salary. Subdivision (6) as adopted in 1925 expressly created a "Relief and Pension Fund," which was "For the purpose of creating, maintaining and providing a fund to meet the payment of demands drawn for the payment of pensions and the expense of said Police and Fire Pension Commission as herein provided." It was further provided in Subdivision (6) that the Commission should employ an actuary "who shall render a report of the cost of maintaining, on a reservation basis, the pension system as hereinabove provided, and the city manager is hereby authorized to include in his annual budget *an amount not exceeding two per cent (2%) of the general tax levy* to be paid into said fund, based upon the estimate of cost as established by the actuary's survey, and the city council

shall annually appropriate the amount of such estimate to the 'Relief and Pension Fund,' and also the amount of any deficit which may remain therein in the event the appropriation of any previous year prove insufficient to pay all demands drawn against such fund, which amount, however, in any one year, shall not exceed two per cent (2%) of the general tax levy." (Italics added.) In addition to the moneys so provided, certain contributions, rewards, donations, fines, and proceeds from the sale of unclaimed property were to be paid into such fund.

At the time said Section 187 was adopted in 1925, Article XXIV of the City Charter provided in detail for a "budget system" under which the city manager submitted to the council an itemized statement based upon detailed estimates furnished by the several departments, officers, boards, and commissions, recommending appropriations, and showing the financial condition of the city. Section 262 provided that "The city council shall, at the time of fixing the tax levy, by ordinance, establish the various funds, as provided for by the department, office, board and commission estimates allowed by the city council, and also for a general fund. All moneys received by the city shall be apportioned by the city auditor to the various funds so established, and no transfer of any money shall be made from one fund to another, except from and to the cash basis fund, until the end of the fiscal year; at which time, after all demands have been paid out of the various funds, and the fund or funds, if any, received from the cash basis fund have been returned, the city auditor shall transfer any residue remaining from any of said funds to the general fund; and the city council may authorize a transfer from the general fund to any fund in which there is an *overdraft created by an actual emergency* in the department." (Italics added.) Thereafter an actuary was employed as provided for in said section and reported that the payment of 2 per cent of the general tax levy into the Relief and Pension Fund would be wholly inadequate to put said fund and pension system on a reservation basis, and that an amount equal to at least 5½ per cent of said general tax levy would be required each year to accomplish that purpose. By reason of the report of said actuary showing the impossibility of setting up the Relief and Pension Fund on a reservation basis, the full 2 per cent of the general tax levy was not paid into said fund, and the then manager and council appropriated and paid into said fund only a sufficient amount to pay all pension demands as same became due. This procedure was followed from 1925–26 to and including the fiscal year 1930–31. During the whole of this period the petitioner was continuously employed as a member of the fire department and continued to be so employed until retired May 1, 1944 after more than twenty years service. Throughout the period from April 16, 1925 up to March 3, 1931, nineteen persons were granted pensions payable out of said pension fund, eleven of whom are still living and entitled to receive a monthly pension.

In the year 1931, p. 2788, Subdivision (6) of Section 187 of the City Charter was amended to read as follows:

"For the purpose of creating, maintaining and providing a fund to meet the payment of demands drawn for the payment of pensions and expenses of said Police and Fire Pension Commission, as herein provided, a fund is hereby created to be known as 'Relief and Pension Fund.' The city manager shall include in his annual budget an amount equal to two per cent of the estimated pay of the members of the police and fire departments, as hereinafter provided, and the city council shall appropriate such amount to the 'Relief and Pension Fund.'

"There shall be paid into said fund, the following monies, to-wit: (a) The city auditor is hereby authorized, and shall deduct and pay into said fund semi-monthly, two per cent of the salary of each member of the police and fire departments; (b) The amount appropriated by the city council, as hereinbefore provided, to-wit: a sum equal to the amount paid into said fund from the salaries of the members of the police and fire departments; (c) All contributions, rewards and donations to the police and fire departments for services by any member or members thereof, except amounts of money donated to provide for any medal or permanent competitive award; (d) All fines imposed on members of the police and fire departments for violations of the rules of said departments; (e) All proceeds from the sale of unclaimed property; (f) All contributions and donations to the said departments NOT specifically designated for inter-department relief funds.

"Such fund shall be a continuing fund and shall be kept in the treasury of the City of Long Beach. All proceeds arising from said fund, including interest thereon, shall be credited to such fund."

Such amendment, according to its terms, became effective March 3, 1931, since which date the city manager has not included in his annual budget, and the city council has not appropriated to said Relief and Pension Fund, any other sums than those provided for in the 1931 amendment just quoted.

During the oral argument it was conceded that attempts, by election, to amend the charter in order to change the financial conditions herein referred to, had failed. Such an election was held in November of 1944, described by Assistant City Attorney Reid as follows: "The people had two propositions submitted: one to repeal 187, doing away with pensions entirely, and the other to give the council the power to levy a special tax to pay the pensions which have already accrued. The people voted to repeal 187 but they voted down the other provision, * * *".

[1] Petitioner and respondents agree that the most important issue presented is in respect to the construction to be placed upon the charter provisions covering payment of the pension, namely, whether the obligation of the city is a general one making it the duty of the manager and city council to provide for the payment of such pensions without any limitation as petitioner contends, or whether respondents are correct in the view that the pensions in question may be paid only from the Relief and Pension Fund set up in Article XVI, Paragraph (6). Manifestly, in that regard, the charter must be construed as it is. If no ambiguity exists, any comparison with former provisions is no aid to construction. And evidence of what it might have been but for the outcome of elections, is clearly beside the issue so far as interpretation is concerned. In addition to briefs filed by petitioner and respondents there is an amicus curiae brief filed on behalf of approximately seventy five men and women entitled to pensions under Section 187 of the City Charter in which latter brief the position is also taken that the charter provisions created a general obligation to pay these pensions.

[2-7] Charter provisions are subject to the same rules of construction which apply to legislative enactments, and as was said in Bruce v. Civil Service Board, 6 Cal.App. 2d 633, 636, 45 P.2d 419, 421, "To ascertain the meaning or intent of the various provisions of the charter, different sections or provisions must be read together, with a view to harmonizing them." It is also "a firmly established principle of judicial construction that pension statutes serving a beneficial purpose are to be liberally construed," O'Dea v. Cook, 176 Cal. 659, 169 P. 366, 367; Gibson v. City of San Diego, 25 Cal.2d 930, 156 P.2d 737. "Where the language of a pension statute is of such ambiguity as to its true meaning as reasonably to afford two different and opposite conclusions, the one leading to its enforcement so that it will in full measure produce the beneficial results which its spirit and its purpose contemplate and its context will support, and the other to the frustration of its central purpose and desideratum, then the former construction must be given the statute or the particular language thereof whose meaning is enshrouded in doubt." Klench v. Board of Pension Fund Commissioners of City of Stockton, 79 Cal.App. 171, 249 P. 46, 52. However as was pointed out in the Klench case, 79 Cal.App. at page 187, 249 P. at page 51, "Of course, these rules of statutory construction, as applied to pension laws, are of no consequence where the language itself of the statute is sufficiently clear or free from obscurity as to reasonably remove all doubt as to its meaning or the legislative intent with respect thereto." This same case is also authority for the holding that, in the case of a city operating under a freeholders' charter such as that of the City of Long Beach, "the matter of the fixing of the compensation and providing for the pensioning of policemen and firemen is strictly a 'municipal affair'", and that such a city "is exempt from the operation of general laws with respect to all 'municipal affairs' as to which such charter speaks."

[8] It is a settled rule of statutory construction that a general provision is controlled by one that is special, the latter being treated as an exception to the former. 23 Cal.Juris. 762. In this case the petitioner relies upon certain general powers of the city such as those contained in Article IV, Section 2, of the Charter, providing that "The City of Long Beach shall have the right and power to make and enforce all

laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter; * * *" and Section 25 vesting the city with power to "exercise all municipal and police powers necessary to the complete and efficient management and control of municipal property and for the efficient administration of the municipal government, whether such powers are herein expressly enumerated or not." On the other hand respondents' case rests upon the specific provisions of Article XVI, Section 187 of the City Charter, entitled "The Disability, Relief and Pension Fund." This article, respondents contend, is free from ambiguity, and by reason of the well-known maxim "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of the other), would indicate that it is clearly intended by the charter that petitioner's pension should be paid only from the pension fund created by said charter.

[9] The City Charter, both in its 1925 aspect and as amended in 1931 is found to contain no language which either expressly or by reasonable implication indicates any intention to make the pension in question a general obligation of the City of Long Beach. On the contrary, as pointed out by respondents, there is every indication that retired members of the police and fire departments were to receive their pensions from "The Disability, Relief and Pension Fund," and from no other source. This is, in fact the title of Article XVI, which in its original form provided for payment of "relief out of said fund," and the appropriation for which was not to exceed 2 per cent. of the general tax levy. Likewise, when the board of "Police and Fire Pension Commissioners" was created in 1925 such board was given exclusive control of "the pension fund or funds" and the specified pensions were directed to be paid "in equal monthly installments *from said fund.*" City Charter, Section 187, Subdiv. (2). (Italics added.) When this section was amended in 1931 the italicized phrase "from said fund" was retained although the source of such fund was changed so that in place of the original appropriation which was not to exceed 2 per cent of the general tax levy, the city made certain "matching payments" equal to 2 per cent of the "estimated pay of the members of the police and fire departments," 2 per cent of the salary of each member of such departments being deducted and "paid into said fund."

If it is intended by the charter that these pension obligations, created by Paragraphs (2), (3) and (4) of Section 187 thereof should be general obligations, then there would have been no necessity for Paragraph (6) which specifically provides: "For the purpose of creating, maintaining and providing a fund to meet the payment of demands drawn for the payment of pensions and expenses of said Police and Fire Pension Commission, as herein provided, a fund is hereby created to be known as 'Relief and Pension Fund.'" If a general obligation was intended it is reasonable to suppose that such a paragraph would have been eliminated or that somewhere in the pension provisions there would be found some definite indication of such an intent. Again, if such were the intent, it would have been an easy matter to have inserted a provision such as that found in the Los Angeles Charter as quoted in Davidson v. Burns, 38 Cal.App.2d 188, 100 P.2d 1105, 1106, 101 P.2d 568, to the effect that there should be an annual tax levy "clearly sufficient to provide the total amount" necessary for the payment of the specified pensions.

In the briefs of petitioner and likewise in the amicus curiæ brief the court's attention is called to the fact that Section 187, Subdiv. (2) states a promise to pay as follows: "He shall thereafter, during his lifetime, be paid in *equal monthly installments* from said fund a yearly pension, * * *" (Italics added), and a similar statement in Subdiv. (3) dealing with pensions for total disability, and seek to draw the conclusion therefrom that the direction to pay such pensions was mandatory, unlimited and general, in no manner qualified by the phrase, "from said fund." While it is quite true that the pension provisions of the charter do not expressly state that the obligation is not a general and unlimited one, the repeated and continued use of the phrase "from said fund" can have no other reasonable meaning in the light of the rules of construction than that the pensions in question were to be paid only from such fund. The provision that the pensions should be paid in "equal monthly installments" indicates nothing so far as the source of such payment is concerned. From the language employed, the charter appears to be about equally concerned with the provision for the payment of pension benefits and with providing a fund from which the payments should be made. Petitioner's argument that, "the creation of various

funds provided for in the Charter was merely to assist the city manager and council in estimating the total moneys necessary to be raised in order to balance the City's financial needs, and to assist the city auditor and the city accountant in the matter of bookkeeping," is not persuasive. Bearing in mind the generally conceded importance of the disposition of public funds when, as here, a charter has created certain special funds into which designated moneys are to be placed and out of which certain pensions are expressly directed to be paid, the creation and administration of such funds can scarcely be regarded as a mere bookkeeping convenience. The charter of the City of Long Beach quite clearly provides for the payment of petitioner's pension from one limited source,—the expressly designated "Disability, Relief and Pension Fund."

It is contended by the petitioner that the obligation to pay retirement benefits was contractual in nature becoming an integral part of petitioner's contract of employment, hence that by the adoption of Section 187, Subdiv. (2) the charter framers in effect irrevocably offered to pay the petitioner and other employees of the police and fire departments who would continue in the city's employ for the designated periods, the retirement benefits therein provided, and that the petitioner has fully complied with his part of the contract. The purport of this contention is two-fold, namely that the obligation to pay petitioner's pension was absolute, general and unlimited, and that the pension being vested under the 1925 Charter provisions which specified an appropriation to the pension fund of an amount not exceeding 2 per cent of the general tax levy, petitioner's rights could not be affected by the 1931 amendment which, as previously noted herein, had abrogated the 2 per cent appropriation feature, substituting certain so-called "matching payments" by the city equaling the specified salary deductions. The respondents' answer to this contention is that the pension in question did not become vested until the retirement of petitioner in 1944 and that any amendment prior to that date would be binding on petitioner.

The case of O'Dea v. Cook, 176 Cal. 659, 169 P. 366, 367, cited by both parties hereto, concerned a pension provided for the family of a member of the police department of San Francisco. It was there held that where, at the time the policeman received injuries which resulted in death more than one year later, the charter provided for such pension without regard to the time elapsing between injury and death, but before the policeman's death the charter had been amended so as to provide for a pension to the family of a member "who may be killed or injured, while in the performance of his duty, and who shall have died within one year from the date of such injury * * *" the time limitation contained in the amendment had no retrospective effect and the widow was entitled to a pension under the original charter provision. There is, of course, no marked similarity between the facts in that case and in this, for in the case now under submission the amendment of the Long Beach Charter occurred some thirteen years before petitioner became entitled to any pension. But in the O'Dea case the Court mentions the fact that where pensions authorized by statute are predicated merely on death occurring during the period of service, "a repeal before death operates to destroy the pension right." 176 Cal. at page 662, 169 P. at page 367.

An early case dealing with pensions is that of Pennie v. Reis, 80 Cal. 266, 29 P. 176, which held that where a police life and health insurance fund had been created out of a part of the monthly salaries of San Francisco police officers and this fund had later, by statute, been merged in a relief, health, insurance and pension fund, the repeal of the original act and merger of funds was valid as against the legal representatives of a police officer whose salary was in part detained under the former act, but who did not die until after passage of the latter act. Counsel for the petitioner concedes that this case is "the fountain head of the principle that a pension right is not vested prior to the happening of the specified contingency and therefore beyond the protection of the due process clause * * *". The Pennie case was appealed to the United States Supreme Court (132 U.S. 464, 10 S.Ct. 149, 151, 33 L.Ed. 426), and in ruling on the question of vested rights the Court said: "It requires no argument or citation of authorities to show that in making a disposition of a fund of that character, previous to the happening of one of the events mentioned, the state impaired no absolute right of property in the police officer. * * * His interest in the fund was until then *a mere expectancy, created by the law, and liable to be revoked*

*or destroyed by the same authority.*" See also in this connection, Carr v. Fire Commission of San Francisco, 30 Cal.App. 2d 208, 85 P.2d 959; Cohrn v. Henderson, 19 Cal.App. 89, 124 P. 1037.

[10] Petitioner, however, relies upon the case of Dryden v. Board of Pension Commissioners, 6 Cal.2d 575, 579, 59 P.2d 104, 106, in which the court said: "It has been clearly held that the pension provisions of the city charter are an integral portion of the contemplated compensation set forth in the contract of employment between the city and a member of the police department, and are an indispensable part of that contract, and that the right to a pension becomes a vested one upon acceptance of employment by an applicant," citing as authority for such statements O'Dea v. Cook, 176 Cal. 659, 169 P. 366, Aitken v. Roche, 48 Cal.App. 753, 192 P. 464, and French v. Cook, 173 Cal. 126, 160 P. 411. As has been heretofore noted, the O'Dea case was dissimilar to the present litigation. The French case does not appear to support the statement that the right to a pension becomes vested upon "acceptance of employment," and the case of Aitken v. Roche, supra, merely cites the O'Dea case as authority for the statement that the right to a pension is a vested one which "enters into the contract of employment when a man enters the police department." Furthermore the quoted statement in Dryden v. Board of Pension Commissioners, supra, was not the basis for the decision in that case which dealt with facts in no wise similar to those now under consideration. In none of these cases, nor in any case cited, is there any expression to the effect that a pension should be judicially declared to be a general obligation where the creating act has clearly indicated that such was not the intent of the makers. It may be noted that the case of Carr v. Fire Commission, 30 Cal.App.2d 208, at page 211, 85 P.2d 959, at page 960, was decided subsequent to the decision in the Dryden case, the District Court of Appeal observed: "A pension law may be changed or modified so long as the vital contingency has not happened upon which an employee may predicate his right to a pension." The Supreme Court of California denied a petition for a hearing of the Carr case.

On the theory that the city owed to petitioner an absolute, contractual and mandatory duty, under the 1925 pension provisions, to annually appropriate for the pension fund at least 2 per cent of the general tax levy, and that such annual appropriation was not made during all of the period subsequent to 1925, the petitioner has presented the argument that "The present balance in the Relief and Pension Fund *in contemplation of law* is in excess of the total payments now due therefrom," and regarding that as done which should have been done, contends that the court should consider that there is now in the Relief and Pension Fund all the moneys which should have been paid into it. On this theory petitioner argues that in equity any surplus funds in the City Treasury should now be treated as a part of the pension fund and that therefore the pension moneys due petitioner should be paid regardless of the actual status of the pension fund. Petitioner has presented no authority for the application of the maxim in question to any state of facts at all similar to the instant case. The charter provisions of 1925 did not, in fact, direct the appropriation of "at least" 2 per cent of the general tax levy, but specifically authorized the city manager to include in his annual budget "an amount *not exceeding* two per cent (2%) of the general tax levy to be paid into said fund," and the city council was directed to appropriate the amount of such estimate and also the amount of any deficit remaining from any previous year, but again specifically provided that the appropriation for any one year "shall not exceed two per cent (2%) of the general tax levy." Long before petitioner was entitled to a pension this 2 per cent system had been superseded by the "matching payments" plan already referred to; in other words one definite, limited pension plan was replaced by another definite, limited system. The fact that neither the original pension plan nor the amended procedure has proven to be satisfactory is not a matter for judicial consideration.

[11, 12] While it is true, as set forth in the amicus curiæ brief, that "a material change in the wording of the section plainly indicates that the Legislature intended a change in the respects in which the previous language was amended," (In re Estate of Broad, 20 Cal.2d 612, 618, 128 P.2d 1, 4) in the instant case there is no indication by the language thereof that the amendment of 1931 was intended to change a special, limited, pension obligation to a

general obligation of the City of Long Beach.

[13] In the petitioner's analysis of pension rights, it is insisted that, under the 1931 charter amendment, not only was there still a mandatory duty to pay the pension benefits in monthly installments as they accrued, but that such duty required the city "to transfer sufficient moneys from the Cash Basis Fund and existing surpluses," to the end that such payment might be made. But again no cases are cited which are at all comparable to the present state of facts, and to accept petitioner's construction would be to ignore the definite provisions of the charter. Had the pension in question been a general obligation of the city instead of one payable only from the Relief and Pension Fund, petitioner's contention just mentioned would be pertinent and appropriate. As pointed out by the respondents, the Cash Basis Fund which is created by Section 265 of the City Charter, St.1935, p. 2575, was to be "used as a revolving fund for the purpose of putting and maintaining the payment of the *running expenses* of the city on a cash basis," with the express proviso "that all money so transferred from the Cash Basis Fund be returned thereto before the end of the fiscal year."

[14] Nor is there any merit in the further contention that the city council can be required by mandamus to make a transfer from the General Fund or from any other city fund for the purpose of balancing an overdraft in the Relief and Pension Fund. Section 266 of the charter provides in part as follows:

"Except as specifically provided in this Charter, no money shall be transferred from one fund to another, or from one appropriation to another, Provided, that in cases of extreme emergency so declared by the City Council, requiring an expenditure from a fund or appropriation having insufficient money on hand or anticipated during the fiscal year for the purpose, and there is surplus money available in other funds or appropriations, the City Council may authorize a transfer of money between such funds.

"An emergency shall be defined as an extraordinary and unforseen occurrence but in no wise shall the underestimating of the cost of the normal and ordinary operations of a department, office, board or commission be deemed an emergency."

In connection with the foregoing provision, respondents' brief contains the following, "It will be noted that by the express terms of this section an emergency is defined as an extraordinary and unforeseen occurrence, but in no wise shall the underestimating of the cost of the normal and ordinary operations of a department be deemed an emergency. There is no showing made, either in the pleadings or otherwise, that any emergency, as defined in Section 266, now exists or has ever existed. On the contrary, it affirmatively appears from the allegations of the petition that the deficit in the Relief and Pension Fund has existed for a number of years, and even if it may be presumed that the Manager and City Council were unaware of the condition of the fund at the time the budgets were made and the appropriation ordinances adopted, the Council could not declare an emergency on that ground. Furthermore, the determination of the emergency must be made by the City Council, and, being a matter entrusted to the discretion of that body, is beyond the reach of the courts." That the problems suggesting or necessitating a consideration of the provisions of Section 266 are legislative and not judicial, there can be no question. But, counsel's interpretation of Section 266 of the charter to the effect, in substance, that its provisions, in the circumstances, are unavailable, is based on an argument which is not exhaustive and hence is not conclusive. For example, the question as to whether an extreme emergency exists, obviously is a legislative or administrative question. Also, whether an "occurrence" is "extraordinary and unforseen", presents a similar question addressed to the judgment of the governing body. It would appear that these questions go back to the time when the situation with regard to the respondents' inability to pay the pensions, first appeared and, necessarily the application of the provisions of Section 266 as to whether such a situation could then have been foreseen, should be considered as of that date. It would appear also that this condition is the result of the provisions of the charter and not the result of an "underestimating of the cost of the normal and ordinary operations of a department". Moreover, in the determination of such questions, the relative importance of the fire department to the safety and welfare of the community, as well as its efficiency and the morale of its members, would likely be

taken into account. But, in any event, as hereinbefore mentioned, the determination of the question as to whether such an emergency exists rests with the governing body of the municipality, and with that matter the court is without power to interfere.

[15, 16] It is noteworthy that the City of Long Beach has at no time denied its liability in respect to petitioner's pension, and this obligation together with all other like pensions, is subject to payment and it is asserted will be paid as soon as the money therefor is available in the designated Relief and Pension Fund. By no theory of implied powers, liberal construction or other suggested hypothesis can the plain reading of the charter provisions be changed, and, in the circumstances, the court is without power to intervene. As was said in the case of Homestead Valley Sanitary District v. Donohue, 27 Cal.App.2d 548, 81 P.2d 471, 472: "There is no ambiguity here and no room for judicial construction resting merely on a judicial view of the expediency of the legislation."

For the reasons heretofore mentioned, the petition for a peremptory writ of mandate is denied.

YORK, P. J., concurs.

WHITE, Justice.

I dissent. I am in accord with that portion of the majority opinion which holds that the determination of the question as to whether an "extreme emergency" exists, as defined in Section 266 of the Charter, St.1935, p. 2576, is for the legislative body of the municipality, but it is my judgment that the question of whether or not an "extreme emergency" exists is not determinative of the issues presented in the instant proceeding.

We are here confronted with a situation wherein the City of Long Beach admits its liability to pay petitioner a pension, concedes the correctness of the amount claimed by him, but contends, although petitioner for more than twenty years has paid into the Relief and Pension Fund 2 percent of his monthly salary, that the city cannot, or will not, pay said pension until there is sufficient money in the Relief and Pension Fund for that purpose, although there is now in the hands of the City Treasurer, in other funds, sums of money far exceeding in amount what would be required not only to pay petitioner herein but to make all other pension payments.

To me it appears that the vital question presented is whether the provisions of section 187 of the Long Beach City Charter impresses upon the municipality a general obligation to provide for and pay pensions which accrue pursuant to said charter provisions.

The present controversy centers around what was the intention of the framers of the city charter. In attempting to discern such intention, heed must be given to the purposes of the provisions therein contained having to do with the establishment of a pension system, and to ascertain the meaning or intent of the various provisions of the charter, different sections of provisions must be read together with a view to harmonizing them.

Subdivisions 2, 3 and 4 of section 187 of the Charter clearly, unequivocally and in no uncertain language provide for the payment of pensions to members of the police and fire departments in equal monthly instalments when disability or death occurs or when a policeman or fireman shall have served a stated number of years as a member of either department. To my way of thinking, the foregoing provisions constitute an obligation to pay retirement, disability and death benefits that was contractual in nature and formed a very part of the policemen's and firemen's contract of employment. There is no occasion for conjecture or speculation as to the intention of the framers of the city charter when they have used language which is clearly understandable. And manifestly, by the mandatory declarations contained in subdivisions 2, 3 and 4, there was created a duty not only to pay, but to provide for funds out of which pensions were to be paid in equal monthly instalments.

Respondents contend that it was the intention of the framers of the charter that the pensions in question should be paid only from the Relief and Pension Fund set up in subdivision 6 of section 187, article XVI, of the charter.

However, an historical review of the pension system set up in the Long Beach City Charter furnishes a complete answer to and refutation of such an argument. Subdivision 6 of Section 187, as enacted by amendment to the Charter in 1925, read as follows: "for the purpose of creating,

maintaining and providing a fund to meet the payment of demands drawn for the payment of pensions and the expense of said Police and Fire Pension Commission as herein provided, a fund is hereby created to be known as 'Relief and Pension Fund.' The Police and Fire Pension Commission shall employ an actuary who shall render a report of the cost of maintaining, on a reservation basis, the pension system as hereinabove provided, and the city manager is hereby authorized to include in his annual budget an amount not exceeding two per cent (2%) of the general tax levy to be paid into said fund, based upon the estimate of cost as established by the actuary's survey, and the city council shall annually appropriate the amount of such estimate to the 'Relief and Pension Fund', and also the amount of any deficit which may remain therein in the event the appropriation of any previous year prove insufficient to pay all demands drawn against such fund, which amount, however, in any one year, shall not exceed two per cent (2%) of the general tax levy."

By their very language in adopting the foregoing amendment in 1925, the people indicated their intention to place the pension system on a reservation basis. This called for an actuarial survey and a mathematical determination of the cost of maintenance. Pending the report of the actuary, the section provided for a contribution of "not exceeding two per cent (2%) of the general tax levy to be paid into said fund." Although it be conceded that the maximum amount to be taken from the general tax levy was 2 per cent, it must not be forgotten that the city had other revenues than those raised through a general tax levy and there is no limitation contained in the charter amendment of 1925 as to the apportionment to the pension fund of other municipal revenues.

In accordance with the amendment of 1925, a survey was made by an actuary, who reported that 2 per cent of the general tax levy was totally insufficient and that to place the pension fund on a sound reservation basis would require an apportionment to the fund of 5½ per cent of the general tax levy. Upon receipt of this report, the city council ceased appropriating 2 per cent of the general tax levy to the pension fund and appropriated thereto only such amounts of money as were necessary to pay current obligations of the fund.

In 1931, with full information before them as to the actuarial report and with knowledge therefrom that 2 per cent of the general tax levy would be insufficient to maintain the fund, the people of the City of Long Beach amended section 187 by striking therefrom the words "not [to] exceed two percent (2%) of the general tax levy." To me it seems plain that in deleting the above-quoted words the people intended to remove the restriction which prohibited the city council from apportioning more than 2 per cent of the general tax levy. And, in any event, such an amendment does not inhibit the appropriation of sufficient moneys from other available funds of the city to protect and preserve the pension fund. In other words, by the amendment of 1931, the people changed the pension set-up from a reservation basis to a current payment basis. Surely it cannot be assumed that when the framers of the amendment of 1931 had before them the actuarial report from which they were advised that 2 per cent of the general tax levy was totally insufficient to maintain the fund that they adopted the amendment of 1931 with full knowledge that in so adopting it they were successfully emasculating the pension plan. With a full knowledge of the duty and obligation of the city to provide for and pay pensions to those entitled thereto in equal monthly instalments, I am impressed that by their action in 1931, in removing the limitation of 2 per cent, the framers of the charter intended to make it possible for the city council to maintain the pension fund in such condition as to meet current monthly obligations thereby put upon the city.

It is also worthy of note that other so-called retirement or pension funds, such as the retirement plan for California state employees, have a provision that, in the event employment terminates, the contributions made to the fund are returned to the employee, or in the event his official connection with the state is terminated by death, refund of payments contributed by him are made to his estate or designated beneficiary. This is not true under the Long Beach City Charter, and consequently the deductions from the policemen's and firemen's pay secured for them, in my judgment, rights similar to a contract of insurance.

Another interesting fact in connection with this proceeding is that section 188 of

the Charter of the City of Long Beach provides that the provisions of the pension fund are intended to be in lieu of and take the place of the Workmen's Compensation Insurance and Safety Act of 1917 of the State of California, p. 831, and amendments heretofore and hereafter to be adopted, and, should it be decided by the courts of this state that the provisions of the Workmen's Compensation Insurance and Safety Act cannot be waived, then payments made under the pension provisions of the charter should be credited on the amounts allowed under the compensation act. Whatever may be the law concerning the rights of a city in anywise to abridge the rights of its employees and their dependents to receive the compensation under the Workmen's Compensation Act, it seems to me that the provisions with reference to the Workmen's Compensation Act cast considerable light upon the intention of the people and of their desire to pay these pensions in equal monthly instalments.

I am further impressed that had it been the intention of the people to abandon the pension plan, and I think we must assume that such was their intention if we hold that they adopted a plan with full knowledge from an actuarial standpoint that it was unsound and could not be maintained, then it seems to me they would have repealed subdivisions 2, 3 and 4 of section 187. If it was not the people's intention to destroy the pension plan, then certainly it cannot be assumed that by the amendment of 1931 they withdrew from the city council the power to successfully maintain it. In the absence of any express language indicating an intention to destroy the plan, it seems to me we should and must assume that by their amendment of 1931 the framers of the charter intended to confer upon the city council the duty to maintain the fund out of revenues of the city in such form as would enable the municipality to discharge the obligations assumed by it toward its policemen and firemen pursuant to the provisions of subdivisions 2, 3 and 4 of section 187.

For the foregoing reasons, it is my judgment that a peremptory writ of mandate should issue as prayed for.

Rehearing denied; WHITE, J., dissenting.

## TWENTIETH CENTURY LITES, Inc., v. CALIFORNIA DEPARTMENT OF EMPLOYMENT et al.*

Civ. 14713.

District Court of Appeal, Second District, Division 1, California.

April 18, 1945.

Rehearing Denied May 7, 1945.

Hearing Granted June 14, 1945.

**1. Master and servant ⇐78**

The Unemployment Insurance Act was designed to implement the social policy of state to end that evil social effects of unemployment might be avoided. St.1935, p. 1226.

**2. Master and servant ⇐78**

The Unemployment Insurance Act should be construed so as to accomplish its objects. St.1935, p. 1226.

**3. Taxation ⇐59**

Under Unemployment Insurance Act, relationship between individual who performs services and person for whom services are rendered must, as to those services, be legal relationship of employer and employee. St.1937, pp. 2052, 2055, §§ 6.5, 9.

**4. Taxation ⇐59**

The relationship of "employer" and "employee" under Unemployment Insurance Act exists when person for whom services are performed has right to control and direct individual who performs services, not only as to result to be accomplished by work, but as to means by which result is accomplished. St.1937, pp. 2052, 2055, §§ 6.5, 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer" and "Employee".

**5. Taxation ⇐59**

In determining whether relationship of "employer" and "employee" exists under Unemployment Insurance Act, test is whether one for whom services are performed possesses power to exercise complete control, regardless of whether or not such potential control is exercised with respect to all details. St.1937, pp. 2052, 2055, §§ 6.5, 9.

**6. Taxation ⇐59**

An individual subject to control or direction of another merely as to result to be accomplished by work and not as to means

* Subsequent opinion 168 P.2d 699.

and methods by which result is to be accomplished is an "independent contractor" and not an "employee" within Unemployment Compensation Act. St.1937, pp. 2052, 2055, §§ 6.5, 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

**7. Taxation ⇐59**

A neon advertising display company's salesmen who worked on a commission without drawing account and were not required to work any particular hours in any specific territory, to solicit any particular persons or to make reports, but who were free to take business to other firms, even though competitors, were not "employees" of company within Unemployment Insurance Act, notwithstanding that they used company's stationery and cards indicating they were company's representatives, signed communications as members of its sales department, and were furnished space in company's office. St.1937, pp. 2052, 2055, §§ 6.5, 9.

**8. Taxation ⇐59**

In determining whether right of control exists so that persons controlled may be considered "employees" within Unemployment Insurance Act, one of the tests is whether or not if instructions were given by alleged employer they would have to be obeyed. St.1937, pp. 2052, 2055, §§ 6.5, 9.

**9. Constitutional law ⇐70(1)**

Whenever meaning to be given a particular term is prescribed by Legislature in enacting statute, that meaning is binding on court.

**10. Taxation ⇐59**

The fact that company had right to terminate agreement with its salesmen at any time without cause did not establish that salesmen were "employees" within Unemployment Insurance Act, where salesmen also could terminate agreement and were responsible to company only as to result of work to be done. St.1937, pp. 2052, 2055, §§ 6.5, 9.

**11. Constitutional law ⇐70(1)**

The Unemployment Insurance Act should not be extended by judicial interpretation to include any class or group clearly excluded by its language, since it is for Legislature to broaden scope of act. St. 1937, pp. 2052, 2055, §§ 6.5, 9.

**12. Constitutional law ⇐70(1), 77**

Neither California Employment Stabilization Commission nor court has power, either directly or indirectly, to modify Unemployment Compensation Act so as to include any class or group excluded by language thereof. St.1937, pp. 2052, 2055, §§ 6.5, 9.

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Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Twentieth Century Lites, Inc., against the California Department of Employment and others to compel the California Employment Stabilization Commission to set aside and vacate a decision determining that 33 named persons were employees of the petitioner under the Unemployment Insurance Act. From a judgment discharging an alternative writ of mandate, the petitioner appeals.

Judgment reversed, and cause remanded, with directions.

Musgrove and Cannan and Robert M. Miller, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for respondents.

WHITE, Justice.

This is an appeal from a judgment discharging an alternative writ of mandate theretofore issued and dismissing the petition, whereby petitioner sought to compel respondent Commission to set aside and vacate its decision determining that thirty-three named persons were "employees" of petitioner under the Unemployment Insurance Act, Chapter 352, St.1935, p. 1226, as amended, Act 8780d, Deering's General Laws, to correct its books and records with respect to such persons so erroneously listed therein as employees of petitioner, and to return to petitioner the sum of $1,873.96 contributed by it on behalf of said persons.

For purposes of convenience, petitioner and appellant, Twentieth Century Lites, Inc., a corporation, will hereinafter be referred to as "appellant"; the defendants and respondents, California Employment Stabilization Commission, successor to the California Employment Commission, referred to in the title and pleadings of the instant proceeding as "California Department of Employment", will be designated

as "respondent"; and the Unemployment Insurance Act, supra, as "the act".

The facts are not disputed and may be epitomized by saying:

Appellant is engaged in the manufacture, sale and installation of neon advertising displays. Its plan of doing business is as follows: Appellant used the services of salesmen who submitted orders for its products. Upon ascertaining the desires of a prospective customer the salesman submitted the same to appellant whose art department prepared a sketch and estimated the cost of installation. The salesman then returned to the prospective purchaser with the sketch and estimate and attempted to sell the installation, and if successful obtained a signed agreement from the customer on a form furnished by the appellant. In some instances, when the prospective sale was for a small display, the salesman quoted a price and obtained the signed agreement without first consulting the art department for a sketch and estimate. The salesman signed such form as appellant's representative. Appellant accepted or rejected the order obtained by the salesman. The agreement for the sale or lease of a neon sign was subject to appellant's approval and to the verification of the customer's credit rating. If the order was accepted by appellant, the salesman was paid a commission thereon. Upon delivery of the signed agreement to the appellant and the latter's approval of the customer's credit the salesman's services ended. A customer's request for changes in installations or for an adjustment of price could be honored only by appellant. The salesmen used cards indicating that they were representatives of the appellant, correspondent with customers on appellant's stationery and signed letters as representatives of the latter's sales department. The salesmen were furnished desk space and telephone service in appellant's office. The salesmen had the right to take their orders to other companies engaged in the same business. The services of the salesmen were terminable at the will of either party without liability. Salesmen were not required to report regularly to appellant's office. A so-called "lead" service was maintained by appellant which was available to all salesmen except in certain instances when the name of a prospective customer was given to only one salesman.

The salesmen were not required to furnish a bond, were not required to produce a minimum amount of business or to work fixed or regular hours. The salesmen were not assigned to any specific territory and only called upon those prospective customers that they chose to solicit. The salesmen received no advances or loans from the petitioner and were not permitted a drawing account. No sales meetings or training classes were conducted and no advertising material was furnished to the salesmen. Salesmen requiring the assistance of other persons made arrangements for the payment of such persons. The salesmen were free to work for others or to devote as much time as they desired to other business activities whether in competition with the appellant or not.

The salesmen entered into a written contract with the appellant before entering into the latter's service. It was provided by the contract that the appellant would make available to the salesmen all current information and "leads" to prospective customers except such as appellant might find expedient to place exclusively in the possession of another salesman. The appellant agreed to assist the salesmen in their work by advice, instructions and full cooperation. The salesmen were to be provided with such facilities as appellant's office might be able to furnish. The salesmen agreed to work diligently to sell or lease appellant's products and to solicit additional prospects and otherwise promote the business. The usual and customary commissions were to be paid the salesmen unless appellant advised the salesmen of a special contract relating to a particular transaction and appellant would not be liable for any commissions until the sale, contract or lease had been approved and accepted by it. The salesmen were not to be restricted to territory, method of sale, the amount of time devoted to appellant's business or any minimum volume of business. They were not required to submit reports of their activities except as to business transacted or consummated. Appellant would make no cash advances to the salesmen for their traveling or other expenses and would not be liable therefor. The salesmen had no authority to bind appellant on any promise or representations unless specifically authorized in writing by the latter. The salesmen were not responsible for collections under transactions consummated by them and in all actions at law should be construed to be sub-agents only with respect to customers for whom services were performed and would otherwise

be deemed to be independent contractors and not servants, employees, joint adventurers or partners of appellant. They were not prohibited from engaging in private enterprise not in conflict with their contract with the petitioner.

The question in the case is whether the aforesaid workers were in the "employment" of appellant as that term is defined in the Act, the pertinent and applicable provisions of which read in part as follows:

" 'Employment,' subject to the other provisions of this act, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied. * * *." Sec. 6.5, St.1937, p. 2052.

" 'Employer' means:

"(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day; * * *." (Sec. 9)

[1, 2] In the case at bar we are dealing with a specific statute declaratory of the social policy of the state and designed to implement such social or economic policy to the end that the evil social effects of unemployment may be avoided. B. P. Schulberg Productions, Ltd., v. California Employment Commission, 66 Cal.App.2d 831, 153 P.2d 404. It therefore becomes the duty of the courts to so construe it as to accomplish its objects and consequently, if expressly or by necessary implication, the act here under consideration, by its terms, brings within the scope of its remedial and regulatory provisions the workers situated and in the status involved here, then the judgment of the trial court must be affirmed.

[3] We regard it as a fair statement concerning the act to say that under its terms the relationship between the individual who performs services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee.

[4-6] Generally speaking, such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is accomplished. In other words, an employee is one who is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. Not that it is necessary that the employer actually direct or control the manner in which the services are performed but that he possess the right to do so. The test is whether the one for whom the services are performed possesses the power to exercise complete control regardless of whether or not such potential control is exercised with respect to all details. If he does, then an employer-employee relationship is established. California Employment Commission v. Los Angeles, etc., News Corp., 24 Cal.2d 421, 425, 150 P.2d 186; California Employment Commission v. Bates, 24 Cal. 2d 432, 436, 150 P.2d 192; Garrison v. California Employment Stabilization Commission, 64 Cal.App.2d 820, 824, 149 P.2d 711. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods by which the result is to be accomplished, he is an independent contractor, not an employee, and manifestly not within the purview of the act here under consideration. Barton v. Studebaker Corp. of America, 46 Cal.App. 707, 717, 189 P. 1025. Cases from other jurisdictions cited by respondent are of little assistance because of material differences in the definitions of descriptive terms therein contained when compared with those appearing in the California Act.

[7] An examination of the factual situation in the case at bar discloses that the contract between the salesmen and appellant herein provided for no set time which was required to be devoted to the latter's business; they were not required to make reports as to their work; were not "prohibited from engaging in private enterprises

which are not in violation, nor in conflict" with said contract. The salesmen were not assigned to any specific territory and called only upon those prospective customers whose business they chose to solicit. No advances or loans were received by the salesmen from appellant, nor were they permitted a drawing account. Such salesmen were free to take their business to firms other than appellant, even though the latter were competitors of appellant. In short, the obligation of the salesmen herein was to seek, secure and bring to appellant orders for the latter's products, but with reference to the details of their work or as to how it should be performed the undisputed evidence shows that the salesmen were not subject to the authoritative control of appellant. This was entirely up to the salesmen. They could work when they pleased and seek out and solicit such persons as they pleased as purchasers of appellant's products, and once they obtained such prospective purchasers they could bring the business to appellant or take the same to one of its competitors. They were under no obligation to give any particular time or service to appellant. When a salesman brought a "prospect" to appellant he was acting as much for himself as for the corporation, and if the "prospect" was converted into a customer the salesman received his agreed commission and if a "deal" was not effected he received nothing.

Respondent directs our attention to the fact that the salesmen used cards indicating they were representatives of appellant, corresponded with customers on appellant's stationery, signing communications as members of appellant's sales department and that they utilized appellant's sales and lease forms; that the salesmen were furnished desk space and telephone facilities in appellant's office. We are not impressed with the significance of these facts because of the undisputed evidence disclosing the terms of the agreement between the salesmen and appellant corporation and the nature of the relationship existing between them as established by such terms. Moreover, the use by the salesmen of appellant's business cards, stationery, telephone facilities and desk space is not determinative of, and has little, if any, bearing upon, the issue with which we are here concerned. Some importance might attach thereto, were we confronted with the issue of ostensible agency, wherein the customers of appellant, or other third parties with whom appellant was dealing, were concerned, but appellant's customers are not involved herein, nor is the question of ostensible agency. The essential element of control is woefully lacking in the case at bar. Moody v. Industrial Accident Commission, 204 Cal. 668, 672, 269 P. 542, 60 A.L.R. 299; Counihan v. Lufstufka Bros. & Co., 118 Cal.App. 602, 5 P.2d 694; Lee v. Nanny, 38 Cal.App.2d 90, 100 P.2d 832.

[8, 9] One of the means of ascertaining whether or not the right to control exists is the determination whether or not if instructions were given they would have to be obeyed. Applying this test to the case at bar, let up suppose that appellant had said to one or all of the salesmen: "You will report regularly to the office at nine o'clock each morning, you will furnish a bond conditioned upon the faithful performance of your duties; you will only call upon prospective customers in a given territory; you will call upon each prospective purchaser whose name is furnished to you; and you will not be permitted to engage in any business other than ours; you will return to the company office at the end of each day's work and make a report of your daily activities". If the salesmen are to be considered as employees it would have been their plain duty to obey the foregoing instructions. But manifestly such obedience was not required under the terms of their contracts herein. To us it seems clear that under their contracts with appellant the salesmen were responsible to the former only as to the result of the work to be done, namely to bring to appellant proposed contracts for the purchase or lease of appellant's products. With reference to what we have herein said we find no contradiction of our views as expressed in B. P. Schulberg, Ltd., v. California Employment Commission et al., supra [66 Cal.App.2d 831, 153 P.2d 405], because therein we said "Appellant was liable for the contributions it made for the year 1938 under the Unemployment Insurance Act only if the above mentioned artists were its employes during the various periods of the year 1937." We adhere to the holding in the case just cited that whenever the meaning to be given to particular terms is prescribed by the Legislature in enacting a statute, that meaning is binding on the courts. It is from the very terms as defined in the act itself that we determine, as have other appellate tribunals, that the act by its very

language never contemplated that contributions be made pursuant thereto unless the legal relationship of employer-employee exists. In holding that the salesmen in the case at bar are not employees of appellant we are guided by the purposes that the Legislature had in mind and the declared objectives of the act itself.

In the Schulberg case it was conceded that the artists were in "employment" of either one of two concerns and the only question presented for determination was which of two corporations occupied the legal relationship of employer-employee to the artists therein mentioned. It was through application of the rules which we have herein enunciated that we arrived at our determination, viz., which corporation exercised the right of control over the artists. Nor are we dissuaded from our expressed views in the instant proceeding by the holdings in National Labor Relations Board v. Hearst Publications, 322 U. S. 111, 64 S.Ct. 851, 857, 88 L.Ed. 1170, and Grace v. Magruder, App.D.C., 148 F.2d 679, so earnestly relied upon by respondent, because, while holding that the statutes there under consideration "must be read in the light of the mischief to be corrected and the end to be attained" and that the word "employee" is "'not treated by Congress as a word of art having a definite meaning * * *.' Rather 'it takes color from its surroundings * * * (in) the statute where it appears,'" nevertheless in both cases it was held that from the contract between the parties the nature of the relationship can ordinarily be determined, and both cases were decided upon the theory that the facts therein present showed, as was said in Grace v. Magruder, supra, "the power of supervision and control implicit in the arrangement" between the one performing the services and the one for whom such services were performed. No such showing is present in the case with which we are here concerned.

[10] Respondent strongly urges that the right to terminate the agreement at any time and without cause is a persuasive argument in favor of the assumption that appellant thereby had the power of coercion and control over the salesmen, but it is equally true that the salesmen also had an equal right to terminate their agreements with appellant and as was said in Fidelity & Casualty Co. v. Industrial Accident Commission, 191 Cal. 404, 410, 216 P. 578, 581, 43 A.L.R. 1304, where a like situation was present, "It could just as well be argued, so far as this aspect of the contract is concerned, that decedent had the power of control over Haydis." It must be conceded that the right of immediate discharge is an incident of the relationship of employer-employee, and points strongly to the existence of such a relationship, but in the instant case we are persuaded that by reason of the terms of the agreement between the parties the right of immediate termination of the contract was vested in appellant to secure satisfactory performance by the salesmen as to the results of their work and not as to the means whereby such results were to be achieved. In an independent contract the parties may and often do incorporate provisions tending to secure satisfactory results without thereby negativing the relationship of independent contractor or establishing the relationship of employer-employee.

[11] While it is true as stated in California Employment Comm. v. Black-Foxe Military Inst., 43 Cal.App.2d Supp. 868, 872, 110 P.2d 729, and quoted with approval in California Employment Commission v. Butte County, etc., Ass'n, 25 Cal.2d 624, 154 P.2d 892, 895, with reference to the act now engaging our attention that "in view of the purpose of these provisions they should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation", it is equally true and amounts only to the statement of a principle of natural justice to say that by judicial interpretation the act should not be extended to include within its provisions any class or group clearly excluded by the language of the statute. It is for the Legislature to indicate by appropriate amendatory language its intention to broaden the scope and meaning of "in employment" beyond the limits now established by the present language of the act as interpreted by the courts of this state.

[12] To uphold respondent's contention in the instant case that the legal relationship of employer-employee existed between appellant and the salesmen would in effect modify the statute. This, neither the California Employment Stabilization Commission nor the court has the power to do, either directly or indirectly. Hutchison v.

Clark, 67 Cal.App.2d 155, 153 P.2d 796, 799.

The judgment is reversed, and the cause remanded, with directions to the court below to issue a peremptory writ of mandate as prayed for.

YORK, P. J., and DORAN, J., concur.




## EMPIRE STAR MINES CO., Limited, v. CALIFORNIA EMPLOYMENT COMMISSION.*

Civ. 7112.

District Court of Appeal, Third District, California.

April 18, 1945.

Rehearing Denied May 18, 1945.

Hearing Granted June 14, 1945.

**1. Master and servant ⇐78**

The Unemployment Insurance Act is a remedial statute and was enacted, not as a revenue-raising measure, but as part of a plan to assist in stabilization of employment conditions and to ameliorate conditions of unemployment. St.1935, p. 1226, as amended.

**2. Statutes ⇐179**

The Legislature did not intend to incorporate in Unemployment Insurance Act the common-law concept of master and servant or definitions of "employment", "service", "employee", and "wages" contained in Labor Code and Workmen's Compensation Act, but act contains its own definitions. St.1937, pp. 2055, 2056, §§ 9, 6.5.

**3. Constitutional law ⇐70(1)**

The courts are bound by meaning given particular terms by Legislature in enacting a statute.

**4. Master and servant ⇐78**

In construing Unemployment Compensation Act, courts have considered broad social aspect of act in regard to employer-employee relationship rather than narrower traditional concepts which in other instances have failed to permit full realization of legislative intent. St.1935, p. 1226, as amended.

**5. Taxation ⇐59**

Where mining company leased particular areas for six-month periods to individuals who engaged other miners to assist in mining operations with company's equipment under agreement whereby miners received 50 per cent. of proceeds, but company retained right to terminate agreement and occasionally required miners to work for it, individual leasers were not "independent contractors" but they and other miners were "employees" within Unemployment Compensation Act. St.1937, pp. 2055, 2056, §§ 9, 6.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

**6. Taxation ⇐58**

The fact that system, whereby mining company leased particular areas for six-month periods to individual miners who engaged others to assist in mining operations with company's equipment under agreement whereby miners received 50 per cent. of proceeds, was instituted prior to enactment of Unemployment Insurance Act, did not render act inapplicable to miners, even though system was not devised to evade act. St.1937, pp. 2055, 2056, §§ 9, 6.5.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Suit by Empire Star Mines Company, Limited, against the California Employment Commission to recover unemployment insurance taxes paid under protest. Judgment for the plaintiff and the defendant appeals.

Judgment reversed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Robert M. Searls, of San Francisco, and Lynne Kelly, of Grass Valley, for respondent.

H. Ward Sheldon, of Nevada City, amicus curiae.

PEEK, Justice.

The respondent corporation, under protest, paid certain unemployment insurance taxes, and thereafter sought to recover the

* Subsequent opinion 168 P.2d 686.

same in accordance with the provisions of the Unemployment Insurance Act, Act 8780d, St.1935, p. 1226, as amended. From the judgment of the trial court in favor of plaintiff the Commission has appealed.

Since 1930 plaintiff has operated a group of mines in Nevada County known as the Empire North Star group. One mine in this group, known as the North Star Mine, contains approximately 150 miles of underground workings. Narrow veins of rock in said workings were reputed to contain good ore, but were so distant from the only available shaft, the company determined that mining these veins on the usual basis would be impractical commercially. To alleviate this condition respondent decided that experienced miners could work these veins at a profit by mining them carefully and by exercising a great deal more care in picking out the waste in mining and handling the ore than was customary in its ordinary operations.

Early in 1930 a leasing system of these portions of the mine was instituted. The method adopted was to issue a lease to a single individual, the latter in turn taking in associates on a wage or profit sharing basis.

The terms of the so-called leases were substantially uniform except as to the description of the area leased. Under the provisions of the agreements the miner lessees, hereinafter referred to as leaser, was given the exclusive right to mine the area described in the lease for a period of six months. He was to furnish all necessary labor, to perform all work in a good miner-like manner, installing timber where necessary, and maintaining the workings in a safe condition. The leaser was required to carry adequate compensation insurance for himself and all workmen associated in his operations, with an insurance carrier satisfactory to respondent, in an amount sufficient to fully cover all compensation insurance hazards. The so-called leaser, upon written request from respondent's superintendent, was required to discharge any employee designated by respondent as objectionable. Also he was required to use suitable precautions to prevent any theft of ore by any one, whether connected with the leaser's operations or not. The agreement further provided that the so-called leaser could not employ more than eleven workmen without the consent of respondent. In one of the agreements the number of workmen was limited to eight. The respondent was to furnish all tools and equipment except explosives and fuse, which the leaser was to purchase from respondent at cost. Respondent agreed to hoist and transport the ore produced and to place at the so-called leaser's disposal sufficient milling facilities to crush and treat the ore mined by him and his associates. The respondent further agreed to retort amalgam, to melt bullion and to market it. The respondent at all times had the right of access to the leased area and to inspect the work in both the underground and milling operations. It had the right to regulate the tramming, storage and hoisting of the ore and the treatment of it in the mill. Respondent at its option could cause the ore produced and delivered by the so-called leaser to be milled in some other mill, to be selected and designated by it. It also had the right and privilege to perform development and exploration work within the area of the mine described in the lease.

For his labor the leaser was to receive fifty per cent of the gross returns after respondent had disposed of the ore. The agreement was not assignable without the consent of respondent.

Respondent had the right to terminate the agreement prior to the expiration of the six months' period upon the happening of any of the following:

(1) If the operations under the agreement were not financially profitable to it;

(2) If the mine was wholly or partially destroyed;

(3) If it decided to suspend all operations;

(4) If it discovered that substantial amounts of ore were being stolen or not accounted for, and

(5) If the so-called leaser failed to perform his part of the agreement.

In addition to the written agreement executed in 1930, written agreements were also entered into and executed in 1935. When the six months' term of the agreements expired, they were extended or renewed for successive six months' periods on the same terms until January 1939, when new written agreements containing substantially the same provisions were executed. Some of the leases and renewals were oral.

Respondent stored and shipped the bullion bars for each group separately and accounted separately to designated repre-

sentatives of each group for fifty per cent of the mint returns upon the ore mined and milled by each group, together with fifty per cent of the computed gross recovery from concentrates. All tailings were to belong to respondent and not to the leaser.

Respondent did not control or participate, directly or indirectly, in the apportionment among the members of any given group of the ore return payments made to the representative of the group.

Although the record before us is not entirely clear concerning the inception of the present controversy it was apparently the outgrowth of certain difficulties which arose between the company and the associates of one Dutton, a leaser. It appears that the company proposed to Dutton that he and his associates cease working under the lease and perform certain development work for the company as its employees, on a per foot basis of pay. Some of the men acquiesced and others refused. Those who refused contended that they were discharged by the company, which contention it denied. After a hearing before the Commission, unemployment benefits were granted to said miners. At approximately the same time unemployment insurance taxes were assessed against the company by the Commission in accordance with the provisions of the act.

During this same period the respondent likewise had become involved under the provisions of the Federal Social Security Act, 42 U.S.C.A. § 301 et seq., which difficulties culminated in an action being instituted by the company in the Southern District of the United States District Court for the Northern District of California, to recover the taxes it had paid under protest. The judgment of the District Court, which was in favor of the company, was sustained by the Circuit Court. Anglim v. Empire Star Mines Co., 9 Cir., 129 F.2d 914.

The present action was instituted by the company under Section 45.10 of the Act, St. 1939, p. 2058, to recover the taxes paid under protest in accordance with a demand of the Commission.

The pertinent portions of said section are as follows:

"* * * after payment of any such contribution under protest, duly verified and setting forth the grounds of objection to the legality of such contribution, the employer paying such contribution may bring an action against the Unemployment Reserves Commission in any court of competent jurisdiction in the county seat of the county wherein the employer maintains his principal place of business for the recovery of contributions so paid under protest."

At the hearing of the present controversy it was stipulated by counsel that the transcript in the Federal case be considered as a part of the record in the instant case and binding upon the parties hereto.

The extensive findings of the trial court herein substantially followed the statement of the facts as previously set forth. In addition, the court found that as a matter of practice the leasers were at all times entirely independent from any supervision, direction or control of plaintiff in the method, manner and details of leasers' operations in the leased premises; that although the lease gave certain rights to the company, plaintiff had no right of control over the operations.

From such findings the court concluded that the leasers were independent contractors and not employees of plaintiff. In accordance therewith judgment was entered, ordering defendant to repay to plaintiff the taxes previously levied and paid by it under protest.

The contentions of appellant herein may be summarized as follows:

(1) That the act is "social legislation" as distinguished from a "taxing statute," and must be liberally construed to the end that its purpose may be accomplished;

(2) That the lease in controversy is, under California law, merely a contract of employment;

(3) That under the common law rule respondent was the master and the leasers were the servants;

(4) That the right of control of respondent over the leasers was a right of complete control;

(5) That the case of Anglim v. Empire Star Mines, 9 Cir., 129 F.2d 914, involving the same parties in a similar controversy in the Federal courts, which is relied upon by respondent, is in conflict with cases in this state and recent Federal cases;

(6) That this court is not bound to accept the common law definition of master and servant as a measure of the relationship of the parties to the lease but must search for and apply a definition which will

accomplish the purpose for which the legislature enacted such act;

(7) That the Commission having considered all of the facts in this case and having found that a relationship of employer and employee existed between respondent and the leaser in a proceeding in which respondent was a party, the question cannot be raised again in this case by respondent.

By virtue of the similarity between appellant's first and sixth contentions we have considered them together, and by reason of the conclusion we have reached herein in regard to the same it becomes unnecessary to discuss the remaining issues.

In answer to appellant's first attack upon the judgment, respondent argues that as the act contains certain taxing provisions, every doubt as to its application must be resolved in its favor and against the Commission. The most recent expression upon this question by our Supreme Court is found in California Employment Comm. v. Butte County, etc., Ass'n, 25 Cal.2d 624, 154 P.2d 892, 894, wherein it is stated:

"The tax feature as to the reciprocal contributions of employers and their employees is but an incident, not the essence of the state unemployment insurance law, which in turn is integrated with the operation of comparable federal legislation. Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595. Such legislation is remedial in character, subject to a liberal construction to effectuate its purpose and to coincide with its reflection of public policy. Los Angeles County v. Frisbie, 19 Cal.2d 634, 122 P.2d 526; California Employment Comm. v. Black-Foxe Military Inst., 43 Cal.App.2d Supp. 868, 110 P.2d 729. In the latter case the broad coverage intent of the act here involved is recognized in the following language at page 872 of 43 Cal.App.2d Supp., at page 732 of 110 P.2d: 'The income tax law is purely a revenue measure, and upon the rule of strict construction applied to such laws, its scope may well be restrained to such matters as are clearly covered by it. Here we have a statute which, while it requires a "contribution" that in itself may possibly be regarded as a tax, has a much broader object than the mere raising of revenue. It sets up a scheme for ameliorating the hardships of unemployment, and undertakes, in conjunction with the United States Government, to pay unemployment benefits to those who, without fault of their own, are out of work, to impose the financial burden of doing this upon both employers and employees, and to measure both burden and benefits by the amount of compensation paid to employees when they are working. * * * *In view of the purpose of these provisions they should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation.*' (Italics ours.)"

[1] And, as this court stated in the recent case of California Employment Stabilization Comm. v. Lewis, 68 Cal.App.2d 552, 157 P.2d 38, statutes such as our Unemployment Insurance Act are remedial statutes and were enacted, not as revenue raising measures, but as part of a national plan to assist in the stabilization of employment conditions and to ameliorate conditions of unemployment. See also California Employment Comm. v. Los Angeles Down Town Shopping News Corp., 24 Cal.2d 421, 150 P.2d 186. That such is now the well established rule likewise is evidenced by the recent cases of Grace v. Magruder, App.D.C., 148 F.2d 679; Carroll v. Social Security Board, 7 Cir., 128 F.2d 876; United States v. Vogue, Inc., 4 Cir., 145 F.2d 609, and cases cited therein.

Section I of the act provides that "as a guide to the interpretation and application of this act the public policy of this state is declared as follows:" The remaining portion of that section consists of a lengthy statement relative to the ill effects of unemployment and its ramifications which is well epitomized in the Butte County case, supra.

Only two other sections of the act are pertinent to this controversy, Section 6.5, St.1937, p. 2056, which reads in part as follows: "'Employment,' subject to the other provisions of this act, means service * * * performed for wages or under any contract of hire, written or oral, express or implied * * *"; and Section 9, which defines "employer" and "employment unit."

Pursuant to and in consonance with such expressed declaration of the social policy of this state the legislature enacted further provisions into the act providing for the imposition of compulsory contributions upon employers and employees to establish a fund from which benefits could be paid to employees who found themselves unemployed through no fault of their own.

The essence of appellant's contention is to urge the adoption of a more functional concept of employer-employee relationship in view of the purpose of the provisions contained in said act.

Respondent's answer to appellant's argument is to the effect that for the court to follow the contentions of appellant in this regard, particularly in view of the so-called lease between the parties, would be to make the law rather than apply it, and that any conclusion other than that of the trial court would amount to an impairment of contract under Article I, Section 10 of the Constitution of the United States.

[2-4] In view of the recent decisions of the courts of this state, the rule is now well established that the "Legislature did not intend to incorporate in this measure the common law concept of master and servant or the definitions of 'employment', 'service', 'employee' and 'wages' as contained in the Labor Code * * * and the Workmen's Compensation Act * * * is evidenced by the fact that the statute itself contains definitions of the words 'employment' and 'employer,' * * *. When the meaning to be given to particular terms is prescribed by the legislature in enacting a statute, that meaning is binding upon the courts. In re Monrovia Evening Post, 199 Cal. 263, 270, 248 P. 1017; Rideaux v. Torgrimson, 12 Cal.2d 633, 637, 86 P.2d 826. We must not, therefore, use the words defined in the statute according to their rigid, precise or dictionary meanings, but rather as defined by the act itself, which evidences a legislative intent to give the words a broad and liberal description to the end that the far-reaching and evil effects of excessive unemployment may be eradicated. The broad language of the definitions contained in the statute leaves no doubt that the application of the act is to be broadly determined rather than by any narrow, technical, or even previously established legal definitions or descriptions." B. P. Schulberg Productions v. California Emp. Comm., 66 Cal.App.2d 831, 834, 193 P.2d 404, 406.

In other words, our courts have in their interpretation of the act considered the broad social aspect of the statute in regard to the employer-employee relationship rather than the narrower traditional concepts which, under this and similar remedial legislation, have proved to be inadequate to permit a full realization of the intent of the legislature.

Additional support for this conclusion is found in the recent case of National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 857, 88 L.Ed. 1170. The question therein presented concerned the application of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., to the employee status of newsboys. In passing upon that issue the court said that Congress in the enactment of the statute "had in mind a wider field than the narrow technical legal relation of 'master and servant,' as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others." And, that the term "employee" must be understood with reference to the "purpose of the Act and the facts involved in the economic relationship." A like expression is found in the earlier case of Lehigh Valley Coal Co. v. Yensavage, 2 Cir., 218 F. 547, 552, wherein a situation not wholly unlike the present was at issue. There the injured party sought compensation from a coal mining company, although at the time of the accident he was employed by another miner, who was in the employ of the defendant company. The company contended that the injured party was not in its employ and therefore it could not be held liable. In passing upon the question so raised the court stated that it followed as a necessary conclusion from such argument that the company therefore was "not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out the contracts to independent contractors, to whom they owe as little duty as to those firms which set up the pumps in their mines. Thus what is confessedly only a means of speeding up the miners and their helpers becomes conveniently an incidental means of stripping from them the protection of the statute." The court then concluded that the uses of the word "employed" "must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their 'hand,' if any one is. Because

of the method of his pay one should not class him as though he came to do an adjunctive work, not the business of the company, something whose conduct and management they had not undertaken."

[5] Likewise, in the present case, what is an admitted attempt by respondent, through the agency of a lease, to prevent the "highgrading" of ore, also becomes "conveniently an incidental means of stripping" from the leasers the protection of the Unemployment Insurance Act. Again, as in the last cited case, the leasers had neither capital nor financial responsibility, and as appears from the transcript they were dependent upon respondent for a continuity of their work.

Dutton, who had an oral lease, testified that from time to time while his lease was in operation he and the miners with him had done development work for the company; that in August 1938, the company, through its superintendent, had requested him to do some further work for it; that when he asked the men to do said work, some refused, and that he thereupon told them there was no reason for them to continue working on the lease. (These were the individuals who were granted unemployment benefits.) On cross-examination he admitted that at a previous hearing he had testified he told the men that unless they cooperated with the company and did the work it requested them to do it would terminate their lease.

Dutton's realistic appraisement of the situation in regard to possibility of termination of the lease by the company for failure to accede to its request is well illustrated by the summarized provisions for termination previously set forth herein, and which, for all practical purposes, was tantamount to control.

The record also discloses evidence that the work so contemplated by the company would have completely disrupted the leasers' mining activities; a situation entirely incompatible with the argument advanced by respondent that the leasers had exclusive possession of the leased portion of the mine.

As further evidence of the employer-employee relationship the record discloses that some of the miners who worked on leases alternately worked for respondent at daily wages and had been in its employ for years.

In accordance with the previous expressions of the courts of this state we must conclude the legislature did not intend that the common law tests should be controlling without regard to the broad purposes of the act. However, because of the many and varied forms of service relationships now existing under our complex economy, the difficult problem is the determination of what the legislature intended to include within "the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment." National Labor Relations Board v. Hearst Publications, supra.

In the present case it seriously cannot be contended that the work performed by the so-called leasers was work usually performed by an individual in the exercise of a special calling, and who could not be discharged before the work was finished without contractual liability in the absence of some breach on his part. To the contrary it must be admitted that the nature of the work being done was more than an indispensable part of the company's business; it was in fact the sole and only business of respondent—the mining and milling of ore. Nor can it seriously be contended that by reason of the provisions in the lease the miners were not dependent upon the company.

Under such circumstances it is readily apparent that if respondent's position be sound, i.e. that the written agreement between the company and the leasers takes this case out of the statute, the effect of a remedial statute upon the basic employee group of an entire industry would be made to depend upon the expertness of the draftsmanship of agreements. And though it may or may not have been an endeavor to set up the appearance of independent contracts while retaining to the employer all of the basic attributes of the employer relationship, the purposes which the legislature has stated were the basis for the enactment of the statute then have been as effectively by-passed as though no statute at all existed,—a result entirely inconsistent with the broad terms and purposes of the statute. Unless the so-called independent contractor definitely is engaged in an independent calling, the mere pen and paper subtraction of the right of control of the means and methods of his operations should

not be countenanced as a method of taking the relationship out of the employer-employee classification, and therefore out of the statute.

[6] Respondent, however, urges that as the leasing system was instituted prior to the enactment of the Unemployment Insurance Act the leases in question cannot be considered as an attempted evasion of the act. Whether the leases were or were not attempted evasions of that or any other act is of no consequence, for, if under the plan the status of employer and employee as contemplated by the act still continued, and we conclude that it did, "the reason for adopting the written contract plan is not material." Pacific Lbr. Co. v. Industrial Acc. Comm., 22 Cal.2d 410, 422, 139 P.2d 892, 898.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.




69 Cal.App.2d 120

## WILTSEE v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Civ. 12767.

District Court of Appeal, First District, Division 1, California.

May 7, 1945.

**1. Mines and minerals ⇐97, 101**

A contract by owner of gold dredging project employing another in the location of mining properties and to assist in the operation thereof at a specified monthly salary plus a percentage of the profits and stating that the parties should not be partners, created an employer-employee relationship and not a partnership or joint venture. St.1937, p. 258, § 2750.

**2. Joint adventures ⇐1**

A mere interest in profits of business, unconnected with any power of control, does not make person having such interest a "joint adventurer" with owner of business.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventurer".

**3. Taxation ⇐59**

The tax feature as to reciprocal contributions of employers and employees is but an incident, not the essence of State Unemployment Insurance Law, which is integrated with operation of comparable federal legislation. Gen.Laws 1937, Act 8780d.

**4. Master and servant ⇐78**

Unemployment insurance legislation is remedial in character, subject to a liberal construction to effectuate its purpose and to coincide with its reflection of public policy. Gen.Laws 1937, Act 8780d.

**5. Statutes ⇐245**

The purpose of provisions for unemployment insurance contributions is broader than mere raising of revenue, hence such provisions should not be whittled down by narrow construction, and exceptions not clearly justified by their language should not be engrafted upon them by judicial interpretation. Gen.Laws 1937, Act 8780d.

**6. Joint adventures ⇐1**
**Master and servant ⇐1**

The relationship of employer-employee and joint adventurers are incompatible and cannot exist together between same parties in relation to same transaction.

**7. Joint adventures ⇐1**

The essential elements of a joint adventure are community of interest in object of undertaking and equal power to control or direct conduct of each other with respect thereto, sharing losses, and a close or fiduciary relationship between parties.

**8. Internal revenue ⇐831**
**Taxation ⇐104**

An association may properly be defined as a partnership for state and federal income tax purposes when all elements of partnership for other purposes are not present.

**9. Taxation ⇐59**

That state and federal governments for income tax purposes treated as a partnership the relationship between owner of gold dredging project and his employee who, under contract, was entitled to speci-

fied percentage of net profits for past services in discovering project and in aiding in development thereof, did not establish existence of partnership within state Unemployment Insurance Law for purpose of determining whether operations at such mining project constituted a separate employing unit from other individual operations of owner. Gen. Laws 1937, Act 8780d, §§ 6.5, 8.5, 9(a) and Supp.1939, § 45.10.

**10. Taxation ⇐59**

Where agreement between owner of gold dredging project and employee created only employer-employee relationship, and not a partnership or joint venture, though contract provided that employee should receive 25 per cent. of net profits of project in addition to salary, such mining project was not an "employing unit" separate from owner's other individual mining enterprises for Unemployment Insurance Law purposes. Gen.Laws 1937, Act 8780d, §§ 6.5, 8.5, 9(a) and Supp.1939, § 45.10; St.1937, p. 258, § 2750.

See Words and Phrases, Permanent Edition, for all other definitions of "Employing Unit".

Appeal from Superior Court, San Francisco County; Elmer E. Robinson, Judge.

Action by E. A. Wiltsee against the California Employment Commission and others to recover assessments under the Unemployment Insurance Act paid by plaintiff under protest. From a judgment for plaintiff, defendant Commission appeals.

Reversed.

Robert W. Kenny, Atty. Gen., State of California, and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., State of California, for appellant.

Joseph C. Meyerstein, of San Francisco, for respondent.

PETERS, Presiding Justice.

The California Employment Commission, after a hearing, determined that E. A. Wiltsee was subject to certain assessments under the Unemployment Insurance Act. Deering's Gen. Laws, Act 8780d, and Supp. 1939. Wiltsee paid the assessments under protest, and brought this action as permitted by § 45.10 of the act, to recover the amounts so paid. The Superior Court determined that Wiltsee was not subject to the assessments and granted him a refund. From this judgment the commission appeals.

Section 6.5 of the act provides that "employment" means "service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied." Section 8.5 defines "employing unit" as "any individual or type of organization, including any partnership, association, * * * which has, or subsequent to January 1, 1936, had, in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this act."

Section 9(a), since 1937, has defined "employer" as "Any employing unit, which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day."

The facts are not in dispute. Wiltsee engages in various mining operations. One such operation in which he at least has an interest is the Hoosier Gulch Placers. It is admitted that if Hoosier Gulch Placers be considered as an employing unit separate from the other individual operations of Wiltsee that not a sufficient number of employees for a sufficient period of time were hired by Wiltsee in connection with these separate activities to bring him within §§ 8.5 and 9(a) above quoted. It is also conceded that the Hoosier Gulch Placers hired a sufficient number of employees for a sufficient period of time during the period here involved (April 1, 1937, to March 31, 1941) to render it an employing unit under

§ 9(a), and that enterprise has paid all contributions required of it under the act. No contributions were originally paid by Wiltsee based upon his individual activities other than the Hoosier Gulch Placers. The commission found that the Hoosier Gulch Placers was an individual operation of Wiltsee and therefore that that activity and his other individual operations should be grouped together under § 8.5 of the act so as to constitute one employing unit. An assessment was thereupon levied against Wiltsee, the amount of which is not in dispute, based upon his employer activities in his operations other than Hoosier Gulch Placers. This assessment was paid under protest. The Superior Court determined that the Hoosier Gulch Placers was a separate employing unit from Wiltsee as an individual, and ordered a refund of the assessment in so far as it included contributions based on the individual activities of Wiltsee other than Hoosier Gulch Placers. The sole question presented on this appeal is whether Hoosier Gulch Placers is an individual operation of Wiltsee, as found by the commission, or whether, as found by the trial court, it is a separate employing unit of which Wiltsee is not the sole operator.

The action was tried on the record produced before the commission. That record shows that Wiltsee filed a certificate of doing business under a fictitious name in which he declared that he was the sole owner and proprietor of the Hoosier Gulch Placers. The returns filed with the department of employment declared that the operation was Wiltsee's individual enterprise. Wiltsee claims, however, that the Hoosier Gulch Placers is an employing unit separate from his other individual enterprises because of a certain contract dated November 5, 1936, between Wiltsee and one Merrill Yost. It is the theory of Wiltsee that this contract made Yost not only his employee but also a joint adventurer, and that for that reason the enterprise was not solely operated by Wiltsee. This contention is based on the fact that although the contract admittedly made Yost an employee of Wiltsee, it also provided that Yost was to have a non-terminable interest in 25% of the net profits of the operation after the return of Wiltsee's original investment. It was the theory of the trial court that this interest of Yost created a relationship in the nature of a joint venture between Yost and Wiltsee so far as the Unemployment Insurance Act is concerned. Since Yost has no such interest in any of the other of Wiltsee's operations, the trial court concluded that Hoosier Gulch Placers constituted a separate employing unit, and that the assessments levied against Wiltsee which failed to so treat it were erroneous.

The contract recites that Wiltsee "has engaged or is about to engage in a gold dredging operation on * * * the Hoosier Gulch property, and intends to carry on the said project under the name of Hoosier Gulch Placers"; that Yost had been instrumental in discovering the gold dredging possibilities of the project; that Yost "has been and intends to continue in the employ of the said E. A. Wiltsee for the purpose of locating gold dredging and other mining property and assisting the said E. A. Wiltsee with the operation" of the properties. It then provides as follows:

"1. E. A. Wiltsee agrees to employ the said Merrill Yost and the said Merrill Yost agrees to serve the said E. A. Wiltsee in the location of gold dredging and other mining property and assisting the said E. A. Wiltsee in the operation of the said Hoosier Gulch property, and other mining properties, and in the performance of such other duties which may be assigned to him by the said E. A. Wiltsee, at a monthly salary of $210.00, and such other additional compensation as herein provided for.

"2. During the continuation of the said employment the said Merrill Yost agrees to faithfully, skillfully and satisfactorily discharge his duties in the location of gold dredging and other mining properties and in assisting the said E. A. Wiltsee in the operation of the said Hoosier Gulch Placers, and to devote his full time and attention to such business.

"3. The said E. A. Wiltsee further agrees to pay the said Merrill Yost and Mary Yost, his wife, jointly, or the survivor of them, a sum equal to twenty-five (25%) per cent. of the net profits made by the said E. A. Wiltsee in the operation of the said Hoosier Gulch Placers, after the return to the said E. A. Wiltsee of all money by him invested therein.

"4. Nothing in this agreement shall be construed or deemed to constitute the parties hereto partners to any extent, but on the contrary, it is expressly understood and agreed that the said parties are not partners and that the said Merrill Yost is in no event to bear any part of the losses of the

said business, and the said Merrill Yost has not, and in no event is to have, any interest in said business or the profits thereof; that the provision for the payment to the said Merrill Yost and Mary Yost of a sum equal to twenty-five (25%) per cent. of the net profits of the said business after the return to the said E. A. Wiltsee of his investment therein, is adopted merely as a convenient method of computing the compensation of the said Merrill Yost.

"5. The term of this agreement shall be seven (7) years, from and after the date hereof, provided, however, that the same shall terminate in the event of the death or permanent disability of the said Merrill Yost, and provided further that the said agreement may be terminated at the option of the said E. A. Wiltsee in the event of the illness or disability of the said Merrill Yost for any period in excess of two months, or in the event of a bona fide sale by the said E. A. Wiltsee of the said business known as the Hoosier Gulch Placers, or the bona fide discontinuance of the said business by the said E. A. Wiltsee because of its unprofitableness.

"6. Provided, further, that the right of the said Merrill Yost or Mary Yost, or the survivor of them, to receive twenty-five (25%) per cent. of the net profits of the business known as the Hoosier Gulch Placers, after the return to the said E. A. Wiltsee of all money by him invested therein, shall not be affected by the termination of this agreement as long as the said Hoosier Gulch Placers shall be operated by the said E. A. Wiltsee or his estate, nor by a sale of the said business, and in the event of said sale said Merrill Yost and Mary Yost, his wife, or the survivor of them, shall be entitled to receive out of the net profits realized twenty-five per cent (25) after the return of all money invested by said Wiltsee therein.

"7. The monthly salary hereinabove provided shall be paid to the said Merrill Yost at the end of each calendar month. The sum equal to twenty-five (25%) per cent. of the net profits of the said business shall be paid to the said Merrill Yost and Mary Yost, at the end of each calendar month after the return to the said E. A. Wiltsee of his investment therein, as long as the said business shall be operated by the said E. A. Wiltsee or his estate.

"8. It is expressly understood that there is no understanding or arrangement between the parties other than that herein set forth, and that no representations have been made by the said E. A. Wiltsee which have not been herein expressly stated, and it is further understood and agreed that this agreement cannot be annulled, modified or changed as against the said E. A. Wiltsee except by an agreement in writing executed by both parties hereto."

It is admitted that this contract correctly represented the true relationship existing between the parties.

[1, 2] There can be no doubt but that this contract created an employer-employee relationship between the parties, and did not create a partnership. § 2750, Labor Code, St.1937, p. 258; Crowley v. Genesee Mining Co., 55 Cal. 273; Wheeler v. West, 71 Cal. 126, 11 P. 871; Hudepohl v. Liberty Hill Con. Mining & Water Co., 80 Cal. 553, 22 P. 339; Stone v. Bancroft, 112 Cal. 652, 44 P. 1069; Empire Star Mines Co. v. California Emp. Comm., — Cal.App.2d —, 158 P.2d 606. This is conceded by respondent. It is his theory that in addition to the employer-employee relationship the contract for the purposes of this act makes Hoosier Gulch Placers "an operation in the nature of a joint venture between respondent and Yost, hence a different employing unit * * * from any other operation conducted by respondent as an individual." In order to reach this conclusion respondent construes the contract as one by which he first employed Yost, and then granted him a vested interest in the profits of the venture. Respondent states: "It is the character of this interest of Yost in the venture, as defined in the said agreement, that raises Yost to a position impressively superior to that of an employee, and imparts to the relationship between respondent and Yost the quality of a joint adventure." Respondent concedes, as he must, that the interest in the profits unconnected with any power of control, does not make Yost a joint adventurer within the meaning of those terms as usually defined. See Beck v. Cagle, 46 Cal. App.2d 152, 115 P.2d 613; Larson v. Lewis-Simas-Jones Co., 29 Cal.App.2d 83, 84 P.2d 296; Enos v. Picacho Gold Min. Co., 56 Cal.App.2d 765, 133 P.2d 663; United Farmers Ass'n v. Sakiota, 7 Cal.App.2d 559, 46 P.2d 770. It is his theory that this is a tax statute; that for tax purposes a relationship may constitute a joint venture without meeting the tests of such a relationship in other fields of the law; that legally the relationship of employer-employee and joint adventurers may exist be-

tween the same parties in relation to the same transaction.

[3-5] Respondent is in error in contending that this statute should be construed as a taxing statute, and should be construed strictly in favor of the taxpayer. In the quite recent case of California Emp. Comm. v. Butte County, etc., Ass'n, 25 Cal.2d 624, 154 P.2d 892, 894, the Supreme Court defined the nature of the act and the proper rule of construction as follows: "The tax feature as to the reciprocal contributions of employers and their employees is but an incident, not the essence of the state unemployment insurance law, which in turn is integrated with the operation of comparable federal legislation. Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595. Such legislation is remedial in character, subject to a liberal construction to effectuate its purpose and to coincide with its reflection of public policy. County of Los Angeles v. Frisbie, 19 Cal.2d 634, 122 P.2d 526; California Employment Comm. v. Black-Foxe Military Inst., 43 Cal. App.2d Supp. 868, 110 P.2d 729. In the latter case the broad coverage intent of the act here involved is recognized in the following language at page 872 of 43 Cal.App. 2d Supp., at page 732 of 110 P.2d: 'The income tax law is purely a revenue measure, and upon the rule of strict construction applied to such laws, its scope may well be restrained to such matters as are clearly covered by it. Here we have a statute which, while it requires a "contribution" that in itself may possibly be regarded as a tax, has a much broader object than the mere raising of revenue. It sets up a scheme for ameliorating the hardships of unemployment, and undertakes, in conjunction with the United States Government, to pay unemployment benefits to those who, without fault of their own, are out of work, to impose the financial burden of doing this upon both employers and employees, and to measure both burden and benefits by the amount of compensation paid to employees when they are working. * * * *In view of the purpose of these provisions they should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation.*'" (Italics the court's.) See, also, California Emp., etc., Comm. v. Lewis, 68 Cal.App.2d 552, 157 P.2d 38; California Emp. Comm. v. Los Angeles, etc., News Corp., 24 Cal.2d 421, 150 P.2d 186; see, also, Carroll v. Social Security Board, 7 Cir., 128 F.2d 876; United States v. Vogue, Inc., 4 Cir., 145 F.2d 609.

[6] There is also substantial authority to the effect that the relationship of employer-employee and joint adventurers are incompatible and cannot exist together between the same parties in relation to the same transaction. Larson v. Lewis-Simas-Jones Co., 29 Cal.App.2d 83, 84 P.2d 296; see Note, 138 A.L.R. 968, at page 992 et seq.

[7] When these rules are applied to the contract here under discussion there can be no doubt at all but that Yost was not engaged in any joint venture with respondent in relation to the Hoosier Gulch properties. The contract describes the relationship as that of employer-employee, and respondent concedes that this relationship was created. Paragraph 1 of the agreement specifies Yost's compensation as $210 per month "and such other additional compensation as herein provided for." This "additional compensation" is set forth in paragraph 3 as 25% of the net profits after a return of Wiltsee's investment. Paragraph 4 provides that nothing in the agreement shall be construed to constitute "the parties hereto partners to any extent," it being expressly understood that Yost was in no event to bear any part of the losses and Yost "in no event is to have, any interest in said business or the profits thereof," and it was expressly provided that the provision as to the 25% profits was "adopted merely as a convenient method of computing the compensation" of Yost. It is true that paragraph 6 provides that the right to 25% of the profits should not be affected by Yost's employment being terminated or by the death of Wiltsee or by the sale of the properties, but that provision did not convert the employment agreement into a joint venture. As clearly as words can express their intent the parties stated that this 25% interest in the profits was additional compensation. It was in the nature of a bonus offered Yost for past services and for signing the contract of employment. The essential elements of a joint adventure are lacking. There was no community of interest in the object of the undertaking. Yost had no power at all to control or direct the conduct of respondent in relation to the enterprise. Yost was exempted from sharing any losses. There was no close or fiduciary relationship between the parties.

If the mere right to a share of the profits as defined in this agreement should be held to make this operation a separate employing unit within the meaning of the Unemployment Insurance Act and to create the anomalous relationship of employer-employee-joint adventurers, it would open up the door to easy evasion of the statute. Obviously, if respondent's contention is correct, any employer engaged in several activities, in none of which four persons are employed under circumstances defined in § 9(a) of the act, could completely avoid the provisions of the statute by giving to one or more of his employees a small right to share in the profits as defined in this agreement. Such construction would permit the beneficent purposes of the statute to be defeated.

[8, 9] Respondent emphasizes that the federal and state governments for income tax purposes treat the Hoosier Gulch Placers as a partnership. The propriety of defining an association as a partnership for tax purposes when all the elements of a partnership for other purposes are not present is well settled. Burk-Waggoner Oil Ass'n v. Hopkins, 269 U. S. 110, 46 S.Ct. 48, 70 L.Ed. 183; Morrissey v. Commissioner, 296 U.S. 344, 56 S.Ct. 289, 80 L.Ed. 263; Swanson v. Commissioner, 296 U.S. 362, 56 S.Ct. 283, 80 L.Ed. 273. We are not here considering the statutory definitions of "partnership" found in the taxing statutes in question. We are here considering the definition of "employing unit" as those terms are used in §§ 8.5 and 9(a) of this statute. Admittedly, the agreement here under consideration did not create a partnership "to any extent." The fact that the federal and state governments for other purposes have defined the relationship here as a "partnership" for income tax purposes is a false factor.

[10] Respondent places some reliance on such cases as Elliott v. Murphy Timber Co., 117 Or. 387, 244 P. 91, 48 A.L.R. 1043, and Palmer v. Crafts, 16 Cal.App.2d 370, 60 P.2d 533, as establishing the point that in specific instances for specific purposes a joint adventure may exist although the agreements involved lacked one or more of the elements usually considered as essential to establish that relationship. That principle may readily be conceded. No useful purpose would be served by reciting the facts of those cases in detail. Suffice it to say that the agreements there involved were substantially and fundamentally different from the one here under consideration. We are here dealing with the Unemployment Insurance Act, and with a contract that created only the employer-employee relationship and nothing else.

It is apparent that the conclusion of law that Hoosier Gulch Placers is an employing unit separate from respondent as an individual is unsound, and that the judgment based thereon must be reversed. It is so ordered.

KNIGHT and WARD, JJ., concur.






69 Cal.App.2d 231

**SPILLERS v. SILVER et al.**

**Civ. 14735.**

District Court of Appeal, Second Appellate District, Division 3, California.

May 17, 1945.

Hearing Denied July 12, 1945.

**1. Automobiles ⇐245(72)**

Whether pedestrian crossing street from west to east on green light was contributorily negligent in failing to observe movement of defendant's automobile which approached intersection from the west and turned to the left where pedestrian was struck was question for jury.

**2. Automobiles ⇐160(4)**

Motorists who are making turns at intersection have the duty to bear in mind that a pedestrian in crossing the street at intersection must give more attention to traffic which is in his path or approaching him from the right or to the left than to that which may be approaching diagonally from the rear.

**3. Appeal and error ⇐207, 1060(4)**

Argument of plaintiff's counsel in automobile accident case improperly accusing defense counsel of attempting to have plaintiff's witnesses change their testimony was not such misconduct as would justify reversal, particularly where no exception to the remark was taken before the jury and verdict for plaintiff was well sustained by the evidence.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Bertha Spillers against Phillip W. Silver and others for injuries sustained when struck by an automobile. Verdict and judgment for plaintiff, and defendants appeal.

Affirmed.

Phillip W. Silver and Sidney Fischgrund, both of Los Angeles, for appellants.

R. Bruce Murchison, Frank E. Gray, and Richard C. Hart, all of Los Angeles, for respondent.

SHINN, Justice.

In a jury trial plaintiff was awarded damages for injuries sustained when she was struck by an automobile driven by defendant, and defendant appeals.

Two points are urged by appellant as grounds for reversal: first, that the testimony of plaintiff as to the manner in which she was crossing the street proved her to have been guilty of contributory negligence and, second, that plaintiff's attorney was guilty of prejudicial misconduct in his closing argument.

At about 8:30 p.m. in clear weather, plaintiff and three other women, who were on their way to call upon friends alighted from a street car traveling south on Broadway when it stopped at the northwest corner of the intersection with First Street in Los Angeles. They were intending to transfer to a car which would come from the east on First Street and turn south on Broadway. Upon leaving the car, plaintiff walked to the sidewalk on the west side of Broadway to speak to a man whom she mistook for a friend. Her companions proceeded toward the northeast corner of the intersection; two of them had reached the easterly sidewalk and the third was close to it when plaintiff started to follow them across the street. Plaintiff passed in front of the standing street car from which she had alighted. She was within the lines of a crosswalk 28 feet wide and when she had crossed into the easterly half of Broadway she was struck by a car operated by defendant, thrown to the ground to the right of the front end of the automobile and suffered severe injuries. Defendant's car had come from the west on First Street into the intersection and had turned north on Broadway. It was stopped almost immediately after the accident and at that time the middle of the front end of the car was approximately 10 feet east of the middle line of Broadway and 18 feet west of the easterly curb. Plaintiff then lay on the pavement several feet east of the front of the automobile. The circumstantial evidence would indicate that defendant was traveling at a moderate speed and there was no evidence that his speed was excessive. Sharply conflicting versions of the accident were given by the witnesses. Plaintiff testified that she was walking rapidly as she crossed the street; the testimony of a man who was seated upon a front seat of the standing street car was that she was walking at a moderate speed. Defendant testified that he first saw plaintiff as she appeared in the light from the street car, that she was then running and ran directly in front of his car before he had time to stop. A short time after the accident two police officers interviewed plaintiff in the receiving hospital, where she had been taken for emergency treatment for two broken legs, fractures of the sacrum and pelvis and other injuries. They testified that plaintiff stated to them that she had been struck by defendant's car as she was running across the street to the northeast corner to take a street car which was standing there. The only eyewitnesses to the accident were the parties and the man who was seated in the street car. Plaintiff denied having made the statements testified to by the officers.

[1, 2] Defendant relies principally upon the testimony of plaintiff for proof of her contributory negligence. She testified that she did not see the automobile approaching until she was within the bright glare of its headlights immediately before she was struck. Signal lights were in operation at the intersection and the green light was on for east and west traffic. Plaintiff testified that she had her eyes on the signal, that she looked for signals before she started to cross the street, and that she was looking straight ahead to where she was going. She was not asked specifically on direct or cross-examination whether she looked to the right or left as she entered the street. For the purposes of our opinion we may assume that as she started across the street she looked straight ahead. The evidence was that there were no automobiles traveling north or south on Broadway in the immediate vicinity. Defendant testified that as he approached Broadway the green light had come on when he was about 100 feet from the intersection, that he did not stop

when he reached Broadway, and in turning he kept to the right of the traffic button in the center of First Street on the west side of Broadway. If, therefore, plaintiff was guilty of contributory negligence which was a proximate cause of the accident, it consisted of her failure to observe the movements of defendant's automobile as it approached from the west and turned north into Broadway. The implied finding of the jury was that under the circumstances the exercise of ordinary care did not require that plaintiff should look for traffic approaching on First Street from the west and we think the conclusion of the jury was not an unreasonable one. When plaintiff looked across the street toward the green light, a considerable area of the street would be within the range of her vision. True, she could have seen but little of the west half of Broadway and would have been in great danger from automobiles approaching her from the north, of which, fortunately, there were none; but while she may have been careless in not looking toward the north, looking to the west on First Street would have been an entirely different matter, and whether she was negligent in failing to do so clearly involved a question of fact and not of law. If she had looked and had seen defendant's car approaching Broadway she would not have known whether it would proceed across the intersection or make a turn. It is argued that she should have observed the rays from defendant's headlights before she did, as defendant's car approached diagonally from the rear, but it must be remembered that she at that time was in the light cast by the headlight of the street car, which would have illuminated the street in much of the same area as the light projected from defendant's headlights. And plaintiff had taken but a few steps beyond that area when she was struck. The jurors no doubt knew from experience that a pedestrian, in crossing the street at an intersection, must of necessity, in order to proceed safely, give more attention to traffic which is in his path or approaching him from the right or the left than to that which may be approaching diagonally from the rear. It is the duty of motorists who are making turns at intersections to have this fact in mind and when they approach pedestrians diagonally from the rear, to assume a large measure of responsibility to avoid striking them. If plaintiff was running across the street and ran directly in front of defendant's car, defendant could not reasonably have been found negligent. But the implied finding of the jury is that plaintiff was not running, and that defendant in the exercise of ordinary care could have avoided the accident. However, plaintiff's speed in crossing the street, whether she was running or walking rapidly, is not decisive of the issue of contributory negligence. That was to be determined from the manner in which she looked for approaching traffic. The implied finding that she looked with the care ordinarily exercised by persons under like circumstances cannot be disturbed. Defendant has cited numerous cases in which it has been held that the failure to look was the failure to exercise ordinary care under the circumstances of the particular situation, but it would serve no purpose to review them. The facts of the present case are exceptional and distinguish it from all of the cases which defendant has called to our attention. Plaintiff's testimony did not, as a matter of law, establish her negligence as a proximate cause of the accident.

[3] Plaintiff's attorney in his closing argument to the jury said, in part, as follows: " * * * I want to again direct your attention the the extraordinary effort, that was made by the—first by Mr. Fishgrund and then by Mr. Silver, to get out of the two officers some information that was obviously wrong. Time and time again they attempted to do things here that weren't—I know that they knew they weren't proper, and yet they continued to try to do it, and I am satisfied in my own mind that that wasn't the first time that they attempted to get the officers to do things that they just didn't know about before that time." The two police officers referred to had appeared on the scene of the accident shortly before plaintiff was removed in an ambulance. They made measurements as to the width of the crosswalk and the street and the position of defendant's automobile where it stood in the street. They were the officers who questioned plaintiff in the receiving hospital and who testified to the statements which she denied. The statement of her attorney in his argument referred to the cross-examination of the officers by defendant, who is an attorney, and by Mr. Fischgrund, who was representing him, with respect to the observations made by the officers at the scene of the accident. This phase of the cross-examination consisted of an effort to lay a foundation for an opinion

by the officers as to the point at which the automobile struck plaintiff. There was no broken glass nor other definite physical evidence, and the officers did not express any opinion as to the point of impact. There was nothing improper in the line of cross-examination which was followed, even though the court properly sustained objections to some of the questions. The accusation made by plaintiff's attorney that the attorneys who conducted the cross-examination were seeking to have the officers change their testimony was unwarranted. No exception was taken to the remark in the presence of the jury but the matter was called to the attention of the judge in chambers and he was asked to declare a mistrial or to direct the jury to disregard the statement made in argument, which he declined to do. Although the usual instruction was given that statements made by counsel are not to be considered as evidence unless made in the form of a stipulation, it would have been better if the judge had expressed his disapproval of the objectionable statement in order to make certain that the jury would understand its impropriety. But the statement, although unfair and improper, did not, in our opinion, amount to misconduct which would justify a reversal. Defendant's argument is that the jury must have believed that defendant and his attorney had made other efforts to influence the testimony of the officers and that since the jury evidently did not believe their testimony as to plaintiff's admissions, the inference is that they believed that the officers had been inspired to give false testimony. The jury may have given little weight to the testimony as to plaintiff's alleged admissions because of the conditions under which she was interviewed. Certainly statements elicited by questioning under the circumstances should be weighed with the utmost caution, for plaintiff could scarcely have been in a condition to give a responsible account of the accident. Furthermore, the officers in their cross-examination did not change their testimony in any particular nor endeavor to fix a point of the accident which would be favorable to defendant. If defendant and his attorney had endeavored to influence the testimony of the officers in their cross-examination, which they did not do, it clearly appeared that the officers were not influenced. The charge was not that the officers had been influenced as to their testimony, but only that attempts had been made to influence them, and if the jury had been misled into construing the cross-examination as such an attempt, they would have seen that it was unsuccessful. Furthermore, the verdict is well sustained by the evidence and we cannot believe that it would have been different if the objectionable argument had not been made. Plaintiff was awarded $10,000, which, in view of her injuries, was not an excessive sum. It would not be unreasonable to believe that the accident happened as testified to by defendant, but the jury accepted plaintiff's version and if that was to be believed, she had a clear right to recover for her injuries. The record shows no reversible error.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.




69 Cal.App.2d 226

**YACK v. TIFFIN.**

**Civ. 14701.**

District Court of Appeal, Second Appellate District, Division 3, California.

May 17, 1945.

**1. Automobiles ⇐245(14, 80)**

In action for damages resulting from an automobile collision at an intersection having a filling station on side of through highway from which defendant was approaching on plaintiff's left, under evidence, whether defendant was proceeding on intersecting street or on through highway from driveway of service station and whether plaintiff was contributorily negligent in failing to look in either direction was a question for jury.

**2. Automobiles ⇐246(24)**

An instruction as to right of motorist on through highway to believe another motorist on a cross-street will obey law, was erroneous in failing to state that motorist on through highway must exercise

ordinary care before he is entitled to assume other motorist will obey law.

3. Automobiles ⇐246(24)

An instruction as to right of motorist on through highway to believe another motorist on a cross-street will obey law, was erroneous in failing to state a motorist's right to rely on assumption that another will obey law ends when it is reasonably apparent, or in exercise of ordinary care would be apparent, that the other is not going to obey law.

4. Appeal and error ⇐1064(1)
Automobiles ⇐246(24)
Trial ⇐296(3)

Where jury probably found defendant had not approached through highway from cross-street but had driven from a service station at plaintiff's left onto through highway, in action for damages resulting from a collision, an instruction that motorist driving on through highway at a lawful speed has right to believe that another motorist approaching highway from a cross-street will obey law and stop, was erroneous, but in view of circumstances and other instructions as to exercising care, instruction was not prejudicial.

5. Automobiles ⇐246(39)

In action for damages resulting from an automobile collision at an intersection, where jury might have found defendant entered through highway from service station on plaintiff's left, and that as defendant entered highway, made a turn in direction in which plaintiff was proceeding, instruction that no person should turn a vehicle until such movement can be made with reasonable safety, was not erroneous on ground of absence of evidence of defendant's turning.

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Appeal from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Action by Morris Yack against Mary Elizabeth Tiffin for damages resulting from an automobile collision. From a judgment for plaintiff, defendant appeals.

Judgment affirmed.

Hunter & Liljestrom, of Los Angeles, for appellant.

David Schwartz and Morris Kastle, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from a judgment upon a verdict in favor of plaintiff for $1000 damages resulting from an automobile collision.

The accident occurred about 4 p. m. on January 31, 1943, in the intersection of Santa Monica Boulevard and Edgemont Street, in Los Angeles. Santa Monica Boulevard extends in an easterly and westerly direction, is paved, and is 60 feet wide between curbs. There are two street car tracks on Santa Monica Boulevard, the outer rails of which are 18 feet apart, and each outer rail is 21 feet from its nearest curb. Edgemont Street extends north and south, and intersects Santa Monica Boulevard. Edgemont Street is 30 feet wide between curbs north of the intersection and 50 feet wide between curbs south of the intersection. The curb at the northwest corner extends about 2 feet farther east than the curb at the southwest corner. The curb at the northeast corner extends about 18 feet farther west than the curb at the southeast corner. There is a boulevard stop sign at the northwest corner of the intersection, requiring southbound vehicles on Edgemont Street to stop before entering the intersection, and there is a boulevard stop sign at the southeast corner of the intersection requiring northbound vehicles on Edgemont Street to stop before entering the intersection. A gasoline service station is on the northwest corner of the intersection, and it has driveways opening on both Santa Monica Boulevard and Edgemont Street. At the time of the accident, plaintiff was proceeding east on Santa Monica Boulevard and when he had gone about 11 feet into the intersection, and was about 15 feet north of the south boundary line of the intersection, the right front fender of defendant's automobile and the left front fender of plaintiff's automobile collided. The automobiles interlocked and went about 38 feet in an easterly direction.

Plaintiff testified that he was traveling approximately 25 miles an hour; that as he approached the intersection he looked "all over," and at all four corners; that the only vehicles he saw were two automobiles which were proceeding west on Santa Monica Boulevard; that he slowed up; that he was about 20 feet from the corner when he looked to the right, about 15 feet from the corner when he looked to the left, and he could see north on Edgemont Street about 200 feet; that he saw

defendant about 5 feet before the impact; that she was traveling in the same direction as plaintiff, and he saw her through his rear view mirror; that his rear view mirror was over his windshield and directly in front of him; and that he did not have time to avoid the accident. A portion of plaintiff's deposition was read at the trial and it included statements that plaintiff did not know what direction defendant came from, and that he was about 10 feet from Edgemont Street when he looked to his right, and about 5 feet from Edgemont Street when he looked to his left.

A pedestrian, called as a witness by plaintiff, testified that she saw the accident; that she gave her name to plaintiff at the scene of the accident when he asked for witnesses; that she first saw defendant when defendant "made that large turn"; that she first saw defendant when defendant was "half-way" across the tracks, and was starting to make a turn; that defendant turned east; that she (the witness) did not know where defendant "came from"; that defendant was traveling 25 or 26 miles an hour; and that plaintiff was traveling 25 to 30 miles an hour. A map of the intersection was admitted into evidence, and this witness marked thereon the position of defendant's automobile at the time she first saw it prior to the accident. The mark indicated that the automobile was approximately 50 feet west of the intersection, was in a diagonal position facing easterly, with the front portion thereof on the eastbound street car track and the rear portion thereof on the westbound street car track. A written document, admitted into evidence, which was signed by this witness about 8 days after the accident, contained the statement that the witness did not know how fast defendant was traveling.

The husband of said witness, called by plaintiff, testified that he and his wife were together at the time of the accident; that he did not see the accident; that he inspected the area near the scene of the accident, and saw tire tracks which curved toward the service station on the northwest corner of the intersection; and that the tire "tracks followed along the same line as the tires, I mean from the point where the car [defendant's] was at a standstill, you could see the tire tracks all the way along." He made marks on the map showing that the tire marks extended from a point on the westbound street car tracks, about 35 feet west of the intersection, through the point of impact to a point immediately east of the intersection. He testified that the tire marks which curved toward the service station were those of the defendant's automobile. Although that statement by the witness was a conclusion, no objection was made to it. (It will be noted hereinafter that 2 witnesses called by defendant also stated conclusions, without objection, as to whether tire marks were made by defendant's automobile.)

Two police officers, who arrived at the scene of the accident approximately 10 minutes after the accident, were called as witnesses by defendant. One of them testified that he measured from the point of collision to the place where the automobiles came to rest, and the distance was 38 feet; that he made an investigation of the intersection, including the areas north and west of the intersection; and that there were tire marks which came from the service station but they were faint and old. He further testified, without objection, that the only "recent" tire marks in the vicinity extended from the point where the two vehicles collided to the point where they came to rest; and that he examined the area west of the point of impact and there were no marks from either plaintiff's or defendant's automobiles. He testified further that the service station was closed on the day of the accident; that plaintiff's automobile had "stickers" on the left side of the windshield; that he did not know what kind of stickers they were, except he did "know there was a gas sticker and a Federal tax stamp there"; that plaintiff stated to him at the scene of the accident that he thought defendant was traveling in the same direction plaintiff was traveling, and that he did not see defendant until the time they "came together."

The other police officer testified that he made an investigation of the scene of the accident; and that he did not examine the area between the driveway of the service station and the point of impact. He further testified, without objection, that he observed tire marks in the intersection caused by plaintiff's and defendant's automobiles which extended from the point of impact to where the automobiles came to rest, and that he observed no other "fresh tire marks" at or near the intersection.

[1] Defendant contends that plaintiff was guilty of contributory negligence as a matter of law in "failing to look either to the right or left until just before entering the intersection." The evidence shows that

plaintiff looked to his right and to his left when he was 15 or 20 feet from the intersection, and at that time he could see about 200 feet north (left) on Edgemont Street. If defendant's automobile was traveling on Edgemont Street, in the manner stated by defendant, then plaintiff was negligent in failing to see it enter the intersection. There was evidence, however, from which the jury might infer that defendant's automobile was not on Edgemont Street immediately preceding the accident, and that it came from the driveway of the service station and turned onto Santa Monica Boulevard west of the intersection. It was therefore a question of fact whether defendant was proceeding on Edgemont Street or on Santa Monica Boulevard immediately before the accident.

[2-4] Defendant also contends that the court erred in giving the jury the following instruction: "A motorist driving upon a through highway at a lawful rate of speed has the right to believe that another motorist approaching the highway from a cross street will obey the law and stop." Her argument is that the instruction was erroneous for the following reasons: that it did not state that the operator of an automobile on a through highway should himself be exercising ordinary care before he would be entitled to assume that an operator of another automobile would obey the law; that it improperly limited the exercise of ordinary care on the part of the operator of an automobile on a through highway to his rate of speed; and that it did not include the necessary qualification that even if the operator of an automobile upon a through highway is himself exercising ordinary care his right to rely upon the assumption that another would obey the law ends when it is reasonably apparent to him, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty and obey the law. The instruction was erroneous for the reasons asserted by appellant; however, it was not prejudicial under the circumstances of this case. Immediately preceding that instruction, the following instruction was given: "The fact that one has the right of way, if such be the fact, does not excuse him from the exercise of ordinary care to avoid causing an accident." Immediately following the questioned instruction the court instructed the jury that: "It is the duty of every person using a public highway, to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision." From a consideration of the evidence it appears probable that the jury found that defendant had not approached the through highway from a cross-street but that she had driven from the service station, and had approached plaintiff's automobile diagonally from the rear of his automobile. In the event that such finding was made, of course the questioned instruction relative to approaching from a cross-street would not have been prejudicial. For these reasons the failure to give a more complete instruction does not require a reversal.

[5] Defendant further contends that the court erred in instructing the jury that "no person shall turn a vehicle unless and until such movement can be made with reasonable safety." Her argument is that said instruction has no application to the instant case in that there was no evidence of turning by defendant. As above stated, the jury might have found that defendant entered Santa Monica Boulevard from the service station and that as she so entered the boulevard she made a turn. It was not error to give that instruction.

The judgment is affirmed.

DESMOND, P. J., and SHINN, J., concur.




69 Cal.App.2d 166

## WEST COAST WINERY, Inc., v. GOLDEN WEST WINERIES, Inc.

Civ. 14626.

District Court of Appeal, Second District, Division 3, California.

May 11, 1945.

**1. Exchange of property ⇐13(3)**

In action for breach of contract by defendant, a wholesaler, to deliver wine to plaintiff, a retailer and wholesaler, in exchange for wine received from plaintiff, evidence supported finding that the transaction was not a sale to defendant at the wholesale ceiling price.

**2. Exchange of property ⇐13(5)**

Where defendant breached contract by failing to deliver wine in exchange for wine received from plaintiff, if such wine was not available in market, plaintiff's loss of profits was a proper element in fixing his damage.

**3. Damages ⇐124(3)**

Where loss of profits is a factor in fixing damages, defendant is required to pay plaintiff only the net profits, not gross profits or gross selling price.

**4. Exchange of property ⇐13(5)**

Where plaintiff, retailer and wholesaler, delivered wine to defendant in bulk, and defendant, wholesaler, failed to return other wine in exchange as agreed, court improperly used retail price as measure of plaintiff's damage, since it would have been necessary for plaintiff to put the wine exchanged in bulk into bottles or other containers to sell it at retail, and plaintiff was entitled only to "net profits", which are the gains made from sales after deducting value of labor, material, rents, and all expenses together with interest on the capital employed.

See Words and Phrases, Permanent Edition, for all other definitions of "Net Profits".

**5. Exchange of property ⇐13(5)**

Where defendant, wholesaler, breached contract to deliver wine to plaintiff, wholesaler and retailer, in exchange for wine received from plaintiff, if defendant did not know and under the circumstances could not have known that plaintiff was licensed as a retailer, and was intending to sell wine at retail, damages should be awarded on basis of wholesale price.

**6. Damages ⇐23**

Damages for breach of contract are only such as may reasonably be supposed to have been in contemplation of parties at time of entering into contract as possible results of breach. Civ.Code, § 3300.

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Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by West Coast Winery, Inc., against the Golden West Wineries, Inc., for damages for breach of contract relating to an exchange of wine. From a judgment for plaintiff, defendant appeals.

Reversed with directions.

C. Loy Mason and Shafer & Grimm, all of Los Angeles, for appellant.

Lane & Lane, of Glendale, for respondent.

FOX, Justice pro tem.

In its complaint plaintiff alleged four causes of action. The first count alleged a breach of contract based upon defendant's failure to return wines delivered by the plaintiff to the defendant upon an agreement of exchange; the second count alleged fraud in inducing the plaintiff to make the exchange agreement, in that the defendant fraudulently represented to the plaintiff that the defendant had a large contract for the delivery of wines from a wholesale winery, and from which wines the defendant would return to the plaintiff, within 10 days or 2 weeks, the requisite wines pursuant to the exchange agreement; the third count alleged that the defendant converted the wines delivered by the plaintiff under the exchange agreement; and the fourth count alleged that defendant owed plaintiff $36 for work and labor in transporting wines between Roscoe, California, and Los Angeles, California.

The defendant admitted owing the $36 claimed in the fourth count, and the court found that there was no conversion under the third count.

The court found that the parties had entered into an agreement to exchange approximately 5,000 gallons of wine; that defendant had committed a breach of its agreement of exchange in that it had failed and refused to return to the plaintiff 4,321 gallons of wine as agreed, and that by reason of such breach plaintiff was entitled to recover as damages the retail price of said wine, viz., $1.54½ per gallon. The court also found in favor of the plaintiff on the second count. From the ensuing judgment defendant appeals.

Defendant's arguments may be reduced to two questions: (1) Was the transaction a sale or an exchange; and (2) did the court apply the proper measure of damages in allowing plaintiff the retail selling price?

[1] It is defendant's contention that the transaction was a sale by the plaintiff who had both a wholesale and a retail place of business, to the defendant who operated only as a wholesaler, at the wholesale ceiling price of .45¢ per gallon. The court, however, found against the defendant on this issue and there is ample evidence to

support such finding. Mr. Lotito, an officer of the plaintiff corporation and who represented plaintiff in the transaction, testified that he called defendant's place of business and told them that his company had a large quantity of port and more tokay than it needed and that it would like to get some white wines, muscatel, white port and angelica. Later, Mr. Joseph Heitler, president of the defendant corporation, telephoned Mr. Lotito and asked him to come to defendant's place of business. There, Mr. Heitler said to Mr. Lotito, according to the latter's testimony, " 'You have port and tokay, and I have some orders to fill, and I have a contract with Bear Creek Winery Association, and you wanted muscatel and sherry, and white port; if you give me this wine, in about a week or ten days, just as soon as the Bear Creek ships the sherry, I will be willing to return it to you, because I have a contract with them.' So I, in good faith, made the deal; that is, I took his word. I took his word that he had a contract with the Bear Creek people, that he would return my wine in exchange for a different flavor I gave him,—that he would return it to be back in about a week or ten days." This testimony is corroborated by the witness Sidney Witkowski who was present at the conversation between Mr. Heitler and Mr. Lotito. Further support for the trial court's determination that the transaction was an exchange is found in plaintiff's exhibits 1 and 2. In exhibit 1 is plaintiff's invoice No. 14605 which shows the delivery to defendant from plaintiff of "12-50 gal. bbl. Port, 503 gal." Across the face of the invoice is written the following "to be exchanged for Light Fortified Wine." In the lower right hand corner of the invoice are two initials which Mr. Lotito testified are "J. H." and stand for Joseph Heitler. Invoice No. 14606, also a part of plaintiff's exhibit 1, shows the delivery to defendant from plaintiff of "10-50 gal. bbl. 488.50 gal.) Port." Following the word "terms" the word "Exchange" is written. A third invoice is contained in this exhibit which shows the delivery to defendant from plaintiff of 3965 gallons of tokay and port in bulk. These deliveries were made pursuant to the deal between plaintiff and defendant. There are no figures on either of these invoices under the headings: Price, amount and total. If the transaction between the parties had been a sale the price and amount would undoubtedly have been stated on the invoices. The absence of any figures under these headings tends to support the trial court's determination that the transaction was an exchange and not a sale. In plaintiff's exhibit 2 is invoice No. 1145 which shows a delivery from defendant to plaintiff of "6 barrels—50 gallons regular wine *to apply on replacement.*" (Italics added.) This was part of the wine that was returned by the defendant to the plaintiff under the exchange agreement according to the testimony of Mr. Lotito. No price was stated on the invoice for this wine. Mr. Heitler, however, testified that defendant was to pay the plaintiff for the wine received from plaintiff "according to ceiling market price to wholesaler." This, of course, only created a conflict in the evidence which the trial court has resolved in favor of the plaintiff Such determination is binding on appeal. Crawford v. Southern Pac. Co., 1935, 3 Cal.2d 427, 45 P.2d 183; Estate of Bristol, 1943, 23 Cal.2d 221, 143 P.2d 689.

[2-4] The court awarded plaintiff damages on the basis of the retail sale price (excluding taxes) of the wine. If such wine was not available on the market plaintiff's loss of profits may be a proper element in fixing its damage. However, when loss of profits is a factor in fixing damage the defendant is required to pay the plaintiff only the net profits, not gross profits, or gross selling price. The rule applicable in such a situation is stated in Coates v. Lake View Oil & Refining Co., 1937, 20 Cal.App. 2d 113, 66 P.2d 463. It is there said (20 Cal.App.2d p. 119, 66 P.2d 466): "Gross profits are really not profits at all, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. See Buie v. Kennedy, 164 N.C. 290, 80 S.E. 445.

"To allow plaintiff to recover a judgment based in part on his gross profits would result in his unjust enrichment. If he is entitled to recover at all, because of his loss of profits, such recovery must be confined to his net profits. Net profits are the gains made from sales 'after deducting the value of the labor, materials, rents, and all expenses, together with the interest of the capital employed.' Black's Law Dictionary, p. 1439." See, also, Carrier v. Piggly Wiggly of San Francisco, 1936, 11 Cal.App.2d 180, 53 P.2d 400. Here, to allow plaintiff to recover the retail sale price of the wine would be to put it in a better position than it would have been in if defendant had re-

turned the wine according to the exchange agreement. The wine plaintiff furnished defendant was in bulk. That which defendant returned was likewise in bulk. Presumably if the defendant had returned the remaining 4,321 gallons it, too, would have been in bulk. It would then have been necessary for plaintiff in order to sell it at retail to provide bottles or other containers, the cost of which would no doubt amount to a substantial figure. The labor necessary to bottle or otherwise package this quantity of wine for retail sale would also be an important item. These two items are mentioned by way of illustrating the proposition that to allow plaintiff the retail price of the wine as damage is to allow it to be reimbursed for items of expense that it never incurred. It was therefore error to use the retail price as the measure of plaintiff's damage.

[6, 7] If, however, on a retrial it should be determined that defendant did not know, and under the circumstances should not have known, that plaintiff was also licensed as a retailer and was intending to sell the wine at retail, then damage should be awarded on the basis of the wholesale price. In such circumstances, it is said in Cal. Press Mfg. Co. v. Stafford Packing Co., 1923, 192 Cal. 479, at page 483, 221 P. 345 at page 346, 32 A.L.R. 114, that "It is a well-settled rule that the damages that can be recovered for any breach of contract are only such as may reasonably be supposed to have been in the contemplation of the parties at the time of entering into the agreement, as the probable result of a breach." To the same effect, see also, Lacy Mfg. Co. v. Gold Crown Mining Co., 1942, 52 Cal. App.2d 568, 574, 126 P.2d 644; Civ.Code, sec. 3300. "This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought must be such as the parties may be reasonably supposed, *in the light of all the facts known, or which should have been known to them,* to have considered as likely to follow in the ordinary course of things, from a breach * * *." Hunt Bros. Co. v. San Lorenzo Water Co., 1906, 150 Cal. 51, 56, 87 P. 1093, 1095, 7 L.R.A.,N.S., 913.

It is unnecessary to consider other questions discussed by counsel in their briefs.

The judgment is reversed with directions to retry only the issue of damages.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

## In re PLAUT'S ESTATE.

### LOW v. LOW et al.*

Civ. 14569.

District Court of Appeal, Second District, Division 1, California.

May 11, 1945.

Hearing Granted July 9, 1945.

1. Wills ⇐473

If, under certain provision of will, testator intended to give daughter power to deprive grandchild of any part of residue of trust estate, such provision could be separated from other parts of the will and disregarded to give effect to grandchild's remainder contingent upon the mother's failure to exercise power of appointment.

2. Perpetuities ⇐3

Constitutional provision which forbids perpetuities has reference to rule providing that all future estates which may arise by way of executory devise, conditional limitation or shifting and springing uses, must vest within a life or lives in being at the death of the testator and 21 years. Const. art. 20, § 9.

3. Perpetuities ⇐4(16)

Testamentary trust providing that corpus should vest in testator's grandchildren when they reached the age of 21 years after the death of their mother, testator's daughter, did not violate rule against perpetuities. Const. art. 20, § 9.

4. Perpetuities ⇐6(1)

Statute providing that contingent remainder in fee may be created on a prior remainder in fee, if limited to take effect upon any contingency by which estate may be determined before final beneficiaries become 21 years of age, a suspension of power of alienation for same length of time permitted as to perpetuities. Civ.Code, § 772.

5. Perpetuities ⇐6(2)

Under testamentary trust providing that corpus should vest in testator's grandchildren after the death of their mother, who received income for life, when they became 21, such estate would go to daughter's issue upon attaining age of 21 years, and there was no unlawful restraint upon alienation. Civ.Code, §§ 715, 772.

6. Perpetuities ⇐6(2)

Under provision of testamentary trust that corpus under certain contingencies should vest in testator's grandchildren living at testator's death, when they attained the age of 25 years, there was no unlawful restraint upon alienation, since all members of the class must be living at death of testator. Civ.Code, § 715.

7. Wills ⇐229

Under will leaving residue of estate in trust for life to testator's surviving daughter, with remainder to her issue and directing that upon death of daughter corpus should be conveyed to such one or more of her issue in such estate and upon such trust as she should by last will in writing appoint and in default of appointment directing division among her issue equally, a grandchild had such an interest in probate estate as gave her right to contest codicil whereby testator left $15,000 to his nurse. Probate Code, § 370.

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Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Petition by Nan Low, by Charles T. Abeles, Jr., guardian ad litem, opposed by Sylvia Plaut Low and another, to revoke a codicil to the will of Louis Plaut, deceased, upon the ground of undue influence. From an adverse judgment, petitioner appeals.

Reversed.

Roth & Brannen and David H. Paltun, all of Los Angeles, for appellant.

Julius V. Patrosso, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

By his last will decedent left the residue of his estate in trust for life to his surviving daughter with remainder to her issue, upon contingencies hereafter to be discussed. Thereafter, and shortly before his death, by a codicil to his will he gave to his nurse, a stranger in blood, $15,000. When he died his only next of kind were his daughter and one granddaughter, issue of his daughter.

The granddaughter petitioned the Probate Court to revoke the codicil, upon the ground of undue influence. The nurse's demurrer to the petition was sustained and judgment rendered in her favor, for the reason that the granddaughter was not an interested party, having the right to contest the will as provided in Section 370 of



* Subsequent opinion 164 P.2d 765.

the Probate Code. And this is the sole question involved in this appeal.

The terms of the trust pertinent in this respect are as follows:

"4. To hold * * * in trust as aforesaid and to pay the net income thereon quarterly to my daughter, Sylvia Plaut Low, for and during the term of her natural life; and upon her death to pay, transfer, set over and convey the corpus thereof to such one or more of her issue, in such estates and upon such trusts as she shall by last will and testament or any codicil thereto in writing appoint; and in default of appointment, to divide the same among her issue, equally, per stirpes and not per capita. In the event, however, that my daughter shall survive all of her issue so that there shall not be any of her issue living, although she still is alive, then and in that event, anything hereinabove to the contrary notwithstanding, the trust shall terminate and my said daughter be entitled outright to all of the trust estate. * * *;

"5. In the event that the issue of my daughter shall take in default of appointment, then my trustees shall during the minority of such issue continue to hold the corpus of any such issue and apply the income thereof to the support, maintenance, and education of such issue during his or her minority and shall not pay any part thereof to any guardian of such issue and pay the corpus of such share to such issue on such issue attaining the age of twenty-one years, unless such issue shall have been born in my lifetime, in which event, my trustees shall continue to hold the share of the corpus of my estate going to each of such issue in trust until such issue born in my lifetime shall respectively attain the age of twenty-five years and pay quarterly the income thereon to such issue and upon such issue respectively attaining the age of twenty-five years, my trustees shall pay, transfer and set over to such issue respectively one-half of the corpus then held in trust for him or her, and shall continue to hold the other half in trust until he or she shall attain the age of thirty years, and shall pay quarterly the income thereon to him or her and upon such issue respectively attaining the age of thirty years, shall pay, transfer, and set over to such issue the balance of the corpus to which such issue respectively shall be entitled, together with accumulations of income thereon, the trust thereupon terminating as to him or her then thirty years of age. The provisions of this paragraph shall, however, apply only with respect to such of the issue of my daughter as take in default of testamentary appointment by her."

These provisions so far as here applicable may be more briefly stated as follows: If the mother dies having exercised her power of appointment and appointed to her issue the trust estate, such issue takes accordingly. If the mother fails to exercise her power, upon her death the granddaughter, or her issue per stirpes, will take ratably with other issue of the mother. If born after testator's death, the trust is continued until such issue reaches the age of 21 years, income in the meantime to be applied to their support. If born prior to testator's death, the trust is continued until such issue attains the age of 25 years, when one-half corpus will be distributed to them, and 30 years, when the remaining one-half of the corpus will be distributed to them, income in the meantime to be applied to their support.

In support of the judgment respondent contends: Firstly, that whatever the granddaughter takes in the trust estate is a mere possibility which does not amount to such interest in the decedent's estate as will enable her to contest his will; and, secondly, in any event the trust is void because it attempts to extend the power of alienation beyond the period permitted by law.

[1] It is unnecessary to decide whether under the power of appointment the granddaughter may be excluded entirely from sharing in final distribution of the trust estate. Perhaps it would do violence to the language of the power to say that if the donee were to have other issue she must appoint at least some fair share of the trust estate to the petitioner. But if it were necessary to ascertain the intention of the testator from a consideration of the will as a whole, and the facts and circumstances surrounding the making of it, it is difficult to believe that he intended to give his daughter the power to deprive this petitioning grandchild of any part of the residue of the trust estate. However, assuming such to be its meaning, it may be separated from other parts of the will and disregarded, to give effect to petitioner's remainder contingent upon the mother's failure to exercise the power. In re Estate of Troy, 214 Cal. 53, 3 P.2d 930.

As stated, in the event the mother fails to exercise her power of appointment, the

trust estate is finally to vest in her issue; (1) upon attaining the age of 21 years, if born at any time during the lifetime of the mother, and (2) upon attaining the age of 30 years if born during testator's lifetime.

Since the decision in the Estate of McCray, 204 Cal. 399, 268 P. 647, there should be no confusion in California relative to void future interests. In that case it is stated in 204 Cal. at page 406, 268 P. at page 650: "The rule against restraints on alienation has been, in some cases, confused with the rule against perpetuities; but the two rules, while having the same end in view, viz. that of preventing undue interference with the freedom of transfer of property, are of entirely different origin and application. The rule against perpetuities, ingrafted upon our system by the Constitution, relates only to future interests in property, the vesting of which is to be postponed beyond the allotted time. The rule relating to restraints on aliention, on the other hand, is statutory in origin, and has reference to an undue prevention of the transfer of estates already vested."

[2] The trust now under consideration provides that the corpus shall vest in the testator's grandchildren when they reach the age of 21 years after the death of their mother, testator's daughter. There is no restraint against alienation because the trustee is given power of sale as to all of the trust property. Therefore, the rule to be applied is that known as the rule against perpetuities, to be found in Section 9 of Article XX of the State Constitution. Neither our Constitution nor our statute defines what is meant by the word "perpetuities" as so used; but we may assume, as the Supreme Court did in the McCray case, 204 Cal. at page 405, 268 P. at page 649, "that the provision of the Constitution which forbids, but does not define, perpetuities has, reference to the rule which had become crystallized under the English common law, that rule merely provides that 'all future estates' which may 'arise by way of executory devise, conditional limitation, or shifting and springing uses, must vest within a life or lives in being at the death of the testator and twenty-one years; and in case the person in whom the estate or interest should then vest is en ventre sa mere, nine months more will be allowed; and all estates created as aforesaid, and so limited that they not vest within that time, are void.'"

[3] There is no violation of the rule against perpetuities in the trust here in question, because the whole estate is to vest in the beneficiaries during the life of the daughter and within 21 years thereafter.

There is of course no need to discuss the other provision of the trust to the effect that the corpus under certain contingencies shall vest in grandchildren living at testator's death when they attain the age of twenty-five years, because, obviously, such beneficiaries will be living persons when the trust comes into existence at testator's death.

[4, 5] Inasmuch as some considerable part of the briefs has been devoted to a discussion upon the assumption that the two trust provisions mentioned constitute an unlawful restraint upon alienation, it may be observed that if either of them were a restraint upon alienation, such a restraint would not be unlawful and the trust in this respect would not be void. The first comes within the exception in Civil Code, section 772, to the general rule stated in Civil Code, section 715, i.e.: That the absolute power of alienation cannot be suspended for a longer period than a life in being at the creation of the limitation. Civil Code, section 772, provides that a contingent remainder in fee may be created on a prior remainder in fee if limited to take effect upon any contingency by which the estate may be determined before the final beneficiaries become 21 years of age. The rule against perpetuities is not violated in a devise to children of a person living at testator's death, to be finally distributed when the youngest of such children becomes 21 years of age. This is so because it must necessarily take effect within a life or lives in being and 21 years thereafter. When it is applicable, a fair construction of Civil Code, section 772, is to interpret it in practical effect to allow a suspension of the power of alienation for the same length of time permitted as to perpetuities. In re Estate of Harrison, 22 Cal. App.2d 28, 70 P.2d 522. Inasmuch as the trust estate is to go to the daughter's issue upon attaining the age of 21 years, and as this must be during the lifetime of the daughter and within 21 years thereafter, the rule against perpetuities is not violated. in view of the exception in Civil Code, section 772, there is no restraint upon alienation beyond the period permitted by law. In re Estate of Harrison, supra.

[6] The second provision above mentioned could not be a restraint upon alienation because all members of the class must be living at the death of testator. Civil Code, Sec. 715; Estate of McCray, supra.

[7] Therefore, petitioner has such an interest in this probate estate as might be impaired to the extent of $15,000 if the codicil giving that sum to the nurse is admitted to probate as part of the will. And the petitioner has the right to have her day in court and prove if she can that the codicil was the result of undue influence. In re Estate of Land, 166 Cal. 538, 137 P. 246.

The judgment is reversed.

YORK, P. J., and WHITE, J., concur.




69 Cal.App.2d 141

**WILLIAMS v. DAVIS.**

**Civ. 14617.**

District Court of Appeal, Second District, Division 2, California.

May 9, 1945.

**1. Appeal and error ⇐624**

The superior court has power to govern conduct of proceedings to perfect appeal from judgment thereof to District Court of Appeal and may extend time for preparation of transcript on satisfactory showing or terminate proceedings for good cause, thereby preparing way for dismissal of appeal, which cannot be dismissed so long as proceeding for preparation of transcript is pending. Code Civ.Proc. § 953a.

**2. Appeal and error ⇐607(1)**

The superior court's order, terminating after effective date of new appeal rules, proceedings for preparation of transcript on appeal taken from such court's judgment over five years before such date, was valid, in view of provision in such rules that they should not apply to pending appeals so far as pertaining to preparation and filing of record. Code Civ.Proc. § 953a; Rules on Appeal, rule 53(b).

**3. Courts ⇐85(2)**

The new appeal rules, modifying procedure on appeal, are applicable only to appeals filed after effective date of such rules. Rules on Appeal, rule 53(b).

**4. Appeal and error ⇐607(1)**

The provision of new appeal rules that they shall apply to pending appeals after filing of record in reviewing court does not authorize appellate court to terminate proceedings for preparation of reporter's transcript on appeal pending five years before superior court's order terminating such proceedings, as well as before effective date of new rules, on filing of clerk's transcript on appeal from such order. Code Civ.Proc. § 953a; Rules on Appeal, rule 53(b).

McCOMB, J., dissenting.

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Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

On petition for rehearing.

Rehearing granted.

Prior opinion, 157 P.2d 655.

Edna I. Williams, in pro. per., for appellant.

Edward R. Young, Frank R. Johnston, and E. L. Searle, all of Los Angeles, for respondent.

MOORE, Presiding Justice.

[1] Plaintiff had sued for a large sum of money. She lost, and on his cross complaint defendant recovered in excess of $25,000. Judgment was entered in January 1938. Following a denial of her motion for a new trial she filed her notice of appeal in April 1938. After the appeal the fortunes of the lawsuit were to be controlled by this court in all respects except one. The Superior Court by virtue of Section 953a, Code of Civil Procedure, had the power to govern the conduct of proceedings to perfect that appeal. It might, on satisfactory showing, extend time for the preparation of the transcript, or for good cause it could terminate such proceedings and thereby prepare the way for a dismissal of the appeal. Such dismissal was not possible so long as the respondent was unable to represent to the appellate court that there was no proceeding pending for the preparation of a transcript.

[2, 3] With varying vicissitudes appellant continued with her labors to obtain a completed transcript. The last extension granted by the court was March 31, 1939. The reporter finally filed a transcript on September 27, 1940. From the first date set for the settlement of the transcript, to-wit, October 7, 1940, to May 18, 1943, the parties vainly negotiated for a settlement of the transcript. After the latter date appellant caused her motion for a new trial to be heard on October 18, 1943. The basis for that motion was Section 953e, Code of Civil Procedure which permits the court to grant a new trial when it is impossible to have a transcription of the phonographic report. Following the denial of the motion for a new trial respondent moved to terminate the proceedings for the preparation of the transcript. The order terminating the proceedings was entered November 26, 1943.

The validity of that order is not open to question under any rule or statute in force at the time the notice of appeal was filed in April 1938. If there be any doubt of its legality, such doubt must arise out of the new rules on appeal adopted by the Judicial Council and approved by the Legislature. They became effective July 1, 1943. Even though they had made no provision for the continued predominance of the statutes and rules existing prior to July 1943 herein referred to as the *old rules,* there would be some reason for holding that an appeal taken five years prior thereto would be controlled by the rules in force at that remote date. It is unreasonable to think that either the Legislature or the Judicial Council would snatch the control of an actual, specific proceeding from the trial court over which it had presided for five years and transfer it to this court for the purpose of determining a motion to terminate that very proceeding. The superior court has controlled such proceedings since the enactment of the first code of practice some 95 years ago. Hence it is rational to conclude that in modifying the procedure on appeals it was the intention of the authors of the new rules to make them applicable to only those appeals filed after July 1, 1943.

But we are not left to deduction and inference. Rule 53 provides in subsection (b) that the new rules shall take effect on July 1, 1943, "and shall govern the procedure in all appeals taken on and after their effective date." But *they shall not apply to pending appeals* "so far as pertains to the preparation and filing of the record on appeal." This language leaves no doubt of the validity of the order made by the trial court.

[4] One sentence of rule 53(b) is likely to lead to error. It reads: "They (new rules) shall also apply to pending appeals, after the filing of the record in the reviewing court." The actual appeal now under consideration is the appeal from the order terminating proceedings. While it is true that a record for the purpose of this appeal was filed "in the reviewing court," yet the rule makers evidently never intended, by the filing of a *clerk's transcript on an appeal from the order of the Superior Court terminating a proceeding for a reporter's transcript,* that the presence of such clerk's transcript on such appeal would in a flash transform the law and confer upon the appellate court the power to terminate a proceeding in an appeal that had been pending five years before the order as well as before the effective date of the new rules. They foresaw no such complication as this situation presents. They intended to and did declare that the trial court should control all proceedings for the preparation and filing of a record on appeal in "pending appeals." By the mere act of filing an appeal from the order made by the trial court, which it alone could enter, terminating a proceeding for the preparation of a transcript, the authors of the new rules could not have intended that the provision in the new rules should be abolished and thereby confer upon the appellate court a power specifically withheld from it in reference to all "pending appeals." The old rules guided the Superior Court in its entry of the order terminating the proceeding. They were valid then as they are valid now with reference to appeals taken prior to the effective date of the new rules. No number of appeals from subordinate or ancillary orders can impair the potency of the old rules in their application to the "preparation and filing of the record on appeal" and of course "preparation and filing" include the failure to prepare and to file a transcript with the trial court's approval.

A rehearing is granted.

W. J. WOOD, J., concurs.

McCOMB, Justice (dissenting).

This is an appeal, taken January 15, 1944, from an order terminating proceedings for the preparation of a reporter's transcript. Defendant predicates his petition for a rehearing on the proposition that insofar as the present appeal is concerned, due to a provision in rule 53(b)* of the Rules on Appeal, the rule announced in our opinion and in Averill v. Lincoln, 24 Cal.2d 761, 764, 151 P.2d 119, is inapplicable. Rule 53(b), Rules on Appeal reads thus:

"[Effective date and application to pending appeals.] These rules shall take effect on July 1, 1943, and shall govern the procedure in all appeals taken on and after their effective date. They shall also apply to pending appeals, after the filing of the record in the reviewing court. Rules 4 to 12 and Rule 52 shall not apply to pending appeals but such appeals, so far as pertains to the preparation and filing of the record on appeal, shall be governed by the rules and statutes in force immediately prior to the effective date of these rules, all of such rules and statutes hereby being made a part of these rules insofar as pending appeals are concerned. The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with the new rules, except the failure to give timely notice of appeal."

This contention is without merit for four reasons.

Firstly, the first sentence of rule 53(b) of Rules on Appeal reads thus:

"These rules shall take effect on July 1, 1943, and shall govern the procedure in *all appeals* taken on and after their effective date." (Italics added.)

It is to be noted that these rules are made effective with the exception of pending appeals to *all* appeals taken on and after July 1, 1943. The appeal in the present case was taken on January 15, 1944, and was not a pending appeal on the effective date of the Rules on Appeal.

Secondly, the second sentence in rule 53 (b) of the Rules on Appeal reads thus:

"They shall also apply to pending appeals, after the filing of the record in the reviewing court."

It is also to be noted that the rules are made applicable to pending appeals "after the filing of the record in the reviewing court." In the present appeal the record was filed in this court on June 23, 1944, thereby making applicable to the instant case all of the provisions of the new Rules on Appeal should we assume for the sake of argument that the first sentence of rule 53(b) is inapplicable.

Thirdly, the third sentence in rule 53(b) of Rules on Appeal, quoted in the footnote, has no application to the present proceeding for the reason that such sentence is expressly limited to the "preparation and filing of the record on appeal." The order from which the appeal was taken did not have to do with either the "preparation" or the "filing" of the record. Such order was collateral thereto and an attempt to stop any further step or proceeding looking to the "preparation" or "filing" of a record in this court. Hence, the order which we are now reviewing does not fall within the saving clause of the third sentence in rule 53 (b) of Rules on Appeal.

Fourthly, the construction which this court has placed upon rule 53(b) of Rules on Appeal is fully supported by the statement of the Chief Justice of the Supreme Court in Averill v. Lincoln, supra. On page 764 of 24 Cal.2d, on page 120 of 151 P.2d, speaking for a unanimous court he said: "As a result of these changes, the motion to terminate proceedings for a record has *disappeared from our procedure.* If the specified time and allowable extensions have elapsed, the appeal will be dismissed under rule 10(a) unless the appellate court grants relief." (Italics added.)

It is to be observed that the court said that a motion to terminate proceedings for a record has "disappeared" from our procedure.

Disappear means "to cease to be; to cease to be known; to vanish from sight; to pass from existence." (See Webster New International Dictionary, 2d Ed. [1939] page 740; Vol. 3, Oxford English Dictionary, [1933] page 403.)

The use of the word "disappeared," that is, to pass from existence, without any qualification or limitation, such as, except

* The third sentence in rule 53(b) reads thus:

"Rules 4–12 and Rule 52 shall not apply to pending appeals but such appeals, so far as pertains to the preparation and filing of the record on appeal, shall be governed by the rules and statutes in force immediately prior to the effective date of these rules, all of such rules and statutes hereby being made a part of these rules insofar as pending appeals are concerned.

in the case of appeals pending on July 1, 1943 (the effective date of the new Rules on Appeal), is particularly significant in view of the fact that the author of the opinion, the Chief Justice, and one of the justices who concurred in the opinion, Mr. Justice Shenk, were both members of the Judicial Council at the time the Rules on Appeal were adopted. Had they intended to make any exception to the rule announced in Averill v. Lincoln, supra, they would undoubtedly have used other and different phraseology.

The petition for a rehearing in my opinion should be denied.




69 Cal.App.2d 200

## REEH v. REEH.

Civ. 14603.

District Court of Appeal, Second District, Division 3, California.

May 16, 1945.

**1. Army and navy ⇐34**

Where summons in divorce action was served on husband who was stationed at army camp in California, and court appointed an attorney to represent husband who instructed attorney not to appear, divorce decree providing for custody of minor daughter and payment for daughter's support sufficiently complied with Soldiers' and Sailors' Civil Relief Act, notwithstanding order appointing attorney and directing entry of judgment did not appear in judgment roll. Soldiers' and Sailors' Civil Relief Act of 1940, § 200(1), 50 U.S.C.A.Appendix § 520(1); Code Civ.Proc. § 670.

**2. Divorce ⇐165(4)**

Where interlocutory decree of divorce was valid and motion to vacate decree was made more than six months after it was entered, motion was made too late. Code Civ. Proc. §§ 473, 670.

**3. Divorce ⇐184(1)**

An order vacating interlocutory decree of divorce would be affirmed, notwithstanding trial court assigned an untenable reason for decision if upon facts it would have been an abuse of discretion to refuse to vacate the decree.

**4. Army and navy ⇐34**

Under facts, if court had denied on the merits husband's motion to vacate interlocutory decree of divorce on ground that husband was in the military service and was prejudiced in presenting his defense by his military service, no abuse of discretion would have been shown. Soldiers' and Sailors' Civil Relief Act of 1940, § 200(4), 50 U.S.C.A.Appendix § 520(4).

**5. Judgment ⇐948(1)**

The defense of res judicata is waived unless it is pleaded.

**6. Appeal and error ⇐173(9)**

The question of res judicata, not raised in trial court, could not be considered by the appellate court.

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Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action for divorce by Dorothy L. Reeh against Paul Reeh. From an order made upon the court's own motion vacating an interlocutory decree of divorce which had been rendered in favor of plaintiff upon defendant's default, plaintiff appeals.

Reversed.

James B. Ogg, of Alhambra, for appellant.

E. Llewellyn Overholt, of Los Angeles, for respondent.

SHINN, Justice.

This is an appeal by plaintiff from an order made upon the court's own motion, vacating an interlocutory decree of divorce which had been rendered in favor of plaintiff upon default of defendant to appear.

Although defendant had moved for relief upon other grounds, the decree was vacated upon the ground that it was void by reason of the alleged failure of plaintiff and of the court to comply with the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 54 U.S.Stats. 1178, 56 U.S.Stats. 769, 50 U.S.C.A.Appendix §§ 501–585. The complaint was filed January 5, 1943, praying for a divorce, custody of a daughter 15 years of age, and that the household furniture be awarded to plaintiff. Plaintiff sought support for the daughter but not for herself. Summons was served on defendant January 7, 1943, in Los Ang-

eles County. On January 22, plaintiff made affidavit that defendant was serving in the Ordnance Department of the Army, stationed at Pomona, California, and on the same day notice was served on defendant of plaintiff's application for appointment of an attorney to represent defendant in the action. On February 5, the court appointed an attorney with offices at Pomona to represent defendant, and on the same day defendant was served with notice of such appointment. The attorney so appointed conferred with defendant over the telephone, was instructed by defendant not to make any appearance in his behalf, and was later instructed by letter not to appear in the trial of the action and he notified the court that in view of such instructions he would not assume the responsibility of defending the action. The case was tried as a default on March 9, plaintiff was awarded a decree, custody of the daughter, and the household furniture, and defendant was ordered to pay $40 a month for the daughter's support. By order entered in the minutes the clerk was directed to enter the decree. Defendant employed an attorney and on July 26, 1943, gave notice of a motion to vacate the default and the decree and for permission to answer. The grounds of the motion were that plaintiff had committed a fraud upon the court by concealing the fact that she had continued her marital relations with defendant after the filing of the complaint, that defendant was in the military service and that his failure to answer was the result of excusable neglect, mistake, inadvertence and surprise. The motion was based in part upon an affidavit of defendant. Plaintiff filed a counter affidavit. The motion was denied August 10, 1943, and no appeal was taken from the order. A similar motion was made by the defendant in February, 1944. The grounds of this motion were the same as those of the first motion and the affidavits of defendant and several others were filed in support thereof. No counter affidavit was filed by plaintiff. The motion was heard on March 20, 1944, and an order was made reading in part as follows: "* * * the court finds: That the defendant is now and at all times since the filing of said action has been in the armed forces of the United States of America and that said default and said default interlocutory decree of divorce were entered without the filing of a military affidavit and/or the waiver by the defendant and or any attorney on his behalf of the rights and privileges of said defendant under the Soldiers' and Sailors' Relief Act of 1940 and Amendments of 1942, and that said orders are void and the court, therefore, grants said motion, and upon its own motion makes the following order: It is hereby ordered, adjudged and decreed that the default which was entered against said defendant Paul Reeh under date of Feb. 17, 1943, and said interlocutory decree of divorce which was entered against said defendant on or about March 9, 1943, are hereby vacated and set aside and the proposed answer of said defendant heretofore filed is hereby made a part of said file, the same having been heretofore filed by defendant in answer to plaintiff's said complaint. It is further ordered that defendant Paul Reeh shall pay to plaintiff Dorothy L. Reeh, for the support of plaintiff and Gloria Reeh, minor daughter of the parties hereto, the sum of Eighty ($80.00) Dollars per month, beginning April 1, 1944, until further order of the court." The order was founded upon the facts recited therein, that the default and the decree "were entered without the filing of a military affidavit and/or the waiver by the defendant and/or any attorney on his behalf of the rights and privileges of said defendant under the Soldiers' and Sailors' Relief Act of 1940 and amendments of 1942." There is no provision of the Act to the effect that a judgment may not be rendered against a defendant while he is in the service unless he has waived his rights under the Act. Section 200(1) of the Act provides as follows: "In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment."

[1] It is not necessary in this case to decide whether the failure to appoint an attorney for a defendant who is in the service or the failure of the judge to order a judgment to be entered would render a judgment void. The provisions of section 200(1) of the federal Act were fully complied with and the court was therefore in a position to try the case and render judgment. It was not necessary that the orders appointing the attorney and directing the entry of the judgment should appear in the judgment roll. This consisted of the complaint, with notation of the default, proof of service, and the judgment. Code of Civ.Proc. § 670. These were in order; the judgment was valid upon its face and in fact.

[2] The court was not authorized to vacate the judgment under section 473 of the Code of Civil Procedure. The application under that section was made too late. The judgment was not void and the motion was made more than six months after the judgment was entered. Macbeth v. Macbeth, 1933, 219 Cal. 47, 25 P.2d 11.

[3] We would end our opinion at this point if our decision would finally determine the question of defendant's right to have the judgment vacated. But it would not. There has been no exercise by the court of its discretionary power under the provisions of the federal Act to vacate a judgment against a defendant who is in the military service. However, the question is before us as to whether there were undisputed facts, shown by the affidavits, upon which it would have been in abuse of discretion to refuse to vacate the decree. If such facts were established we should affirm the order, even though the judge assigned an untenable reason for his decision.

The judgment could have been set aside under section 200(4) of the Soldiers' and Sailors' Civil Relief Act if it had appeared that defendant had been prejudiced by reason of his military service in making his defense and that he had a meritorious or legal defense to the action or some part thereof. The court did not make this determination of fact or pass upon the merits of the application under the federal Act. We have examined the affidavits and counter affidavits filed on the motion. There was not only a conflict in the evidence as to material facts, but there were also conflicting inferences to be drawn from such facts, some of which were favorable, others unfavorable, to defendant's contentions.

Defendant's affidavits set forth many bitter charges against plaintiff, and stated sufficient facts to constitute a defense to the action. In support of the claim that defendant was prejudiced in presenting his defense by his military service, the second affidavit stated "that affiant was hospitalized and was in the Veterans' Hospital at Sawtelle, California, from March 7, 1943, to April 1, 1943, and the next day after being released from said hospital affiant was transferred to Fort Crook, Nebraska, where affiant is now located." No other facts were stated in that affidavit tending to show that defendant was prejudiced by his military service in making a defense to the action. However, his second motion was made upon all the records and files in the case and it may be considered that his first affidavit was before the court. It appeared from that affidavit, which was filed July 27, 1943, that defendant was then stationed at Fort Crook, Nebraska, having been transferred from Pomona; that he had been in military service since prior to January 5, 1943; that on January 7, 1943, when he was served with summons, he was a member of the School Detachment, School Provisional Battalion of the United States Army; that on or about February 7, 1943, Lt. Norman H. Noel, Adjutant of said School, wrote Judge Frank Swain, Department 35 of the Los Angeles Superior Court, asking that the trial of said divorce case be continued until affiant was transferred to a new location which was then pending, to wit, to Fort Crook, Nebraska, for the reason that said affiant was then under quarantine and affiant would need to obtain counsel; that he was hospitalized at Sawtelle from March 7 to April 1, and the next day was transferred to Fort Crook, Nebraska; that during that time he had no opportunity to discuss the matter with an attorney, except with the Legal Aid Officer connected with the Fort; that he had been requested by an attorney in Pomona, one Charles R. Stead, that he represent affiant, "but at that time affiant had been advised and believed that the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 as amended, would give affiant the proper protection until affiant was released from the military service so that defendant could properly present his defense and contest plaintiff's allegations." Also in the record is a letter dated January 27, 1943, from defendant to the judge of one of the departments of the court, stating that defendant was in the Army at Pomona

under orders to be transferred momentarily, and requesting that the case be put off calendar due to defendant's inability to be present at the hearing. Plaintiff's affidavit filed on the first hearing set forth that she was and had been for over 7 years employed as cashier of Kress & Company's store in Alhambra, California. It denied that she had continued marital relations with defendant after the institution of her suit and averred that she would not live with defendant again under any conditions and that there was no hope of a reconciliation. It was further stated "that the plaintiff has no definite information about him [defendant] being in quarantine but that she does know that he visited her domicile every week from the date the action was instituted until the date the divorce was granted. That she did not let him in her home and that he only got in on two occasions and that he broke in both times." Other affidavits were filed by the parties but none of them bore on the question whether defendant was prejudiced by his military service in making a defense to the action.

[4] The court would have been justified in finding from defendant's affidavits that he decided he did not have to present his defense until he was released from military service but that he had not been so advised by the attorney appointed to represent him, since his affidavit did not state that the attorney had given such advice. And it could have been concluded also that defendant was seeking only delay, and not a bona fide effort to defend the action, since he refused the advice and services of the attorney who had been appointed to represent him and made no effort to obtain leave in order to prepare for the trial. The court could have believed, as stated in plaintiff's affidavit, that defendant visited the home every week-end during the months of January and February, that he failed to prove that he could not have made an adequate defense, and that he made no effort to do so. We cannot decide these disputed questions of fact. All we decide is that if the court had denied defendant's motion on the merits, no abuse of discretion would have been shown. There is much in the comprehensive discussion of the law in the recent case of Johnson v. Johnson, 1943, 59 Cal.App.2d 375, 139 P.2d 33, that is pertinent to the facts of the instant case.

[5, 6] We express no views as to plaintiff's further contention that defendant's first application for relief was made upon the same grounds as the second one, that it was decided against him on the merits, and that the issues became res judicata. It does not appear that plaintiff made the objection that the matters in issue were res judicata. The defense of res judicata is waived unless it is pleaded. Rideaux v. Torgrimson, 1939, 12 Cal.2d 633, 638, 86 P.2d 826; Domestic and Foreign Pet. Co., Ltd., v. Long, 1935, 4 Cal.2d 547, 562, 563, 51 P.2d 73; Madruga v. Borden Co., 1944, 63 Cal.App.2d 116, 123, 146 P.2d 73. The question is not properly before us.

The order is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.




69 Cal.App.2d 246

## R. R. BUSH OIL CO. v. BEVERLY-LINCOLN LAND CO.

Civ. 14592.

District Court of Appeal, Second District, Division 3, California.

May 18, 1945.

As Modified on Denial of Rehearing June 15, 1945.

Hearing Denied July 16, 1945.

1. Mines and minerals ⇐78(1)

A corporate plaintiff, which was lessee of two adjacent oil-producing tracts separately owned, having placed wells on such tracts so that one-fourth of production from well on land not owned by defendant lessor drained from defendant's adjoining land, thereby depriving defendant of royalty on substantial quantity of oil, was liable to defendant in damages for an amount equivalent to royalty lost on oil so drained.

2. Mines and minerals ⇐78(1)

An oil and gas lessee owes lessor implied obligation to refrain from taking any affirmative action which will result in draining of a substantial quantity of oil and gas from lessor's property and producing such oil and gas through lessee's well on adjacent premises belonging to a different lessor, and for breach of such obligation lessee is accountable for royalty on oil and gas so drained.

3. Mines and minerals ⇐78(1)

In absence of express provision in oil and gas lease, lessee should not be required to drill an offset well to protect lessor's land from drainage caused by third person over whom lessee has no control, unless an ordinarily prudent operator would drill such a well.

4. Mines and minerals ⇐78(1)

Where corporate oil and gas lessee, by its conduct in drilling well on adjoining leased property in another ownership, drained oil through such adjoining property from defendant lessor's land, lessee's duty to drill offset well on defendant's land was not dependent on whether a prudent operator should drill such a well to protect his lessor against drainage caused by act of third person, but it was lessee's duty to drill such well or to account to defendant for loss of royalty.

5. Mines and minerals ⇐78(1)

The obligation of lessee of two oil-producing tracts, separately owned, to drill a well on property of defendant lessor offsetting lessee's well on adjoining property owned by another than defendant arose, not because of express provision of lease, but because of lessee's breach of its implied obligation not to drain oil and gas from defendant's property through a well located on such adjoining premises.

6. Mines and minerals ⇐78(1)

The express provisions of oil and gas lease which lessee claimed excluded covenant to drill offset well did not relieve lessee from implied covenant to drill such offset well to protect one lessor's premises from drainage caused by lessee's operations on adjoining land owned by another lessor.

7. Mines and minerals ⇐78(1)

An oil and gas lessee's liability for draining oil underlying land of one of its lessors through well on adjoining property separately owned arose when drainage well was placed in production, though, under its lease, lessee had three or six months to drill offset well after completing drainage well, such provision applying to a well drilled on adjacent property by a person other than lessee.

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Appeal from Superior Court, Los Angeles County; Myer B. Marion, Judge pro tem.

Action by R. R. Bush Oil Company against Beverly-Lincoln Land Company involving question of plaintiff's liability to defendant for royalty on oil and gas produced from a well on lands adjoining defendant's lands by drainage of such oil and gas from defendant's lands without drilling offset wells, where plaintiff was lessee of defendant's lands and also of said adjoining lands. Judgment for defendant, and plaintiff appeals.

Affirmed.

Cree & Brooks, of Long Beach, for appellant.

Burke, Hickson, Burke & Marshall, of Los Angeles, for respondent.

FOX, Justice pro tem.

Respondent owned lots 169 and 170 in Montebello, a city in Los Angeles County, subject to an oil and gas lease held by appellant giving it the sole and exclusive right to drill for and produce oil and gas from said premises. These lots contain approximately ten acres, and form a rectangle measuring 330 feet from east to west and 1260 feet from north to south. Lot 170 is immediately north of lot 169. Appellant drilled two wells on this property—one well on each lot. These wells are known as Mihlfred No. 1 which is located on lot 169 and Mihlfred No. 2 which is located on lot 170. This latter well is approximately in the center of the lot. Mihlfred No. 1 is some 200 feet south of the northerly line of lot 169 and 115 feet east of the westerly property line of said lot. Appellant commenced to drill the first of these wells on September 27, 1939 and placed it on production November 16, 1939. The drilling of the second well was started on January 31, 1940 and it was placed on production April 10, 1940. These wells were drilled to a depth of 7700 feet. Both wells have produced oil and gas in commercially paying quantities ever since they were placed on production. These were the only wells drilled on respondent's property.

Lots 171 and 172 lie immediately to the east of and adjoining lots 169 and 170, respondent's property, the westerly line of lots 171 and 172 being identical with the easterly line of respondent's property. Lot 172 is immediately north of and adjoining lot 171. Lot 169, which belongs to respondent, and lot 171 have a common easterly-westerly boundary line. Lots

171 and 172 have the same dimensions as those belonging to respondent and are also rectangular. Respondent, however, has no interest in lots 171 and 172.

During all times herein mentioned appellant has been also the lessee under separate oil and gas leases of lot 171 and the west half of lot 172. Between May 21, 1939 and January 25, 1940, appellant drilled and placed on production three wells on these last-mentioned lots. (Two other wells were also drilled by another operator on the east half of lot 172.) Zanetti well No. 2, drilled by appellant on the west half of lot 172, and Alauzet well No. 1, drilled by appellant on lot 171, are offset, according to the court's finding, by the two wells appellant drilled on respondent's property. Zanetti No. 1 was commenced by appellant on September 13, 1939 and placed on production November 15, 1939. It is located on lot 171, 82½ feet east of the easterly line of lot 169 at the surface of the ground and 68 feet east of said boundary line at the bottom, the well being drilled on a slant toward respondent's lot 169. This well was never offset by any well on respondent's land. The closest well on respondent's property (Mihlfred No. 1 on lot 169) is 436 feet from appellant's Zanetti No. 1 on lot 171.

The court found that appellant so located and spaced the said wells so drilled by it on said lots 169 and 171 as to cause oil and gas to be drained through said well known as Zanetti No. 1 not only from lot 171 on which said well is located but also of a large portion of the said premises owned by respondent. The court also found that ever since said well known as Zanetti No. 1 was placed on production, appellant has been continuously and still is producing through said well large quantities of oil and gas drained beneath the surface of said lot 169, which oil and gas so drained from beneath said lot 169 is irretrievably lost to respondent, and that appellant has gained and is gaining the benefit thereof. The court also found that appellant failed to protect respondent's said premises against said drainage of oil and gas by and through the well known as Zanetti No. 1. The court further found that if the oil and gas which appellant produced through its Zanetti well No. 1 from respondent's lot 169 up to December 31, 1941, had been produced from a well located on respondent's said lot the respondent would have been entitled to $3,020.49 in royalties under the terms of the lease which provided for a landowner's royalty of 13½ per cent. In arriving at this figure the court found that one-fourth of the oil and one-fourth of the gas produced by appellant through its Zanetti well No. 1 was drained from respondent's said lot and that this proportion of the production of Zanetti well No. 1 would continue to be drained from respondent's property until a sufficient protection well is drilled thereon.

The court gave respondent judgment for: (1) $3,020.49 damages up to December 31, 1941; and (2) a sum equal to a royalty of 13½ per cent of the proceeds of one-fourth of all the oil and gas produced and sold after December 31, 1941, from said well known as Zanetti No. 1 until the appellant drills a sufficient protection well on respondent's lot 169 or quitclaims to respondent the southerly 207 feet of the east half of said lot. The appeal is taken from this judgment which, in our opinion, should be affirmed.

[1] Appellant is in the position of being the lessee of two adjacent oil producing tracts which are separately owned. It so placed the wells on said tracts, according to the findings of the trial court, that one-fourth of the production from Zanetti Well No. 1 is drained from respondent's land. The respondent is thus deprived of royalty on a substantial quantity of oil from its land through the act of its lessee. It certainly should not be held to have been within the contemplation of the parties that appellant who is in possession of respondent's property under the written lease and who has assumed the obligations of that lease should drain oil from beneath respondent's property by means of Zanetti Well No. 1 on lot 171. The express covenants in the lease cannot be construed as an authorization for so doing. This proposition finds support in Hartman Ranch Co. v. Associated Oil Co., 1937, 10 Cal.2d 232, at pages 241 and 242, 73 P.2d 1163. Respondent must then be entitled to damages for this wrongful invasion of its property rights. Such was the relief granted in a very substantial amount in the Hartman case where the relationship of the parties was identical with that of the parties in this case.

In Geary v. Adams Oil & Gas Co., D.C. 1940, 31 F.Supp. 830, the situation is also

identical with that in the instant case. Plaintiff sought damages for his share of the royalty on oil drained from beneath his land by the defendant who held a lease on plaintiff's property and also on the adjacent premises. It appeared that oil and gas were being drained from the plaintiff's land through the wells of the defendant located on the adjacent leases. Defendant urged as a defense that it would not have a prudent operation for it to have drilled a protection well on plaintiff's property. The court held that where the lessee was draining oil and gas from his lessor's premises through the operation of wells on adjacent premises such lessee must either drill such wells as might be necessary to protect plaintiff against drainage by wells on defendant's other leases, or, in the alternative, to make provision for making good plaintiff's losses by payment of money. In this connection the court said, 31 F.Supp. at page 834:

"While Mr. Buchanan, defendant's vice president in charge of expansion, was of the opinion that to put a well in the southeast part of the Geary lease, in view of the present location of the well, would not have been a prudent operation, he thought it might eventually pay out but that it was very questionable as to whether it would be a profitable venture.

"Looked at solely from the defendant's point of view, the location of a well in the southeastern part of the lease perhaps would not have been a prudent operation in view of defendant's belief that, though it might pay out, the chances of making a profit were very questionable. If the defendant had no interest in the adjoining leases on the north and south, it would seem that its defense, based on the foregoing facts, might be sound. *But here the mind is haunted by the fact that the defendant is the beneficiary of the oil drained from plaintiffs' land by the wells on the north and south which belong to the defendant. It has not only been saved the cost of drilling, equipping and operating a protecting well but it gets the oil anyway without plaintiffs being paid for it.*" (Italics added.) The position taken by this Federal Court strikes us as being honest and fair to all parties and pointedly applicable to our case.

In Kleppner v. Lemon, 1900, 197 Pa. 430, 47 A. 353, the defendant was the lessee of plaintiff's land and of the adjoining tract of Stotler. In May, 1895, defendant brought in a well on the Stotler tract, 157 feet from the line of plaintiff's land. When defendant began to sink that well, plaintiff requested defendant to place it further from his line since it might drain the oil from his land; and, after it had come in a good well, plaintiff requested defendant to sink a well on his land adjoining the Stotler property. Defendant refused to comply with either request. In August, 1895, the Stotler well produced 2358 barrels of oil, but dropped to only 379 barrels in August, 1896, when the oil was substantially exhausted. The well did drain oil from plaintiff's land. He was therefore allowed damages equivalent to the royalty on the oil that was drained from his land. See opinion modifying judgment in Kleppner v. Lemon, 1901, 198 Pa. 581, 48 A. 483. The opinion of the trial judge is incorporated in the court's opinion, 47 A. 353. It is there pointed out that "If he [defendant] designedly placed the Stotler well so near plaintiff's land as to drain it, and thus save the expense of sinking a well on plaintiff's land, it was bad faith, and a manifest, intentional injury to plaintiff. It was taking his oil without paying the royalty." In a later Pennsylvania case (Barnard v. Monongahela Natural Gas Co., 1907, 216 Pa. 362, 65 A. 801, 803), the court said, a lessee "cannot take advantage of the fact that he has leases on adjoining farms so as to fraudulently deprive either of his lessors of his royalty or annual gas rental."

This problem was considered in Hughes v. Busseyville Oil & Gas Co., 1918, 180 Ky. 545, 203 S.W. 515, 518. Defendant had leases on adjacent lands. It had drilled on plaintiff's land within the specified time all the wells required under the lease. The court held there was no obligation to drill other wells in so far as development of the property was concerned but that the express covenant in the lease did not relate to drainage; that "it would be a manifest injustice" to the lessor if the lessee "were permitted to stand upon the terms of its contract", and "at the same time destroy the life and substance of it by permanently taking" through operations on adjoining land the income which the lessor had the right to enjoy. This case is summarized by our Supreme Court and cited with approval on this point in Hartman Ranch Co. v. Associated Oil Co., supra, 10 Cal.2d at page 240, 73 P.2d 1163. See, also, Carper

v. United Fuel Gas Co., 1916, 78 W.Va. 433, 439, 89 S.E. 12, L.R.A.1917A, 171, and Indian Territory Illuminating Oil Co. v. Haynes Drilling Co., 1937, 180 Okl. 419, 69 P.2d 624, 636.

[2] From these authorities we conclude there is an implied obligation on the part of an oil and gas lessee to refrain from taking any affirmative course of action which will result in draining a substantial quantity of the oil and gas from the lessor's property and producing the same through the lessee's well on adjacent premises belonging to a different lessor. For a breach of this obligation the lessee is liable and is accountable for the royalty on the portion of the oil and gas which he drains from beneath the leased premises.

[3, 4] Appellant earnestly contends that it is not liable for the drainage of respondent's land through its Zanetti No. 1 well, because the evidence does not establish that an ordinarily prudent operator would have drilled an offset well on respondent's property. Appellant's proposition is generally applicable where the drainage well is drilled by a third person, for obviously a lessee should not be required, in the absence of an express provision in the lease, to drill an offset well to protect his lessor's land from drainage caused by one over whom he has no control unless an ordinarily prudent operator would drill such a well. That, however, is not the problem we have here. The drainage well in this case was drilled by the appellant. By appellant's affirmative course of conduct respondent is losing its oil and gas and the royalty thereon. It is not a question of whether a prudent operator should drill an offset well to protect his lessor against drainage caused by the acts of some third person but rather whether the lessee itself may drain the oil and gas from its lessor's land through a well on adjacent property without paying royalty to the owner of the drained land. The distinction is clearly pointed out in a note in 19 A.L.R. 437, at page 443. It is there said: "The foregoing rule requiring the lessor to show in effect that as an ordinary business proposition common prudence requires the lessee to drill offset wells has been applied in cases where the wells upon adjoining premises are operated by a stranger to the lease. *If such wells are operated by the lessee, it would seem clear that, at least, he would be required to account to the lessor for the latter's share of the oil secured through the adjoining wells.*" (Italics added.) So, in this case the appellant should be required to account to the lessor for the latter's share of the oil and gas secured through Zanetti Well No. 1 on the adjoining premises. The trial court's decision is in accordance with this proposition.

[5] The obligation on appellant to drill a well on respondent's property offsetting Zanetti Well No. 1 arises not by reason of any express provision of the lease between the parties, but by reason of appellant's breach of its implied obligation not to drain the oil and gas from respondent's property through a well located on adjacent premises. The drilling of such a well is simply one of the means which appellant might have adopted to prevent a breach of its obligation not to drain respondent's land. Whether such a well would have been considered an ordinarily prudent operation need not be determined, since the drainage which it would have prevented was caused by appellant's own affirmative acts.

[6] Appellant says that the parties by express provisions in their lease excluded a covenant to drill an offset well. It cites the provisions of paragraphs 8 and 12 of the lease in support of its contention. There might be some point to appellant's proposition if the drainage well, Zanetti No. 1, had been drilled by some third party. As pointed out by our Supreme Court in the Hartman case, supra, it certainly should not be held to have been within the contemplation of the parties that the lessee should by its own affirmative operations on adjoining land drain oil from beneath respondent's property. Consequently the provisions of the lease with respect to drilling offset wells cannot be invoked to justify the appellant in doing that which the parties never contemplated and which injures the respondent. The provisions of the lease, to which appellant points, clearly have no application to the situation before us.

[7] Appellant also argues that the trial court erred in fixing November 15, 1939, as the date from which the appellant is answerable in damages. This is the date on which the drainage well was placed on production. Appellant contends that if it was obligated to drill an offset well then, under the terms of the lease, it had either three or six months in which to drill it after completing Mihlfred No. 2 on re-

spondent's property on April 10, 1940. Here again there might be some point in appellant's argument if an offset well on respondent's property had been made necessary by reason of a well having been drilled on the adjacent property by some third person. Such, however, is not the situation, as we have pointed out. Hence the provisions of the lease to which appellant points have no application.

The evidence is sufficient to support the essential findings necessary to sustain the judgment.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.




69 Cal.App.2d 190

## LAUREL HILL CEMETERY ASS'N v. ALL PERSONS, etc.

Civ. 12748.

District Court of Appeal, First District, Division 2, California.

May 16, 1945.

Hearing Denied July 12, 1945.

**1. Public lands ⇐29, 224½**

Where by treaty of 1840 the United States agreed to respect property rights of inhabitants of lands in California and to recognize patents issued by Spanish and Mexican governments and the doctrine of Mexican law that each pueblo was entitled to four square leagues of land upon which pueblo was located, the four square leagues of original Mexican Pueblo never became a part of public domain of the United States and were therefore not subject to pre-emption or settlement under public settlement acts. Treaty Between the United States and the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922; Act Cong. March 3, 1851, 9 Stat. 631; Act Cong. March 8, 1866, 14 Stat. 4.

**2. Public lands ⇐34, 224½**

The title to four square leagues of original Mexican Pueblo which never became part of public domain of the United States passed to city and county of San Francisco under treaty of Guadalupe Hidalgo and was confirmed to the city by United States patent so that city's deed to a cemetery association passed clear title, while claim of those based upon invalid claim of pre-emption or "squatter's right" was void from its inception. Treaty Between the United States and the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922; Act Cong. March 3, 1851, 9 Stat. 631; Act Cong. March 8, 1866, 14 Stat. 4; St. 1867–1868, p. 379.

**3. Evidence ⇐366(11)**

A deed from city and county of San Francisco conveying to cemetery association land which city had confirmed to it under act of Congress authorizing city to confirm four square leagues of "pueblo land" acquired from Mexico is prima facie evidence that officers performed their duty in issuing such deed, and that it was issued to rightful claimants. Treaty Between the United States and the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922; Act Cong. March 3, 1851, 9 Stat. 631; Act Cong. March 8, 1866, 14 Stat. 4.

**4. Cemeteries ⇐14**

When use for cemetery purposes is abandoned there is no reversion, especially when abandonment is compelled by statute or governmental agency.

**5. Cemeteries ⇐11**

In quiet title action by cemetery association which acquired land under deed, judgment was properly rendered for association on ground that if defendants' predecessors had any claim based upon "squatter's right" such right was completely lost through their transfers of all their interests to association's predecessors. Gen.Laws 1937, Act 1026.

**6. Quieting title ⇐1**

The purpose of the statute providing for quieting title to realty in case of loss or destruction of public records was to prevent fraud upon those who had title or interest in the property. Gen.Laws 1937, Act 1026, § 14.

**7. Quieting title ⇐31**

In statutory action to quiet title against all persons claiming any interest in realty involved, court was not without jurisdiction because all other persons who had appeared in former action involving same realty had not been served, where action was an equitable one and court having

jurisdiction of subject matter had jurisdiction to render judgment as to parties who put title in issue. Gen.Laws 1937, Act 1026, § 14.

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Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Laurel Hill Cemetery Association against All Persons claiming any interest in, or lien upon, the real property described or any part thereof, wherein three persons claiming an adverse interest in the property set up their claims. From a judgment for plaintiff quieting its title, defendants appeal.

Affirmed.

Sefton & Quattrin and Seibert L. Sefton, all of San Francisco, for appellants.

Myrick & Deering and Scott and James Walter Scott, all of San Francisco (Stoney, Rouleau, Stoney & Palmer and Royal E. Handlos, all of San Francisco, of counsel), for respondent.

NOURSE, Presiding Justice.

Plaintiff sued to quiet title to real property naming as defendants "all persons" in accordance with the act "to provide for the establishing and quieting of title to real property in case of the loss or destruction of public records," Deering's Gen.Laws, Act No. 1026. Three persons claiming an adverse interest in the property appeared and set up their claims. Judgment went for the plaintiff quieting its title and decreeing that the defendants had no interest in the property. The three defendants have joined in an appeal from the judgment.

The plaintiff bases its claim of title upon a deed from the City and County of San Francisco dated June 23, 1871, and the United States patent which preceded it. The three defendants rest their claim upon the theory that their predecessors in interest deeded the property to the predecessors in interest of the plaintiff for public cemetery purposes only and that, upon the abandonment of the cemetery, the title to the property reverted to the three original grantors and that these defendants became entitled to an undivided one-third interest. The plaintiff contends that the predecessors of the defendants had no title at any time which they could convey for any purpose, and that if they had any equitable interest it was conveyed absolutely to the predecessors of plaintiff by deed which was not conditioned upon a trust for cemetery purposes.

Appellants' claim of title begins with a "preemption claim" by Kinzer recorded January 7, 1853. On April 9, 1853, Kinzer and wife conveyed to McCann. On April 8, 1854, McCann conveyed to Gray, Ranlett and Austin. On December 27, 1854, Ranlett conveyed to Atkinson. On July 10, 1856, Austin conveyed to Butler. On May 26, 1868, Gray, Atkinson, and Butler conveyed to Laurel Hill Cemetery, a corporation. And on May 12, 1868, Austin and wife quitclaimed to the cemetery corporation. The question first arises whether these various grantees had any title which was subject to transfer.

The history of San Francisco land titles is to be found in numerous decisions of both the federal and state courts and does not require repetition. It is sufficient to summarize: At the end of the war between the United States and Mexico title to all lands in California was claimed to have vested in the United States. By the terms of the treaty of peace proclaimed July 4, 1848, 9 Stat. 922, the United States agreed to respect the property rights of the inhabitants. Included in this compact was the recognition of patents issued by the Spanish and Mexican governments, and the settled doctrine of the Mexican law that each pueblo owned and was entitled to four square leagues of land upon which it was located. Conformably on March 3, 1851, 9 Stat. 631, the Congress passed "An Act to ascertain and settle the private Land Claims" which authorized the cities to present their claims to the public land commissioners for settlement. The City of San Francisco, on July 2, 1852, filed its petition for confirmation to it of four square leagues of "Pueblo Land." Prior to the consolidation of the City of San Francisco and the County of San Francisco much litigation arose involving title to these pueblo lands and to the "Outside Lands" which was settled in part by the Act of the Congress of March 8, 1866, 14 U.S.Stats. p. 4, which declared that the "Outside Lands" should be held in trust by the City to be disposed of "and conveyed by said city to parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of this act, in such quantities and upon such terms and conditions as the legislature of the State of Cal-

ifornia may prescribe * * *." Pursuant to this act the municipality enacted an ordinance which was approved by act of the Legislature on March 27, 1868 (Stats. 1867-8, 379). The effect of this act was to confirm the right of the City and County to settle the title to all the "Outside Lands" in accordance with a map prepared for that purpose and to permit it to vest title in "the person, or to the heirs and assigns of persons, who were, on the eighth day of March, eighteen hundred and sixty-six, in the actual bona fide possession thereof, by themselves or their tenants" and who had, previous to the first day of April, 1868, paid "all taxes which have been assessed thereon during the five fiscal years preceding" July 1, 1866. Under the authority of this legislation the city deeded the property in dispute to Laurel Hill in June, 1871.

[1, 2] These facts stand undisputed: On March 8, 1866, respondent's grantor, Laurel Hill Cemetery Association, was in "actual bona fide possession" of all the land in dispute, and paid all the taxes assessed thereon. The appellants were not in possession, claimed no right of possession, and are not shown to have paid any taxes upon the property since the year 1853. These conclusions necessarily follow: The four square leagues of the original Mexican Pueblo never became a part of the public domain of the United States and were therefore not subject to pre-emption or settlement under the public settlement acts. The title to these lands passed to the City and County of San Francisco, through the Pueblo, under the terms of the treaty of Guadalupe Hidalgo and was confirmed to the City by United States patent. The deed of the municipality to Laurel Hill in 1871 passed clear title which by proper conveyances went to the respondent herein. The claim of appellants based upon an invalid claim of pre-emption, or "squatter's right," was void and valueless from its inception and never gained any validity through the passage of time. It is not necessary to burden the opinion with the citation of the numerous authorities in support of these propositions. It is sufficient to refer to City and County of San Francisco v. Le Roy, 138 U.S. 656, 11 S.Ct. 364, 34 L. Ed. 1096, where it was held that by the Act of the Congress of March 8, 1866, 14 Stat. 4, and the decree of the court in Grisar v. McDowell, 73 U.S. 363, 6 Wall. 363, 18 L.Ed. 863, the title of the municipality was confirmed in the four square leagues of land as successor to the Mexican Pueblo bounded on the east by the Bay of San Francisco, on the north and west by the Pacific Ocean and on the south by an east-west line coterminous with the city boundary. Thereby "* * * all the right and title of the United States to the land (with certain reservations not important here) * * * were relinquished and granted to the city, and the claim to the land was confirmed * * *." [138 U.S. 656, 11 S.Ct. 367.] The trust upon which the City held these lands, as successor to the Mexican Pueblo, was "a public and municipal trust, to be exercised chiefly in the distribution of the lands to occupants and settlors * * * subject to the supervision and control of the legislative authority either of the state or of the United States." The "squatters" claim upon which the parties based their title was then rejected, the court saying (138 U. S. 656, 11 S.Ct. at page 367, 34 L.Ed. at page 1100): "That claim of itself was of no value whatever, as the lands were not subject to pre-emption, not being lands of the United States, nor would they have been even if owned by the United States, except under the Town-Site Act, because they were within the limits of what was then a town; but a large portion of the tract thus taken up was fenced in by Kissling, occupied by him, and a portion of it cultivated. His occupation was continuous during the whole period required by the ordinance to enable him to have the benefit of the transfer it made. He therefore acquired as complete a title in the interest which the city then held in the property as it was possible for the city to convey, under the Van Ness ordinance and the confirmatory legislation of the state and the United States." The same language is applicable here. The cemetery association's occupation was continuous during the whole period required by the statutes and by the City's deed the association acquired all the title which the City could possibly convey.

[3] Conformably with these statutes, Federal and State, and their confirmation by Federal and State decisions, the City and County of San Francisco, on June 23, 1871, executed its deed to Laurel Hill Cemetery Association covering the entire tract in dispute. Such deed "like a patent, is prima facie evidence that the officers performed their duty in issuing it; and so that it was issued to the rightful claim-

ants." Galvin v. Palmer, 113 Cal. 46, 53, 45 P. 172, 173, and cases cited. The argument in appellants' brief that there is a flaw in respondent's title because the city deed ran to Laurel Hill Cemetery, a corporation, whereas the corporation was not formed until after March 8, 1866, and hence could not have been in actual possession as required by the Act of the Congress finds some ground in an affidavit attached to the complaint. But the deed is in evidence and this shows that the grantee was "Laurel Hill Cemetery Association."

For these reasons we hold that the appellants herein had no claim of any value upon which they could assert either a legal or an equitable interest in the property in suit.

[4] Notwithstanding these settled rules the appellants insist that they have an interest, through the theory of possibility of reverter, because their ancestors "dedicated" the land to a public use which was abandoned when the owners were prohibited by law from continuing the occupation of the land for cemetery purposes. This they say follows because under the rules of the common law, which were then in force in this State, the "possibility of reverter" is not an "estate" and could not be transferred. At the outset it should be noted that there is no evidence in the record that any of the conveyances made to the association contained any "dedicatory" language, or that they were other than outright grants of the full title, or, in the absence of "title", a complete assignment of all the possessory interest. And there is no evidence that at any period of its occupancy the cemetery represented to the public that it was a charitable organization or that it was anything but a simple commercial enterprise. From the day of the first "dedication" in 1854 the three owners, or claimants under the pre-emption title, held themselves out as the "proprietors." Three other persons were named as "trustees", but the character and purpose of their trusteeship does not appear. It does appear, however, that when the Association acquired the property from the "proprietors" in 1868 it paid them $25,000 for the property. Assuming as we must upon this record that the operation of the cemetery was from the beginning a commercial enterprise the authorities uniformly hold that there is no reversion when the use for cemetery purposes is abandoned, especially when the abandonment is compelled by statute or governmental agency. The authorities are reviewed in the opinion of the learned trial judge from which we quote, in part:

"A leading case is that of Rawson v. Inhabitants, etc., of Uxbridge, 89 Mass. 125 [7 Allen 125, 83 Am.Dec. 670], which was a writ of entry to recover land in Uxbridge which had been used for cemetery purposes. The deed, made in 1737, is phrased in interesting pre-Revolution English. It contains the recital 'said land being improved for a burying place.' The habendum clause concludes 'to the said town of Uxbridge forever * * * for a burying-place forever.' Burials were conducted for many years, the last being about 1843. In 1860 the town sold the land to persons who removed the remains, changed the grade and appropriated the land for school purposes. An heir of the original grantor re-entered 'for breach of the condition of said deed.' In the trial court judgment went in her favor. It was reversed. * * *

"It was contended on the side of the reentry that a condition could be implied from the deed. The question presented was whether there was, or was not, such condition.

"The opinion of Judge Bigelow examines the deed with great care. It goes into the English cases. It is particularly apposite for it is the declaration of a common-law court and the case presented the very question presented here, i. e. Whether at common law a 'possibility of reverter' remained in the grantor. It is interesting, moreover, because there, there were words in the deed which furnished some basis for argument that a condition was to be read into the deed or at least implied from it, while here both deeds are straight-out, unadorned grants. On top of all that, the opinion draws attention to the fact that a 'voluntary' donation is one thing while a transfer where a consideration is involved is quite another. * * *

"Thornton v. Mayor of Natchez [5 Cir.], 129 F. 84 [86] follows the able opinion in the Rawson case. It, too, stresses the commercial feature. 'A consideration of $500 was paid the grantors, and the grant was not made purely and exclusively from motives of charity or benevolence' says the court.

"In the Thornton case a reverter was claimed. The language in the deed was, to have and to hold the same 'for the uses

and purposes of a burying place and so to be forever kept, used and enclosed in a decent and substantial manner and to and for no other use or purpose whatsoever.'

"Field v. City of Providence, 17 R.I. 803 [24 A. 143], involved a rather elaborate deed 'for the sole purpose of a burying ground' and held 'on the authority of the carefully considered case' of Rawson v. Uxbridge, supra, that the deed in question 'carried an absolute estate in fee simple to the grantees, and therefore the petitioner has no claim for any reversionary or resulting right in the land conveyed.' The fact that the grantees paid 'one hundred and twenty Spanish milled dollars' for the property 'which does not appear to have been less than its full value' weighed, of course, with the court.

"The court concluded as in the Rawson and Thornton cases that this was simply a business deal.

"The Rawson and Thornton cases have been cited with approval, and followed in numerous instances and in many jurisdictions.

"No case has been cited by the defendants supporting their contention that at common law a reversion would be read into a grant where the instrument was silent respecting a condition subsequent particularly where the transaction was an ordinary business transaction where the grantor sold his land and was paid a consideration therefor. In the cases just discussed the deeds were not entirely silent, but the courts nevertheless held against a reverter. * * *

"The Victoria Hospital case [Victoria Hospital Ass'n v. All Persons, etc.], 169 Cal. 455 [147 P. 124, 126], cited by the defendants is as strong as the Rawson case (if not stronger) in what it says respecting conditions subsequent. The deed which was involved in that case contained an habendum clause with an 'express condition', —which was so denominated—but notwithstanding that, the court held against the contention that it created a condition subsequent. See discussion commencing with 'It is, of course, a familiar principle that such conditions are not favored in law because they tend to destroy estates, and that no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction.' This is substantially what was said in the Rawson case, supra. * * *

"The case of Board of Commissioners of Mahoning County v. Young [6 Cir., 1893], 59 F. 96, is directly in point. * * *

"The opinion is interesting because of the full discussion found therein of the authorities holding that a condition subsequent and the retention of a right of reentry will be found only if it clearly appears from the deed that such was the intention. The discussion on this score is much the same as that found in the Rawson case.

"The opinion is interesting, moreover, because it holds very definitely that whenever burials are prohibited by law such forced termination of the cemetery use will not be treated as a breach of condition or give rise to a right of re-entry. In other words, the further performance of the condition is excused because of the intervention of the law. * * *

"The Youngstown case [Board of Com'rs of Mahoning County v. Young, 6 Cir.], 59 F. 96, has been cited and followed many times. Hopkins v. Grimshaw [165 U.S. 342, 17 S.Ct. 401, 41 L.Ed. 739], cited by the defendants, not only cites the Rawson case several times but (165 U.S. 355 [17 S.Ct. 406, 41 L.Ed. 739]) it cites this case as well, as a case turning 'upon a question of forfeiture for breach of a condition subsequent in a deed to a municipal corporation.'

"In Wright v. Morgan, 191 U.S. 55, 58 [24 S.Ct. 6, 8, 48 L.Ed. 89] Justice Holmes cites the Youngstown case. In his opinion he says: 'If the legal title was in the city (Denver), it was an absolute title. In view of the extreme unwillingness of courts to admit the existence of a common-law condition, even when the word "condition" is used, it needs no argument to show that there was no condition or limitation here. Stuart v. Easton, 170 U.S. 383 [18 S.Ct. 650, 42 L.Ed. 1078]. * * * We should require the clearest expression of such an unusual restriction before we should admit that it was imposed,—especially in an ordinary sale for cash.'

"In Columbia, etc., Co. v. State of South Carolina, 261 U.S. 236 [43 S.Ct. 306, 67 L. Ed. 629], the Youngstown case is cited and followed. At page 250 [of 261 U.S., at page 310 of 43 S.Ct., 67 L.Ed. 629] Justice Sutherland says: 'When * * * we consider all the circumstances, including the fact that the sale to the defendant was absolute and for a valuable consideration, that there are no express terms creating a

condition, no clause of re-entry nor words of any sort indicating such purpose, the conclusion is unavoidable that the obligation in question is a covenant and not a condition subsequent. Board of Commissioners v. Young [6 Cir.], 59 F. 96.' Immediately following this there is a lengthy quotation from the Young case at page 105 of 96 F.

"In Kibbe v. City of Rochester [D.C.], 57 F.2d 542, 545, the Youngstown case is again cited and followed.

"In United States v. 2,086 Acres of Land, etc. [D.C.] 46 F.Supp. 411, 413, the Youngstown case is cited and followed on the point that forfeiture of an estate granted on a condition subsequent is excused when the grantee later is precluded by law from using the property for the purpose designated.

"Indeed the Youngstown case has been cited and followed by our own Supreme Court. In the case of Gramer v. City of Sacramento, 2 Cal.2d 432, 439 [41 P.2d 543, 546], Justice Thompson says: 'We find in Board of Com'rs v. Young [6 Cir.], 59 F. 96, 105, a pertinent statement, as follows: "Too little weight has been given to the fact that the deed was upon a valuable consideration; to the fact that it was a quitclaim of all right, title, and interest; to the fact of a previous common-law dedication; and to the failure, under such circumstances, to make the title subject to an express right of re-entry."'"

[5] We are in full accord with these views and therefore hold that, if the appellants' predecessors had any claim based upon the "squatters rights" it was completely lost through their transfers of all their interests to the predecessors of respondent.

[6, 7] Finally it is argued that the court was without jurisdiction to proceed with the trial because all other persons who had appeared in former actions involving the same property had not been served, as required by section 14 of the Act. Deering's Gen.Laws Act 1026. The purpose of the section was to prevent fraud upon those who had title or interest in the property. See Westover v. Stanley, 93 Cal.App. 113, 269 P. 475. But, insofar as appellants are concerned, the action as to them became an action to quiet title. This being an equitable action, and the court having jurisdiction of the subject matter of the controversy—the question of title between these parties—it had full jurisdiction to complete the litigation and render a judgment quieting the title as between the parties who put that title in issue. See Faxon v. All Persons, 166 Cal. 707, 712, 137 P. 919, L.R.A. 1916B, 1209, and cases there cited.

Judgment affirmed.

STURTEVANT, J., and DOOLING, Justice pro tem., concur.




69 Cal.App.2d 207

## CALIFORNIA PRUNE & APRICOT GROWERS ASS'N v. H. R. NICHOLSON CO.

Civ. 12804.

District Court of Appeal, First District, Division 2, California.

May 17, 1945.

Hearing Denied July 12, 1945.

**1. Appeal and error ⇐1008(1)**

Trial court's ruling finding facts in favor of plaintiff and against defendant would not be disturbed on appeal unless trial court abused its discretion.

**2. Trade-marks and trade-names and unfair competition ⇐65, 75**

In order to establish trade-mark infringement or unfair competition, it was not necessary that plaintiff should prove actual confusion of goods.

**3. Trade-marks and trade-names and unfair competition ⇐93(3)**

Evidence supported finding that defendant's acts, in using trade-mark "Sunsweet" in connection with sales of fruit juices for making soda pop and other beverages, constituted unfair competition, in view of plaintiff's prior use of the trademark in processing prunes which could be used for food or for making prune juice.

**4. Trade-marks and trade-names and unfair competition ⇐61, 71**

Where defendant was engaged in marketing fruit juices for making soda pop and other beverages while plaintiff was engaged in processing prunes which could be used for food or for making prune juice, the products of the parties were of

the same "descriptive properties," so that use by defendant of a trade-mark similar to plaintiff's prior trade-mark would constitute trade-mark infringement and unfair competition.

See Words and Phrases, Permanent Edition, for all other definitions of "Descriptive Properties".

**5. Trade-marks and trade-names and unfair competition ⇐65, 75**

Where facts indicate that a purchaser, exercising ordinary care would be likely to be deceived by imitation of a trade-mark, it is not necessary to prove actual fraud or deception, but it will be assumed.

**6. Trade-marks and trade-names and unfair competition ⇐61**

One who has established a trade-mark and good will in connection therewith is entitled to use thereof in any reasonable extension of its business.

**7. Trade-marks and trade-names and unfair competition ⇐61**

A trade-mark protects owner against not only its use upon articles to which he has applied it, but also upon such other articles as might naturally or reasonably be supposed to come from him.

**8. Trade-marks and trade-names and unfair competition ⇐59(1)**

Where application of defendant's predecessor to registered trade-mark "Sunsweet" had been refused and thereafter predecessor was given a registration as "Nicholson's Sunsweet," defendant could not justify use of "Sunsweet" as a trade-mark on ground that it had but abbreviated the trade-mark from "Nicholson's Sunsweet."

**9. Trade-marks and trade-names and unfair competition ⇐93(3)**

Evidence sustained finding that word "Sunsweet" was susceptible of being used as a trade-mark, as against defendant's contention that word was merely descriptive of process of curing.

**10. Trade-marks and trade-names and unfair competition ⇐44**

United States Patent Office classification was of importance in determining whether goods had same descriptive properties on issue of trade-mark infringement, but it was not controlling.

**11. Trade-marks and trade-names and unfair competition ⇐98**

Where it was determined that defendant was guilty of trade-mark infringement and unfair competition, an order directing defendant to account for all profits was not too broad on ground that order should have been limited to sales made in state.

**12. Trade-marks and trade-names and unfair competition ⇐98**

Where trial court had ordered an accounting of profits, following finding that defendant was guilty of trade-mark infringement and unfair competition, defendant's contention that order was too broad in that it should have been limited to sales made in state was premature before accounting was held.

**13. Appearance ⇐9(4)**

Where defendant by its answer denied nearly every allegation pleaded in plaintiff's complaint and prayed for general relief, defendant made a "general appearance," notwithstanding that by its pleading it attempted to limit its appearance as special.

See Words and Phrases, Permanent Edition, for all other definitions of "General Appearance".

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Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action by California Prune & Apricot Growers Association against the H. R. Nicholson Company involving trade-mark infringement and unfair acts of competition. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Kenneth A. White and Ogden, Crocker & Steelman, all of Los Angeles, for appellant.

Naylor & Lassagne and James M. Naylor, all of San Francisco, and Gerald H. Hagar, of Oakland, for respondent.

STURTEVANT, Justice.

The plaintiff alleged two separate counts against the defendant. It pleaded a charge that the defendant was guilty of infringing on the plaintiff's trade mark and that the defendant was guilty of unlawful and unfair acts of competition. The defendant denied said allegations and on those plead-

ings, among others, issue was joined and a trial was had. Later the trial court made findings in favor of the plaintiff on each material issue.

This defendant now contends that the record does not show it was guilty of infringing on plaintiff's trade mark or that it was guilty of doing any unlawful or wrongful acts of competition. A complete answer is the findings are to the contrary and the record contains an abundance of evidence supporting the findings. In its brief the plaintiff sets forth separately a set of facts which it asserts shows its right and a set of facts which it claims shows the defendant's rights. In its closing brief the defendant does not challenge the accuracy of either statement. Those two statements follow, with certain modifications.

Plaintiff's History.

The respondent, California Prune and Apricot Growers Association, is a nonprofit, cooperative organization, formed by grower-members in the year 1922, as the outgrowth of an earlier organization, California Prune and Apricot Growers, Inc., wherein the growers held shares of stock in proportion to the acres that they signed up.

Respondent's said predecessor was organized in 1917 and immediately adopted and commenced using the word "Sunsweet" as the principal trade mark or brand to identify the goods canned, bottled, packed and processed by it. In that first year the commodities of the predecessor company were packed largely in what are called bulk 25- and 50-pound boxes from which the retail trade served the customer with anything from 1-pound up that they might be seeking to purchase.

Use of the "Sunsweet" mark by respondent's predecessor in 1917 is further evidenced by a Christmas package of "Sunsweet" prunes, as an early carton pack. Further commercial use of the trade mark was evidenced by a photographic reproduction of a display of "Sunsweet" prunes in a Sacramento hotel. Respondent's predecessor during its existence commenced the use of a 5-pound prune carton bearing the trade mark "Sunsweet".

From the inception of the business of respondent's predecessor the use of the trade mark "Sunsweet" was expanded to other commodities in addition to dried prunes and apricots, and there are in evidence facsimiles of labels employed in marking such new items, including a photostatic copy of the history of respondent's predecessor's application for registration of the mark in the Patent Office, and including reproductions of labels applied to "Ready to Serve" canned prunes; fruit butter made from prunes and apricots, and a jam product which was "simply a blend of apricots with some citrus fruit ingredient." This application was filed April 28, 1921.

Cognizant from substantially the inception of its business that its products had direct relation to the preparation of beverages, the respondent, as early as 1921–22, urged and taught the ultimate consumer how to readily and simply convert "Sunsweet" prunes into a prune juice beverage, including final preparation with plain or carbonated water.

From the outset the "Sunsweet" trade mark was what respondent calls its "top brand", namely, the brand under which "the highest type and quality" of its dried fruits was offered and sold to the public. The "Sunsweet" brand of goods was widely and nationally advertised even in the early years of the business as evidenced by the advertising supplement to the "Sunsweet Standard", bearing date December, 1921, reporting on the past and future advertising programs and media and containing reproductions of such advertising material. Respondent's witness, Dunlap, identified the contents of said supplement as typical of the kind of advertising employed.

Expansion of respondent's "Sunsweet" business to prune juice, in its commercially bottled form, as distinguished from the early recommendation for consumer manufacture of a beverage from "Sunsweet" prunes, occurred in 1932 and might have had its inception prior to that time. It came about as a result of respondent's desire to fully utilize its available raw materials, i.e., the fruit grown by its members. One of respondent's exhibits was identified as a replica of the "Sunsweet" prune juice package employed in 1932.

At the present time the respondent itself sells "Sunsweet" prune juice in the territory west of the Transcontinental Divide. East of the dividing line "Sunsweet" prune juice is sold by a firm named Duffy-Mott by an arrangement with respondent. The arrangement contemplates the shipment of prune concentrate in 50-gallon barrels to Duffy-Mott, which processes and distributes prune juice as a finished beverage. Under

the arrangement with Duffy-Mott the respondent reserves the right of supervision of the preparation of the prune juice sold under the trade mark "Sunsweet"; it checks the quality; it picks up samples and they are tested in San Jose by a chemist.

As early as April 29, 1933, respondent was advertising "Sunsweet" prune juice, which it was offering for sale as a finished beverage, as shown by an advertisement in "Pacific Rural Press". Typical newspaper advertising is evidenced by one of plaintiff's exhibits covering the period October 20, 1933 to March, 1934 and another exhibit shows a full page four-color advertisement in the Saturday Evening Post, the estimated cost of which was $11,000 for a single issue. Plaintiff's Exhibit 16 is a collection of typical advertisements in various media, during the period July, 1941–June, 1943, covering various "Sunsweet" products including specific mention of "Sunsweet" prune juice.

The history and broad pattern of respondent's advertising of its "Sunsweet" products is shown in the recapitulation of expenditures in evidence. It was explained by the witness Hendrixson, respondent's statistician, that the years 1917 and 1918 were not included in the recapitulation because of his inability to locate the exact ledgers, and his understanding that the advertising conducted by respondent's predecessor in the initial two-year period was primarily promotional in character.

In the fiscal year 1933–1934 the sum of $34,646.62 was allocated to the advertisement of "Sunsweet" prune juice; in the next succeeding fiscal year the amount was $102,139.17; the next year $129,210.86. Additionally, in 1932–1933 the sum of $13,188.28 was allocated for the allowance of five per cent special discounts for advertising and the next year (1933–1934) the sum was increased to $58,061.60.

Exhibits in evidence reflect the growth of respondent's business in the sale of "Sunsweet" products, namely, carton prunes, carton apricots, carton seedless raisins, carton peaches, whipped prunes and prune juice, and were based upon a study of respondent's records.

The fact of federal registration of respondent's trade mark for its various commodities was proved by the introduction of printed copies (by stipulation, in lieu of certified copies). Additionally, three other registrations were proved by file histories.

Ownership of these registrations is evidenced, not alone by the admission in appellant's answer, but by the testimony of the witnesses as to succession, and certified abstracts of title relating to said registrations effected in the name of respondent's predecessor.

Defendant's History.

The comparative chronology of the business of respondent and appellant is shown by a consideration of Plaintiff's Exhibit 42, "Title Chart on 'Nicholson's Sunsweet' Trade Mark," which was admitted without objection, for which reason it may be assumed to correctly state the facts.

The Ver-Vac Company:

The incorporation of the Ver-Vac Company, a Maryland Corporation, on December 19, 1919 was proved. It was this corporation (and not H. R. Nicholson, the individual) which originally made application to the Patent Office for registration of the trade mark "Sun Sweet" for non-alcoholic, maltless, concentrated and non-concentrated fruit syrup used for making soft drinks, on April 5, 1922 and, when registration of that mark was denied, converted the application into one seeking registration of the mark "Nicholson's Sunsweet." In its verified application it was alleged that: "The trade mark has been continuously used in the business of said corporation since March 31, 1922."

In attempting to carry appellant's date of first use of the trade mark "Nicholson's Sunsweet" back of the date sworn to in the federal application, i.e., March 31, 1922, the evidence tendered consisted of the testimony of appellant's witnesses as to their recollections unsupported by documentary evidence.

The documentary evidence and the admissions of appellant's witnesses under cross-examination raise a question as to whether the date of first use, namely, March 31, 1922, may be relied upon. The file history in evidence of appellant's federal application, contains a label specimen bearing the diagonally printed statement "Temporary Label." The words "Nicholson's Sunsweet Orange Concentrate" were printed on a separate strip pasted at the top of the label, over the words "Pure Fruit Orange Concentrate". This "label" was represented in appellant's federal application as a specimen of the label actually affixed to the goods or containers thereof, and yet in the cross-examination

of Mr. Nicholson, appellant's principal witness, the following statements appear:

"Q. In other words, the label forming the part of Plaintiff's Exhibit 23 was prepared especially for the purposes of the application? A. I imagine so.

"Q. It is not, is it, a label such as you would use in ordinary commerce? A. No, sir."

The nearest approach in appellant's proofs to a showing of the earliest actual commercial use of the notation "Nicholson's Sunsweet" by The Ver-Vac Company, aside from the recollections of the witnesses, is found in the records concerning purchase of bottle crowns. One of defendant's exhibits, the card records of The Crown Cork & Seal Co., shows approval of a sketch of "Nicholson's Sunsweet" crown by "Shipley Steam Bottling Works," as the customer, bearing date of May 5, 1923, or some six years subsequent to respondent's first use of its mark "Sunsweet" in 1917.

No attempt was made by appellant to give the figures or show the records upon which to approximate the business of The Ver-Vac Company, and consequently we can merely surmise as to the volume of business done by that company. From Defendant's Exhibits J and K we find that on April 3, 1924, North Ontario Packing Co., of Los Angeles, California, shipped 60 barrels of double strength "Cal-Ora," valued at $4,169.52 to The Ver-Vac Company. "Cal-Ora" was the name used by the shipper to indicate the goods "California Orange". There was no evidence offered, however, to show that these raw materials found their way to the bottlers under the trade marks "Nicholson's Sunsweet" or "Sunsweet." According to the formula given by Mr. Nicholson for the manufacture of the bottler's base, the 60 barrels of double strength concentrate did not represent any great volume of business.

From the record it appears that the business of The Ver-Vac Company consisted of preparing a bottler's concentrate of fruit juices by adding water and sugar thereto and selling the same to a limited number of customers. No advertisement of the product of The Ver-Vac Company was shown, from which the respondent argues that the business was both local and small in size. It was also short-lived for the charter was forfeited February 13, 1926 for non-payment of taxes.

The Ver-Vac Products Company:

This company was incorporated under the laws of the State of Maryland on May 7, 1924 and voluntarily dissolved on March 24, 1937.

On June 10, 1924, it caused an assignment to be recorded at the Patent Office, purporting to have been executed May 31, 1924, and to transfer the trade mark "Nicholson's Sunsweet" and the registration thereof, from The Ver-Vac Company to The Ver-Vac Products Company. The circumstances surrounding this transfer are not shown; the records have been destroyed.

On the basis of oral testimony and documentary material in the record, it is evident that nothing more than nominal use was made of the trade mark "Nicholson's Sunsweet" during the life of The Ver-Vac Products Company.

The very earliest documentation of business activity by The Ver-Vac Products Company, as shown by the record, was the purchase of 15 forty-nine gallon barrels of orange concentrate from North Ontario Packing Co. on July 22, 1925. An idea of the volume of business resulting therefrom to The Ver-Vac Products Company may be gained by reference to the formula previously given by the witness Nicholson.

Documents introduced by the appellant consisting of invoices and delivery receipts spanning the years April 8, 1929 to August 16, 1935, indicate that the sales of orange concentrate under the trade mark "Nicholson's Sunsweet" were in extremely small volume and that the business was far from a growing and thriving enterprise. The oral testimony of witnesses, who admittedly had never examined the records of the company, that greater volume was enjoyed, cannot change the quantum aspect of the pictures, especially where the testimony was given many years after the event.

It may be true that The Ver-Vac Products Company used labels and advertising banners, but the record is silent as to the extent of such use from which the volume of business could be deduced.

During its existence (1924–37) The Ver-Vac Products Company made certain changes with respect to the bottle crowns employed by the bottlers of its products, and the chronology of these changes, as nearly as they can be determined, ran something like this:

1. Defendant's Exhibit B, dated March 27, 1930, represented the dropping of the prefix word "Nicholson's" from the combination "Nicholson's Sunsweet," while retaining the embellishments of Defendant's Exhibit A.

2. Defendant's Exhibits Y–2 and Y–4 represent the use of the word "Nichol" as a prefix for the word "Sunsweet."

3. Defendant's Exhibits Y and Y–3 are bottle crowns bearing the word "Sunsweet" in a circular arrangement with the names of the particular fruit flavors, as orangeade and lemonade, respectively.

4. Defendant's Exhibit Y–1 is a "privately designed crown" bearing the word "Sunsweet" with an associated sunburst and delivery boy design.

The dates of these changes are not made certain by the oral testimony or documentary evidence adduced on behalf of appellant. However up to the year 1930 the marks "Nicholson's Sunsweet" and "Nichol Sunsweet" were used, and "Sunsweet" came into being in 1930 as a denomination of the product of The Ver-Vac Products Company. Whatever else these changes may suggest they are satisfactory evidence that the use of the word "Sunsweet," alone or in combination with other words or with designs, as a trade mark, lacked stability in the business being done by The Ver-Vac Products Company during the period of its existence and that from 1924 to 1937 The Ver-Vac Products Company had no permanent brand or mark for its goods.

The most significant characterization of the business of The Ver-Vac Products Company is found in the bill of sale to appellant. This instrument was executed April 17, 1937 (after dissolution of the seller on March 24, 1937). The property conveyed as a "going business" consisted of some sixty items, ranging from "15 gal. sarsaparilla flavor" to "1 Ford 1929 delivery." It included only "2 gal. orange conc." (meaning 2 gallons of orange concentrate), the product in which The Ver-Vac Products Company was supposed to be doing business and in connection with the sale of which it was supposed to be using the trade mark "Sunsweet."

The price paid for the property of The Ver-Vac Products Company was the sum of $221.85 and for the added consideration of $1 there were transferred accounts receivable totalling $212.78. The bill of sale contains no specific reference to "good will" of the business.

The H. R. Nicholson Company:

The appellant company succeeded to the business of The Ver-Vac Products Company, acquiring its 60-item inventory of assets through the bill of sale already referred to.

Insofar as appellant's acquisition of the registered trade mark "Nicholson's Sunsweet" is concerned, there is uncertainty in the official record. One of plaintiff's exhibits shows an assignment dated March 14, 1938 and recorded April 11, 1938 from The Ver-Vac Company to appellant, notwithstanding earlier conveyance of its interest in the trade mark to The Ver-Vac Products Company and the fact that it had been dissolved on February 13, 1926, or some twelve years previously for non-payment of its taxes.

On December 2, 1942, some six months after the commencement of this action, appellant recorded in the Patent Office a purported assignment, acknowledged April 17, 1937, transferring the trade mark from The Ver-Vac Products Company to appellant. The assignment of April 17, 1937 was executed after dissolution of the assignor company and purported to convey the trade mark and "good will" despite the fact that the bill of sale failed to transfer good will as one of the assets of The Ver-Vac Products Company along with the 60 items of property specifically identified therein.

Among the things done since its inception in 1937, appellant claims to have employed a label bearing the words "Nicholson's Sunsweet" as a trade mark for orange concentrate sold to bottlers despite the fact that The Ver-Vac Products Company, had, in the year 1930, dropped the prefix word "Nicholson's" in favor of "Nichol Sunsweet" and "Sunsweet" alone.

The first tangible evidence of use of the word "Sunsweet" by appellant is in the introduction of the applied color label bottle. Here the word "Sunsweet" and indeed all other label matter, is processed as a permanent part of the bottle itself. This bottle was apparently introduced to defendant's customers at about the same time it was offered to The H. R. Nicholson Company, the California copartnership, as a part of the transaction of January 6, 1941.

In these particulars the record shows that appellant has used "Nicholson's Sunsweet" and "Sunsweet" interchangeably and without any fixed pattern, as its predecessors had done.

Up to January, 1943, the date of the government order freezing the manufacture and sale of concentrated citrus juices, the appellant conducted its business along the following lines:

Appellant, itself, does not manufacture concentrates made from citrus juices; it merely distributes to bottlers concentrates made by others. The concentrates thus distributed are orange, lemon, grapefruit and grape. It has an agreement with Mutual Orange Distributors, of Anaheim, California, giving it the exclusive right to distribute to bottlers of carbonated beverages the concentrates manufactured by Mutual Orange Distributors.

The concentrates shipped by Mutual Orange Distributors were packed in gallon cans, six to the carton, each can bearing a "Sunsweet" label and the labels were applied by Mutual Orange Distributors. Each of these labels bore mixing instructions and the notation "Distributed by H. R. Nicholson Company, Baltimore, Maryland, Chicago, Illinois, San Pedro, Calif." These labels were applied to "all shipments", which would include shipments on orders from "The H. R. Nicholson Company, San Pedro, California" or "The H. R. Nicholson Company, Chicago, Illinois".

In addition to the labels just referred to appellant has employed the "Nicholson Sunsweet" label in connection with samples sent to the trade. The label carries directions for making plain or carbonated water punch bowl beverages, water ice and sherbets and cake icings from the concentrates to which it was applied. They were printed in "quantities of possibly ten or fifteen thousand, or something like that" as a fairly widespread recommendation by appellant that its concentrates were useful and to be used for making products other than carbonated beverages.

With respect to soft drinks sold in bottles it is the appellant's practice to let the bottler furnish his own bottles and purchase the crowns from the appellant.

The labels were made "for bottlers of carbonated beverages who did not care to go to the expense of buying what we called a color applied label bottle."

The defendant commences its brief by stating a number of academic arguments discussing at length certain propositions claimed to be rules of law applicable to such actions. In its fifth point it finally contends that certain findings (referring to them by their respective numbers) are not sustained by the evidence. It then refers back to said discussions of legal propositions as sustaining its contention that said findings are not sustained by the evidence. As we understand the defendant it seeks by both methods to show that the facts proved were legally insufficient to support said findings. As we proceed we will examine each finding so attacked by the defendant and give it such consideration as we think should be given to it, but we will not go through a long record consisting of 370 pages of typewritten transcripts and more than a hundred exhibits and attempt to find error in the record.

The defendant asserts that the evidence shows it is engaged in processing certain fruit juices and selling wholesale the product for making "soda pop" and other beverages, whereas the plaintiff is engaged in processing prunes and preparing them for consumption as food. Such being the facts the defendant asserts there is not and cannot be any competition or infringement. That contention presents mixed questions of fact and law. As to all questions of fact involved this court and the parties are bound by the findings. Those findings are supported by the evidence hereinabove set forth. Commencing in 1922 the defendant and its predecessors were engaged in marketing fruit juices for beverage purposes. During that same period the plaintiff was engaged in processing prunes which could be used for food or for making prune juice.

[1-3] As shown by the facts hereinabove set forth the defendant was using and claiming the right to use trade marks very similar to those used by the plaintiff. The trial court found the facts in favor of the plaintiff and against the defendant. That ruling will not be disturbed unless the trial court abused its discretion. Sun-Maid Raisin Growers v. Mosesian, 84 Cal. App. 485, 494, 258 P. 630. Addressing ourselves to the first count of plaintiff's complaint pleading infringment of trade marks, it was not necessary that the plaintiff should prove actual confusion of goods. Del Monte Special Food Co. v. California Packing Corporation, 9 Cir., 34 F.2d 774, 775; Henry Muhs Co. v. Farm Craft Foods, D.C., 37 F.Supp. 1013, 1015. Addressing ourselves to the second count of plaintiff's complaint pleading unfair competition, the rule is the same. 24 Cal.Jur. 630; Restatement of the Law of Torts, §

728; Hoover Co. v. Groger, 12 Cal.App.2d 417, 419, 55 P.2d 529. The finding of the trial court that defendant's acts constituted unlawful competition was therefore sustained by the evidence.

[4] Closely allied to the last point the defendant contends that its products and the products of the plaintiff were not of the same "descriptive properties". Under the facts hereinabove recited we think the point must be ruled against the defendant. Four Roses Products Co. v. Small Grain Distilling & Drug Co., 58 App. D.C. 299, 29 F.2d 959. In that case the court held, quoting the first syllabus, "A malt syrup, intended for and actually used in home brew of alcoholic content, *held* as bearing on right to registration of trade-mark, within the meaning of the Trade-Mark Act (15 U.S.C.A. § 81 et seq.), to be of the same descriptive properties as whisky." Toward the end of that decision the court said: "As we have many times observed, the trade-mark registration act was designed to prevent and not to promote misrepresentation. The Patent Office, therefore, would have been justified in refusing appellant's application, quite apart from the opposition of the appellee." See also California Fruit Growers Exch. v. Windsor Beverages, 7 Cir., 118 F.2d 149.

The defendant cites and relies on John Sexton & Co. v. Schoenhofen Co., 50 App. D.C. 363, 273 F. 327. It is not in point. It held that grape juice, a fruit beverage, and ginger ale or root beer, cereal beverages, are not goods of the same descriptive properties. But in the instant case the goods sold by the plaintiff and those sold by the defendant were both fruit juices. It is manifest that they were of the same descriptive properties.

As applicable to the two points we have just discussed the defendant cites and relies on France Milling Co. v. Washburn-Crosby Co., 2 Cir., 7 F.2d 304. Because the facts are so different we do not consider the case helpful. Commencing in 1880 the defendant Washburn had built up a flour business. It sold its flour in barrels and bags. It sold under the name "Gold Medal". Among other customers it sold large quantities to the plaintiff. The plaintiff mixed the flour it purchased with certain ingredients and sold its flour for making pancakes. In 1904 it was awarded a gold medal prize at the Louisiana Purchase Exposition. Thereafter it used on its product the brand "Gold Medal". Business was so conducted down to the year 1923. At that time rumors reached France that Washburn intended to make a prepared flour and sell it under the name of "Gold Medal". France protested. In 1923 Washburn registered in the Patent Office the phrase "Gold Medal" as a trade name. In 1924 France petitioned the Patent Office to cancel said registration. Such registration "was cancelled by agreement". The record does not disclose that France ever applied for registration. Having set forth distinctly the foregoing facts, the court said (7 F.2d at page 305): "We likewise lay aside all arguments based on registration of marks; these litigants must both stand on what are usually (and not very accurately) called their 'common-law' rights, aided by such equities derived from conduct and lapse of time as may serve them." Thereupon the court held that France was properly awarded a decree enjoining Washburn from using "Gold Medal" on its prepared flour.

[5] The distinctions made by the defendant are not sound. The correct test to be applied was stated in Sun-Maid Raisin Growers v. Mosesian, 84 Cal.App. 485, 258 P. 630. In that case, 84 Cal.App. at page 497, 258 P. at page 635, the court said: "The authorities are fairly uniform to the effect that it is not necessary to prove actual fraud or deception, but this may be assumed where the facts indicate that a purchaser, exercising ordinary care, would be likely to be deceived by the imitation of a trade-mark."

In Del Monte Special Food Co. v. California Packing Corporation, 9 Cir., 34 F.2d 774, at page 775, the court said: "The injury to the appellee by the use of the Del Monte Brand by the appellant does not result from preventing sale by appellee of oleomargarine of its own, but from a representation to the public that it produces a product which it does not in fact produce and over which it has no control. Its reputation for quality is therefore placed to some extent in the hands of a corporation who owes it no allegiance and has no concern in maintaining the high reputation established by the appellee, and who may utilize that reputation to sell the public an inferior production. Thus every effort made by the appellee to increase the volume and variety of its products and maintain its high standard of quality by its systematic and expensive advertising campaign and by care in the preparation of its products redound to the benefit

of the appellant, which does not contribute in any manner to the expenditures involved in this vast undertaking, and whose only motive for the adoption of the same 'brand' is to get the advantage of appellee's name, reputation, and good will. The law of unfair competition has resulted from the application of a simple proposition to the extension and modern development of manufacturing and merchandising. The principle may be expressed in the language used by the various courts when dealing with the subject of unfair competition, as follows: 'That nobody has any right to represent his goods as the goods of somebody else.'"

[6, 7] The mere fact that the registrations of the plaintiff in the Patent Office were made under class 46 whereas the defendant's registration was made under class 45 is not necessarily determinative. In Henry Muhs Co. v. Farm Craft Foods, D.C., 37 F.Supp. 1013, at page 1015, the court said: "The modern doctrine is certainly to grant, to one who has established a trade-mark and good will in connection therewith, the use thereof *in any reasonable extension* of its business. Aunt Jemima Mills Co. v. Rigney & Co., 2 Cir., 247 F. 407, L.R.A.1918C, 1039; Waterman Co. v. Gordon, 2 Cir., 72 F.2d 272; Yale Electric Corp. v. Robertson, 2 Cir., 26 F.2d 972." (Italics ours.) And in California Fruit Growers Exch. v. Windsor Beverages, 7 Cir., 118 F.2d 149, 152, the court said: "From these and other precedents we conclude that it is now settled in this country that *a trade-mark protects the owner against not only its use upon the articles to which he has applied it but also upon such other articles as might naturally or reasonably be supposed to come from him. Protection extends to all goods of the same class even though the alleged infringement is not upon the same species of articles.*" (Italics ours.) Such rules were specifically applied in Sun-Maid Raisin Growers v. Mosesian, 84 Cal.App. 485, 258 P. 630. As stated with approval in California Fruit Growers Exch. v. Windsor Beverages, supra, 118 F.2d at page 152: "The real test is whether the use of identical or similar trade-marks would be likely to cause confusion or mistake in the minds of the public, to deceive purchasers,—where the challenged goods are sold in the same stores or distributed in the same manner. Here confusion is bound to result. It was the congressional intent to prevent such confusion and resulting mistake or deceit. Though the merchandise of others may be dissimilar, if the trademark is the same or similar, and the merchandise such as reasonably may be attributed to plaintiffs, deceit results. Decker & Cohn, Inc., v. S. Liebovitz Sons, Inc., 46 F.2d 179 [18 C.C.P.A., Patents, 781]; Goodrich Co. v. Hockmeyer, 40 F.2d 99 [17 C.C.P.A., Patents, 1068]. Surely bottled beverages bearing the name Sunkist belong to the same general class of merchandise as bottled fruit and vegetable juices sold under the same name. As Judge Baker said, speaking for this court, in Church & Dwight Co. v. Russ, C.C., 99 F. 276, 280, 'Goods are in the same class whenever the use of a given trade-mark or symbol or both would enable an unscrupulous dealer readily to palm off on the unsuspecting purchaser the goods of the infringer as the goods made by the owner of the trade-mark, or with his authority and consent.'" All of the facts being considered it is plain that the products of the plaintiff and those of the defendant are of the same class and descriptive properties.

[8] In its next point the defendant claims it holds a valid trade mark, properly registered, and that it has made a *continuous* and *prior* use of it. The vice in this claim is that it is not supported by the facts. The record shows that one of the defendant's predecessors applied for permission to register "Sunsweet" as a trade mark. Its application was refused and such predecessor changed its application and applied for and was given a registration as "Nicholson's Sunsweet". Said predecessor was never given a registration as "Sunsweet". Neither was the defendant nor any of its predecessors. Nevertheless the defendant and some of its predecessors have, without registry rights, or any rights, used the trade mark "Sunsweet". Such use, in the teeth of the registration laws, created no right in the defendant nor in the predecessors of defendant. Straus v. Notaseme Hosiery Co., 240 U.S. 179, 181, 36 S.Ct. 288, 60 L.Ed. 590.

As to the acts of the defendant and its predecessors in using "Sunsweet" as a trade mark when its registration had been refused, the defendant claims it but abbreviated the trade mark from "Nicholson's Sunsweet" to the word "Sunsweet". The contention is not new. A similar contention was made in John Morrell & Co. v.

Hauser Packing Co., 9 Cir., 20 F.2d 713. That court said:

"It further appears from the evidence that in June, 1897, plaintiff registered its trade-mark as 'Iowa's Pride,' and in October. 1916, as 'Dakota's Pride,' and in January, 1920, as 'Morrell's Pride'; never prior to 1922 as 'Pride' alone. Manifestly its present contention that 'Pride' alone has always been its actual trade-mark, and that the words used and registered in combination therewith are to be disregarded, is a conception to be attributed to recent necessity. * * *

"As said by the court below, within the scope of the complaint the question is not whether the word 'Pride' could, but whether it did in fact, become plaintiff's trademark prior to 1907. And we concur in answering the question in the negative. In the combination as actually used, and as registered, both words are given equal prominence, and to ignore one would be quite as arbitrary as to ignore the other. Both in the Patent Office and on the market, plaintiff declared its trade-mark to be, not 'Pride,' but 'Morrell's Pride,' or some other combination. Under such circumstances, the trade-mark must be deemed to consist of the combination. Armour & Co. v. Louisville P. Co., D.C., 275 F. 92; Id., 6 Cir., 283 F. 42."

[9] The defendant contends the word "Sunsweet" is merely descriptive of the process of curing and is not susceptible of being used as a trade mark. Patton Paint Co. v. Sunset Paint Co., 53 App.D.C. 348, 290 F. 323. The facts of that case show it is not helpful. Each of the cases depends on its own facts. Harlan-Wallins Coal Corp. v. Transcontinental Oil Co., 64 F.2d 122, 123, 20 C.C.P.A., Patents, 944. As to all facts the trial court has passed on them and has made its findings. Those findings are conclusive in this court. Bearing in mind that in the instant case we are considering findings of the trial court, that such findings sustain the claim of the plaintiff to the word "Sunsweet" accompanied by the design of a sunburst, it is settled law that a court of review will not "draw fine distinctions to upset the discretion of a trial court in awarding a preliminary injunction where the equities are so clearly in favor of the owner of a trade-mark over which he has exercised exclusive control and use for a period of 10 years or more." Sun-Maid Raisin Growers v. Mosesian, 84 Cal.App. 485, 493, 258 P. 630, 633.

[10] The defendant stresses the classification made in the U. S. Patent Office. Such classification is of importance, but it is not controlling. Harlan-Wallins Coal Corp. v. Transcontinental Oil Co., supra. In that case the court said it "has never deemed the Patent Office classification of articles to be of controlling importance in the ascertainment of whether two articles are of the same descriptive properties. In fact, we have many times held to the contrary." [64 F.2d 123.] In Aluminum Cooking Utensil Co. v. Sargoy Bros. & Co., D.C., 276 F. 447, at page 448, the court said: "Validity of trade-mark cannot depend upon classification or indexing by the Patent Office alone."

[11-13] The defendant contends the judgment was too broad in ordering it to account for all profits. It contends such order should have been limited to sales made in this state. It presents no authority showing that the judgment should have been so limited. We know of none. There was evidence that defendant did business in California, but the record does not show how much. The trial court did not take an account. As to unfair competition the second cause pleaded in plaintiff's complaint was a common law count charging the defendant had committed certain frauds. Plaintiff had the right to go into the trial court and ask for relief against fraud committed in this state. If perchance some acts of fraud were committed in other states such fact did not limit the jurisdiction of the trial court to proceed and hear all allegations of the complaint filed by the plaintiff. When equity takes jurisdiction it does so for all purposes. In 4 Pom.Eq. Jur., 4th Ed., sec. 1318, the author said: "Where the subject matter is situated within another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which *directly* affect and operate upon the person of the defendant, and not upon the subject matter, although the subject matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain acts toward it, and it is thus ultimately but *indirectly* affected by the relief granted. As examples of this rule, suits * * * for relief on the ground of fraud, actual or constructive, * * * and the like, may be brought in any state where jurisdiction of defendant's person is obtained, although the land or other subject matter is situated in another

state, or even in a foreign country." In actions to enjoin infringement of trade marks the above rule has been directly followed. Vacuum Oil Co. v. Eagle Oil Co., C.C., 154 F. 867, 875; Hecker-H-O Co., Inc., v. Holland Food Corp., D.C., 31 F.2d 794; Morris v. Altstedter, 93 Misc. 329, 156 N.Y.S. 1103. Furthermore the defendant's contention is premature. The trial court has ordered an accounting, but the record before us shows no evidence of any specific sales. If and when an accounting is had the question presented by the defendant may arise, however it has not arisen as yet. The defendant appeared, answered and fully participated in the trial. By its answer it denied nearly every allegation pleaded in plaintiff's complaint, and prayed for general relief. True it is that by its pleading it attempted to limit its appearance as special. It cites no authority supporting such procedure. Roberts v. Superior Court, 30 Cal.App. 714, 159 P. 465, states the rule fully. Under the facts the defendant made a general appearance and the contention which it now makes may not be sustained.

The judgment appealed from is affirmed.

NOURSE, P. J., and GOODELL, J., concur.




69 Cal.App.2d 237

## CITY OF SAN DIEGO v. VAN WINKLE et al.

Civ. 3351.

District Court of Appeal, Fourth District, California.

May 17, 1945.

1. Evidence ⇐25(2)

The Court of Appeal will take judicial notice of overcrowded conditions existing in San Diego area.

2. Injunction ⇐215

The suspension, during the war emergency and housing shortage, of enforcement of injunction which forever enjoined property owners from occupying or permitting any person to occupy property as a duplex or two-family dwelling in one-family zoning area, was not an abuse of discretion under evidence that duplex was occupied by two Army officers and their families, and that if they were to be evicted there were no dwellings available in the vicinity.

3. War ⇐4

Everything that is covered by Emergency Price Control Act, and that does not unreasonably invade private rights, is within power of congressional legislation under the Constitution, and hence, in congested area where continuity of war activity depends upon facilities available to war workers, the act and regulations promulgated thereunder are part of rental contract, so that the government, as the agency intrusted with enforcement of that right, is in effect a party to the contract. Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix § 901 et seq.; U.S.C.A.Const. art. 1, § 8.

4. Injunction ⇐215
War ⇐4

The enforcement of injunction enjoining defendants from occupying or permitting occupancy of property as a duplex or two-family dwelling in one-family zoning area was properly suspended during war emergency and existing housing shortage, where, under O.P.A. rent regulations, the army officers occupying the dwelling could not be evicted and any action of ejectment would probably result in injunction by the federal courts. Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix § 901 et seq.

5. States ⇐4

Federal laws or regulations passed under constitutional authority suspend state or local laws or regulations in conflict with them.

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by the City of San Diego against Peter Van Winkle and another to enjoin defendants from violating a city zoning ordinance. From that portion of a judgment which suspended the enforcement of the injunction which forever enjoined defendants from occupying or permitting any person to occupy the realty and dwelling described as a duplex or two-family dwelling,

during the war emergency and housing shortage, the plaintiff appeals.

Affirmed.

J. F. DuPaul, City Atty., and Bertrand L. Comparet, Deputy City Atty., both of San Diego, for appellant.

Luce, Forward, Lee & Kunzel, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from that portion of a judgment which, during the present war emergency and present housing shortage in La Jolla in the city of San Diego, suspended the enforcement of its provisions which "forever enjoined (defendants) from using, occuping or permitting any person to use or occupy the real property and dwelling described in plaintiff's complaint as a duplex or two-family dwelling, or for any use or purpose not permitted in an 'R–1 Zone' under the terms of the Ordinance of the City of San Diego."

Defendants are the owners of the real property in question located in La Jolla in the city of San Diego. It is situated in Zone R–1 as defined in the Zoning Ordinance of that city. Only single family dwellings can be erected in that zone.

In February, 1942, defendants commenced the erection of the building in question, which was completed in June. It was erected as a duplex, or two-family dwelling, in admitted violation of the Zoning Ordinance, although the trial court found that this violation was due to the mistake and misapprehension of defendants to the effect that authority had been granted for a variance in the Zoning Ordinance permitting them to erect the two-family building.

The trial court found on sufficient evidence that the building was a new modern structure of attractive appearance; that it did not seem to be a duplex or two-family residence; that in appearance, maintenance or occupancy the building was not a detriment to the property or its vicinity; that several other two-family dwellings have been maintained in the vicinity, though erected prior to the effective date of the Zoning Ordinance. The evidence shows that the houses on each side of the building of defendants, and adjoining it, are two-family dwellings.

[1] The apartments are occupied by two officers in the Armed Forces of the United States on active duty, together with their wives. One was a Major in the Marine Corps and the other a Captain in the Army. Both testified they had searched diligently and unavailingly for other living quarters. The Major testified that he had searched from San Clements, in Orange County, to San Diego, both inclusive, without success. There is other evidence of the overcrowded conditions existing in this area. The members of this Court may take judicial as well as actual notice of these conditions. The finding to the effect that if either of the officers were evicted from his apartment he "would be unable to find other accommodations in La Jolla or San Diego or any other place within a reasonable distance of their stations" is undoubtedly true, as is the further finding "that large numbers of the families of officers and men of the Armed Forces of the United States are now unable to find any accommodations reasonably or decently suited for their use." It was also found "that the public interest would not be jeopardized by the continuance of the use of said building as a two-family dwelling during the present emergency; and that it would be in the interest of the public generally and to the Armed Forces of the United States and the officers and families thereof to permit the continued use of the said premises during the present war emergency as a two-family dwelling."

Plaintiff argues that zoning ordinances are an exercise of the police power to promote the general welfare; that if the zoning ordinances are not arbitrary, discriminatory nor oppressive the courts must enforce them on the suit of a public agency. Citing, Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A.L.R. 1479; City of Stockton v. Frisbie & Latta, 93 Cal.App. 277, 270 P. 270; Kort v. City of Los Angeles, 52 Cal.App.2d 804, 127 P.2d 66. It is further argued that where the municipality is seeking to enforce its own zoning ordinance and proves a clear case of violation of its terms the trial court must enforce the ordinance as a matter of right and has no discretion to either refuse or to stay an injunction.

Defendants admit the foregoing rules when it is understood that they are broadly stated and generally applied. They argue, however, that when, as here, the immediate enforcement of the provisions of the zoning ordinance in this and other similar cases will do no good except to satisfy the esthetic senses of certain officials and some

citizens, and that its immediate enforcement will harm members of the Armed Forces and war workers by depriving them of places to live and will thus hamper the war effort of the United States, the trial judge should have the discretion of suspending the execution of the injunction during the present war emergency and housing shortage in this locality. They rely on such cases as Willis v. Lauridson, 161 Cal. 106, 118 P. 530; Blackfield v. Thomas Allec Corp., 128 Cal.App. 348, 17 P.2d 165; Vesper v. Forest Lawn Cemetery Ass'n, 20 Cal.App.2d 157, 67 P.2d 368; Helms Bakeries v. State Board of Equalization, 53 Cal.App.2d 417, 128 P.2d 167.

The case of Fairchild v. Raines, 24 Cal.2d 818, 151 P.2d 260, 264, was an action based on a contract which provided that the occupancy of certain lots in Pasadena be restricted to members of the Caucasian race until January 1, 1950. The defendants, colored Americans, were enjoined from occupying one of the restricted lots. The Supreme Court reversed the judgment and in considering the judicial discretion involved in an injunction case, said:

"It is the general rule that the granting or withholding of equitable relief involves the exercise of judicial discretion. (Vesper v. Forest Lawn Cemetery Ass'n, 1937, 20 Cal.App.2d 157, 163, 67 P.2d 368; Diederichsen v. Sutch, 1941, 47 Cal.App.2d 646, 649, 118 P.2d 863.) It is likewise true, as a general rule, that 'the equity courts will not enforce restrictive covenants by injunction in a case where, by reason of a change in the character of the surrounding neighborhood, not resulting from a breach of the covenants, it would be oppressive and inequitable to give the restriction effect, as where the enforcement of the covenant would have no other result than to harass or injure the defendant, without benefiting the plaintiff.' (Hurd v. Albert, 1931, supra, 214 Cal. 15, 23, 3 P.2d 545, 548, 76 A.L.R. 1348.) As was said in Trustees of Columbia College v. Thacher, 1882, 87 N.Y. 311, 317, 41 Am.Rep. 365, 367, 'It certainly is not the doctrine of courts of equity, to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case * * *.'"

[2] In the instant case the trial court did grant the injunction sought by plaintiff but suspended its execution during the present war emergency and the existing housing shortage in San Diego. We believe this to be a wise, equitable and judicious exercise of a judicial discretion under all of the circumstances of this case. The trial court should weigh the equities between the parties and should not lose sight of the results that would follow the immediate and strict enforcement of an injunction. The house with its two kitchens is doing no actual harm or damage to anyone. It is providing habitation to two officers of the United States who are devoting their time and energy to the defense of all of us. The plaintiff city "is seeking to enforce a statutory standard which is at least an approach to an ideal of living conditions rather than the specifications of a minimum of what a people engaged in a war can get along with" (Realty Revenue Corp. v. Wilson, 181 Misc. 802, 44 N.Y.S. 2d 234, 236), and is endeavoring to enforce an ordinance which will result in an officer and his wife being ejected from their home when there is little chance of their finding another place to live, if the injunction could be enforced. Under these circumstances we must conclude that the trial judge was vested with a discretion, and that suspending the enforcement of the injunction during the war emergency and the housing shortage was a wise and judicious exercise of that discretion.

Nothing that we have said should be construed as prohibiting the city of San Diego from preventing the future construction of multiple dwellings in Zone R–1.

There is another and what we believe a stronger reason for upholding the judgment in this case. Although it was not presented to the trial judge it deserves consideration here.

Section 6(a) of "Rent Regulation for Housing" issued by the Office of Price Administration under authority of the Emergency Price Control Act of 1942, 50 U.S.C. A.Appendix § 901 et seq., effective in San Diego, contains the following:

"So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or oth-

erwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, * * *" Exceptions follow which are not material here.

Such provisions of law are not new to American jurisprudence. The State of New York passed a law of similar import as a sequence to the activities following the First World War. Chapter 942 et seq. N.Y. Laws 1920, Ex.Sess. This act was upheld as a constitutional exercise of the police power of the State by the Court of Appeals of New York. People v. La Fetra, 230 N.Y. 429, 130 N.E. 601, 16 A.L.R. 152. The Supreme Court of the United States reached a similar conclusion in the case of Marcus Brown Holding Co., Inc., v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877.

A quite similar law was passed by the Congress and made applicable to the District of Columbia. Act of Oct. 22, 1919, C. 80, Title 2, 41 Stat. 298—District of Columbia Rents. This act was upheld by the Supreme Court of the United States. Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165.

It was further held in Chastleton Corp. v. Sinclair, 264 U.S. 543, 4 S.Ct. 405, 68 L.Ed. 841, 843, that the provisions of the law became inoperative after the housing emergency had passed.

The effect of Section 6(a) of the Rent Regulation for Housing as applied in San Diego, was considered in the case of Brown v. Lee in the United States District Court, Southern District of California, 51 F.Supp. 85. Mrs. Lee owned residential rental property in San Diego which was occupied by tenants who were not injuring the property and were paying the rent. She desired to withdraw the property from the rental market but did not intend to occupy it herself. She gave the tenants the notices to vacate, required by California law, and upon their failure to surrender possession sought to eject them through an action in the municipal court of the city of San Diego. She recovered judgment which she proposed to enforce by process. The administrator for the Office of Price Administration brought an action in the United States Court to enjoin Mrs. Lee from enforcing her judgment and ejecting her tenants. He was successful in his action.

[3] The question of a preliminary injunction was argued before and decided by the Hon. Paul J. McCormick who rendered an opinion on March 23, 1943.[1] It was held that the Emergency Price Control Act of 1942, and the Rent Regulation for Housing adopted under its provisions, were a constitutional exercise of the power granted to Congress, Art. I, Sec. 8, U.S.Const., "to wage successful war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval forces, to provide for the common defense and general welfare of the United States"—to adopt the language of the Honorable District Judge. He said further: "The Act itself is founded in the environment of the war effort, and that everything that is covered by the Act, and that does not unreasonably invade private rights, is within the power of Congressional legislation under the provisions of the Constitution that I have mentioned. If, as was the case under the selective service decisions of the Supreme Court in World War I, the individual is subject to involuntary induction into the Army, it seems to me there is less reason to say that the property owner can conduct himself, with respect to the occupancy of his property by others, as he pleases. * * * So here, in a congested area, such as San Diego, where the continuity of war activity depends upon the facilities that are available to war workers in that area, it seems to me it becomes a part of the contract of tenancy and all of those regulations that are properly promulgated under the price control act are a part of that contract in and of itself; so that when a property owner rents his property to a tenant, except for the provisions that are covered in the regulations, the tenancy itself is a part of the contractual right, and the Government, as the agency intrusted with the enforcement of that right, is, in effect, a party to the contract."

[4] The only conclusion to be drawn from the foregoing authorities is that under the facts disclosed the defendants cannot evict the Army officers from the rented premises.

If the execution of the judgment in the instant action had not been stayed by the trial court, defendants would be compelled

[1] No opinion for publication.

to attempt to eject one of the officers. Any action of ejectment could be successfully defended under the regulations above quoted. Such an attempt could and probably would result in an injunction by the Federal Courts. The defendants could not obey both court orders. This brings this case squarely within the rule announced in the case of Realty Revenue Corp. v. Wilson, 182 Misc. 552, 50 N.Y.S.2d 941, 942.

The Realty Revenue Corporation owned an apartment house in the city of New York which did not conform to the health and safety laws. As stated by the court, "The most important of the alleged violations consist of the failure to provide a sprinkler system, an interior fire alarm system and fire proof self-closing doors from apartments to public stair halls." The Commissioner of Housing and Buildings of the City of New York required the owner to cause the building to be vacated "as unfit for human habitation and dangerous to life and health" by reason of the defects mentioned.

The owner brought the action to enjoin the Commissioner from enforcing the order. It developed that the War Production Board had refused to give a priority to the owner for materials necessary to make the required changes so the owner was unable to make the building safe and to conform with the requirements of the law. There were about 500 people living in the apartment house. The Supreme Court adopted certain portions of the opinion of the trial judge, from which we quote the following:

"Contrary to what perhaps may be a popular impression, the constitutionality of law depends, not upon abstract theories of philosophy, but upon a very practical application of laws to facts, and a statute which is valid as to one set of facts may be invalid as to another, and one which is valid when enacted may become invalid by change in the conditions to which it is applied. Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 414, 415, 55 S.Ct. 486, 79 L.Ed. 949; Municipal Gas Co. of City of Albany v. Public Service Commission, Second Dist., 225 N.Y. 89, 95, 96, 121 N.E. 772 (773, 774). Owners of multiple dwellings may be subjected to uncompensated obedience to many regulations which are costly and burdensome to them, but to enforce against them regulations which the Federal Government says they shall not comply with would be an unreasonable and unconstitutional deprivation of their rights. State commands and Federal prohibitions cannot be allowed to become upper and nether millstones between which the rights of citizens are ground to bits. * * * The commissioner will not be stayed if walls, floors or ceilings are falling down, or if unsanitary conditions make disease imminent. It thus may be that if inability to get materials continue for a long period there may come a time when owners of such dwellings will have to submit to having them vacated. Upon the papers now presented it does not appear that that point has been reached in this case. * * * The State's statutory standard stands upon the statute books capable of enforcement whenever and wherever the Federal prohibition does not interfere, but while the Federal prohibition continues, and in those cases to which it applies, the State's statutory standard remains in suspended animation."

It was concluded that as the apartment house was "reasonably safe for human habitation" the Commissioner of Housing and Building of the City of New York should be enjoined from enforcing the order to vacate the building "during the present emergency or until such time as the War Production Board releases the required materials."

[5] The doctrine that federal laws or regulations passed under constitutional authority suspend State or local laws or regulations in conflict with them is not new. In State of Florida v. Mellon, 273 U.S. 12, 47 S.Ct. 265, 266, 71 L.Ed. 511, it was said:

"The act is a law of the United States, made in pursuance of the Constitution, and therefore the supreme law of the land, the Constitution or laws of the states to the contrary notwithstanding. Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield. Ex parte [State of] Virginia, 100 U.S. 339, 346, 25 L.Ed. 676; Brown v. Walker, 161 U.S. 591, 606, 16 S.Ct. 644, 40 L.Ed. 819; Cummings v. Chicago, 188 U.S. 410, 428, 23 S.Ct. 472, 47 L.Ed. 525; Lane County v. Oregon, 7 Wall. 71, 77, 19 L.Ed. 101." See also, Miller v. Kaliwerke Aschersleben Aktien-Gesellschaft, 2 Cir., 283 F. 746; Brenen v. Dahlstrom Metallic Door Co., 188 App. Div. 685, 178 N.Y.S. 846.

We have reached the conclusion that the trial court was not guilty of any breach of discretion in suspending the execution of the injunction during the present war emer-

gency and the existing housing shortage in San Diego, and that he was fully justified in exercising his equitable powers in so doing.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.




**HANSEN v. BEAR FILM CO., Inc., et al.***

**Civ. 12664.**

**District Court of Appeal, First District, Division 2, California.**

**April 30, 1945.**

**As Modified on Denial of Rehearing May 29, 1945.**

**Further Rehearing Denied June 28, 1945.**

**Hearing Granted July 26, 1945.**

**1. Trusts ⇐21(2)**

Declaration of trust, whether written or oral, must be reasonably certain in its material terms, and such requisite of certainty includes the subject matter or property embraced within the trust, beneficiary or person in whose behalf it is created, nature and quantity of interests which they are to have, and manner in which trust is to be performed.

**2. Trusts ⇐44(1)**

An express oral trust of preferred stock transferred by son, since deceased, to his mother for benefit of son, could not be spelled out of circumstantial evidence, even if transaction viewed as an outright gift was unnatural, where terms of alleged oral trust could not be spelled out with reasonable certainty.

**3. Trusts ⇐110**

A transfer of preferred stock by son, since deceased, to his mother, did not create a constructive or resulting trust in the stock in favor of son, in absence of any evidence of overreaching of son by mother.

**4. Evidence ⇐269(3)**

Declarations, oral and written, by son, since deceased, not made in presence or to prove knowledge of mother, that son owned stock of film company which he organized together with another person, which declarations were made after purported transfer of stock to mother, were admissible on issue of delivery of stock to mother.

**5. Evidence ⇐236(3)**

Where legal title to stock in film company which plaintiff's decedent had organized together with another person had passed from decedent to his mother by virtue of delivery of the stock, decedent could not disparage that title by any subsequent declaration.

**6. Trusts ⇐81(4)**

The validity of finding of a resulting trust in favor of plaintiff's decedent in common stock of film company organized by decedent during his lifetime together with another person, following transfer of the stock from other organizer to decedent's mother, depended upon whether evidence would support conclusion that consideration for the transfer was paid by decedent, and that the transfer was made to decedent's mother. Civ.Code, § 853.

**7. Trusts ⇐62**

A resulting trust may be created in personal property as well as in real property. Civ.Code, § 853.

**8. Trusts ⇐72**

Purchase-money resulting trusts are based upon the ancient equitable principle that beneficial estate follows consideration and attaches to the party from whom the consideration comes.

**9. Trusts ⇐81(4)**

Fact that son made himself the medium by which legal title to common stock of film company organized by him together with another was transferred to his mother from other organizer would not prevent purchase-money resulting trust in favor of son from attaching upon proof that son paid consideration for the transfer. Civ. Code, § 853.

**10. Trusts ⇐86**

Where son was obliged to make payment for common stock in corporation organized by him together with another person which was transferred to his mother from other organizer, and it appeared that son indorsed his salary check to mother and that she in turn paid amount of such salary check to other organizer with her own check, inference could be drawn that such payment on stock was in fact made by son through agency of mother, as regards issue of resulting trust. Civ.Code, § 853.

**11. Corporations ⇐155(2)**

The right to receive dividends is an incident to ownership of corporate stock,

* Subsequent opinion 168 P.2d 946.

and the owner of the stock at date the dividend is payable is entitled to receive it without regard to when earnings were accumulated.

**12. Trusts ⇐83**

If purchase price is paid for beneficiary by grantee, a trust will result in beneficiary's favor. Civ.Code, § 853.

**13. Trusts ⇐83**

Fact that beneficiary has assumed a binding legal obligation to pay for property is sufficient to raise a resulting trust. Civ. Code, § 853.

**14. Trusts ⇐89(3)**

Evidence supported finding that payment of $10,000 on purchase price of common stock in corporation organized by plaintiff's decedent during his lifetime together with another person, which stock was transferred to mother of decedent by other organizer, was made by mother for benefit of decedent and in pro tanto satisfaction of his obligation, as regards issue whether resulting trust arose in favor of decedent. Civ.Code, § 853.

**15. Trusts ⇐78**

Where plaintiff's decedent during his lifetime entered into agreement with one with whom he organized corporation whereby other organizer was to transfer his common stock in company to mother of decedent upon payment of purchase price by decedent, payments of installments on the purchase price by the corporation and charged to account of decedent were payments by decedent, as regards issue whether a resulting trust arose in his favor. Civ. Code, § 853.

**16. Gifts ⇐47(1)**

Fact that other objects of payor's bounty would be unjustly discriminated against if transfer of common stock in company to mother upon payment of purchase price by son, since deceased, was construed as a gift, was entitled to be weighed against claimed presumption of a gift arising out of relationship of the parties.

**17. Gifts ⇐47(1)**

Presumption of gift of common stock in company organized by son, since deceased, and another person based on transfer of the stock to decedent's mother from other organizer upon payment of purchase price by son, if any, was sufficiently rebutted, where son would be stripped completely of control of company and son's daughter would be unjustly discriminated against if transfer was construed as a gift.

**18. Trusts ⇐372(3)**

Evidence supported finding that a son in accepting transfer from mother of common stock in company which had been controlled by deceased brother during his lifetime took stock with notice of equities of estate of deceased brother, and that he was not a purchaser for value and without notice of any trust.

**19. Appeal and error ⇐1071(6)**

Where only support in evidence for affirmative defense that transfers by son to his mother of stock in company organized by him and another person were made to evade payment of federal income taxes was found in saving of income tax on dividends declared on preferred stock, and evidence did not support a finding of resulting trust for son in the preferred stock, failure to make finding on the issue presented by the affirmative defense was immaterial.

**20. Limitation of actions ⇐197(2)**

Facts justified finding that statute of limitations did not commence to run against action to establish resulting trust in corporate stock in favor of plaintiff's decedent until plaintiff's actual discovery of the facts, by reason of misrepresentation and wrongful concealment of defendants who were plaintiff's grandmother and uncle, and in whom plaintiff reposed confidence.

**21. Limitation of actions ⇐104(1)**

Where defendant is guilty of fraudulent concealment of cause of action, the statute of limitations is deemed not to become operative until aggrieved party discovers existence of the cause of action.

**22. Limitation of actions ⇐104(1)**

Where one of coadministrators of estate of decedent concealed facts from her other coadministrator which would show a cause of action against first administrator to establish a resulting trust in corporate stock in favor of decedent, the concealment would prevent statute of limitations from running against the action until actual discovery of the facts.

**23. Trusts ⇐365(4)**

Where defendants' concealment of facts tolled statute of limitations until actual discovery thereof, and action was commenced almost immediately after discovery

first started the statute to run, plaintiff was not guilty of laches in bringing the action.

**24. Executors and administrators ⇐434(2)**

After death of person operating corporation, the corporation was not entitled to pay alleged debts of the person and take credit for those payments in accounting to his estate. Probate Code, §§ 703, 710, 711.

**25. Money paid ⇐1**

One who officiously intrudes himself into business which does not concern him has no right to compel reimbursement in absence of a subsequent promise on part of debtor to repay.

**26. Executors and administrators ⇐202(1)**

Where corporation paid salary of person who was in charge of its operation in advance, and such person died before full period of service for which he had been paid, corporation was entitled to a pro tanto recovery.

**27. Appeal and error ⇐1011(1)**

Trial court must weigh evidence even where witness gives conflicting or inconsistent testimony on direct and cross examination.

**28. Corporations ⇐308(11)**

In action to recover bonus credited to plaintiff's decedent on books of defendant company at end of 1928, evidence supported finding that minutes of purported meeting of directors of corporation accepting offered refund of the bonus were actually written and placed in minute book after decedent's death and were ineffective.

**29. Corporations ⇐308(11)**

In action to recover $10,000 bonus credited to plaintiff's decedent on books of defendant company at end of 1928, evidence, including payment of bonus of $10,000 in 1927 to plaintiff's decedent without formal corporate action, supported finding that the only other stockholder knew of and consented to crediting of similar bonus in 1928 to decedent.

**30. Executors and administrators ⇐52**

Evidence supported finding that corporation was liable to estate of person who had been in charge of corporation upon his death for $5,000 which he had advanced to the corporation.

**31. Judgment ⇐707**

Where action commenced by company against estate of decedent who had been in control of company during his lifetime to determine interest, if any, of estate in branch operated by company was filed at time one of coadministrators of his estate was dominating the company, judgment was not res judicata of right of decedent's successor in interest to amount allegedly advanced to company's branch.

On Petition for Rehearing.

**32. Payment ⇐4**

One may satisfy debt of another by payment to creditor if creditor accepts the payment.

**33. Trusts ⇐83**

Where payment of $10,000 on purchase price of common stock in corporation organized by plaintiff's decedent during his lifetime together with another person, which stock was transferred to mother of decedent by other organizer, was made by mother for benefit of decedent and was intended in satisfaction of decedent's obligation, the payment operated to create a resulting trust pro tanto for decedent. Civ.Code, § 853.

**34. Trusts ⇐83**

Where plaintiff's decedent during his lifetime entered into agreement with one with whom he organized corporation, whereby other organizer was to transfer his common stock in company to mother of decedent upon payment of purchase price by decedent, and agreement recited that $10,000 was "payable upon execution of this agreement, receipt whereof is hereby acknowledged", fact that agreement acknowledged payment did not show that decedent did not assume any obligation to pay the $10,000, as regards issue whether resulting trust arose in favor of decedent. Civ.Code, § 853.

**35. Injunction ⇐72**

Where dividends on preferred stock were declared at time when common stock in company was wrongfully withheld from plaintiff and without her participation and consent, equity could cancel the dividends declared but unpaid for purpose of preserving the status quo as to unpaid dividends until plaintiff could assume her position as owner of the common stock.

**36. Appeal and error ⇐1176(2)**

Where, on evidence, trial court should have entered judgment for defendants on issue whether preferred stock was held in

trust for plaintiff's decedent, District Court of Appeal had power to order that to be done. Code Civ.Proc. § 956a.

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Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Virginia J. Hansen against Bear Film Company, Inc., etc., and others involving issue as to whether stock in defendant company was held in trust for plaintiff and plaintiff's right to recover money judgment against defendant corporation for amounts allegedly due to plaintiff's decedent. From a judgment for plaintiff, the defendants appeal.

Judgment in accordance with opinion.

Brobeck, Phleger & Harrison, of San Francisco, for appellants, Alice Carmody Hansen, Robert Carmody Hansen, and Florence Josephine Hansen.

Richard S. Goldman and Gorman R. Silen, both of San Francisco (A. B. Bianchi, of San Francisco, of counsel), for respondent.

DOOLING, Justice pro tem.

Plaintiff, the respondent on this appeal, is the daughter of Oscar C. Hansen. Oscar (throughout this opinion the various members of the Hansen family are, for convenience, referred to by their first names) in 1919 was an employee of Wakelee's Drug Store in San Francisco and Warren S. Quinn was its manager. In that year Oscar and Quinn started a small photo-finishing business. In 1921 this business was incorporated as Bear Film Co. with a capital stock of 5000 shares, 2500 thereof being issued to Oscar and 2500 to Quinn. At the time of incorporation the assets of the business were stated in an application to the corporation commissioner to have a value of approximately $9,775. Oscar was elected president of the corporation, a position which he occupied continuously to the date of his death, and at all times was in the active charge and management of the corporate business, Quinn taking no active part therein. In 1924 the articles of incorporation of Bear Film Co. were amended to change its stock from a single class to 2500 shares of preferred and 2500 shares of common stock, the holders of the preferred being entitled to 70% of the assets on distribution. The old stock was thereupon surrendered and the new preferred stock was issued to Oscar (one share being issued to his nominee) and the new common stock was issued to nominees of Quinn, thereby in effect increasing Oscar's interest in the assets of the corporation from 50% to 70% and correspondingly decreasing Quinn's interest therein.

Virginia, Oscar's only child, was born October 18, 1916. She lived with her mother Fay and Oscar until some time in 1920 when Fay left Oscar and went to live in Michigan, taking Virginia with her. From that time until his death, on April 26, 1929, Oscar saw Virginia only twice, each time when a business trip enabled him to see her in Michigan. Oscar secured a final decree of divorce from Fay in San Francisco on the ground of desertion and Fay thereafter married one Bixby in Michigan. Oscar, after the divorce, contributed the sum of $25 per month for Virginia's support.

From the date of the separation from his wife in 1920 until the time of his death Oscar lived in San Francisco with his mother, Josephine. On or about November 2, 1926, Oscar signed an instrument in writing, reading, so far as material, as follows:

"Whereas, the undersigned, O. C. Hansen is the owner of twenty-four hundred and ninety-nine (2499) shares of the preferred stock of the Bear Film Co. evidence by certificate No. 1, standing in his name, and

"Whereas the undersigned, O. C. Hansen, is also the owner of one share of the preferred stock of the said Company evidenced by certificate No. 2 * * * endorsed * * * to O. C. Hansen, and

"Whereas O. C. Hansen intends to divest himself of title to the said stock and vest such title absolutely in Josephine T. Hansen,

"Now, Therefore, for value received O. C. Hansen hereby transfers and assigns all his right, title and interest in the said twenty-five hundred (2500) shares of the preferred stock of the Bear Film Co. evidenced by the said certificates number 1 and 2 to Josephine T. Hansen."

The trial court found that on or about November 2, 1926, Oscar delivered this document to Josephine and at the same time surrendered the certificates referred to therein, properly endorsed, and caused to be issued a certificate numbered 4 for 2499 shares of the preferred stock in Josephine's name and delivered said certificate to Jose-

phine and caused to be issued in his own name a certificate numbered 3 for one share of the preferred stock.

Following the date of these transfers and on November 8, 1926, Josephine was elected a director and vice-president of the corporation. At a directors' meeting on November 16, 1926, Oscar's salary, which had theretofore been $500 per month, was increased to $1250 per month "same to be retroactive from January 1st, 1926," and Oscar was also voted a bonus of $10,000 "in consideration for services rendered in the past." On November 24, 1926 a dividend of $4.20 per share on the preferred stock and $1.80 per share on the common stock was declared payable January 10, 1927. This was the first dividend declared by the company since 1922 when a dividend of 50 cents per share had been declared and paid.

On February 5, 1927, Oscar and Quinn entered into an agreement whereby Quinn agreed to sell the 2500 shares of common stock to Oscar for $30,000, of which $10,000 was to be paid in cash and the balance of $20,000 in monthly instalments of $750 each with interest on overdue instalments at the rate of 7%. To secure the payment of this balance Oscar agreed: 1. To execute and deliver to Quinn a promissory note. 2. That the payment of this note should be guaranteed by the Bear Film Co. 3. As collateral to assign to Quinn certain policies of insurance on Oscar's life aggregating $13,000 and to procure an additional policy for $2000 and assign the same as collateral to Quinn.

One of the provisions of the promissory note so agreed to be executed and delivered by Oscar to Quinn was in the following language:

"It is further agreed that the entire unpaid balance of the principal sum shall immediately become due and payable in the event that the undersigned shall voluntarily dispose of the controlling interest of Bear Film Co., a corporation * * *."

At a meeting of the directors of Bear Film Co. on February 5, 1927, the same day as the execution of Oscar's agreement with Quinn, all directors including Josephine being present, a resolution was unanimously adopted reciting that:

"Whereas O. C. Hansen is about to execute to Warren S. Quinn a promissory note in words and figures following, to-wit: (Then follows a complete copy of the note.)

"Now, Therefore, it is hereby Resolved that the president and secretary of this corporation in its name, and on its behalf, contemporaneously with the execution of the said promissory note by O. C. Hansen execute a guarantee of the said promissory note in the following form * * *."

The trial court found that in performance of said agreement of sale Quinn "delivered all the certificates evidencing his ownership of all said common stock to Oscar C. Hansen on or about February 18th, 1927, and Oscar C. Hansen caused 2490 of said shares to be immediately placed in the name of Josephine T. Hansen and ten of said shares in the name of Nieta Drake, a nominee of Oscar C. Hansen on the books of the corporation. The certificates evidencing said 2490 shares of common stock were delivered to Josephine T. Hansen at the time of said transfer."

The court further found that the down payment of $10,000 was made to Quinn by a personal check of Josephine and that the source of this $10,000 was the payment to Josephine on January 10, 1927 of the dividend of $4.20 per share declared in November on the preferred stock of Bear Film Co.; and that the first monthly payment of $750 was paid by Josephine's check and that this $750 was derived from a salary check of $750 delivered to Oscar by the corporation and by Oscar endorsed and delivered to Josephine who deposited it in her account. All subsequent monthly payments up to the time of Oscar's death were made by Bear Film Co. to Quinn and charged by Bear Film Co. against Oscar's salary on its books. At Oscar's death a balance was still owing to Quinn. This balance was paid by checks of the Bear Film Co. as follows: April 20, 1929, $750; May, 1929, $750; and June, 1929, the balance with the accumulated interest, $1413.10. Each of these payments made after Oscar's death was likewise charged against Oscar's account.

Between the time of the transfers of the shares of the preferred and common stock to Josephine and Oscar's death he was in practically complete control of the corporation. With the exception of the disputed minutes of December 31, 1928, and March 29, 1929, hereafter discussed, the minute book shows the minutes of no meeting from February 21, 1927, until after the date upon

which Oscar died. It does show two resolutions authorizing the borrowing of money under date of March 30, 1927, and February 16, 1928, with no supporting minutes, and it contains during that period 25 slips, uniform in language, reciting that there being no quorum present at the regular monthly meeting the meeting was adjourned. At the end of 1927 a bonus of $10,000 was credited to Oscar on the books and at the end of 1928 a similar credit was given him, both without any formal corporate action. The court found in this regard that:

"There was not during that time a total disregard by Oscar C. Hansen of the corporate entity, but there was a disregard of the corporate entity in this: that during all said time the board of directors of said corporation was under his complete dominance, control and direction and all the members of said board relinquished entirely to him their discretion and judgment in all corporate matters, and were not called upon to give, and did not give, any suggestions or advice respecting the control or management or direction of said corporation, nor did they assert their right to do so."

On February 21, 1927, Oscar and Josephine executed a document consenting to the reduction of the number of directors of the corporation from four to three. In this, over their signatures, it is recited that Josephine is the owner and holder of 2499 shares of the preferred stock and 2490 shares of the common stock and Oscar is the owner and holder of one share of the preferred stock of Bear Film Co.

Oscar died suddenly of a heart attack on April 26, 1929. Two brothers survived him, Charles, who was an invalid living in the San Francisco Bay area, and Albert, who was a member of the faculty of Purdue University in Indiana. Albert came immediately to San Francisco and was asked by Josephine to look after her interest and manage the Bear Film Co. He demurred to giving up his professional career which included in addition to his professional work at Purdue the writing of scientific articles for various publications. According to the books and records of the corporation Josephine was the apparent owner of all of the stock of Bear Film Co. Albert declined to give up his professional career unless Josephine transferred this stock to him. On June 25, 1929, Josephine and Albert entered into a written agreement which recited that because Albert agrees to sacrifice his professional career at Purdue University and discontinue his work as author of articles for various magazines and other publications in order to take over the active management of the Bear Film Co. Josephine agrees "to sign over" all the stock of the Bear Film Co. now in her name, provided: 1. That Josephine be placed on the payroll of the corporation for life at a salary of $300 per month. 2. That Albert shall have no interest in any other property of Josephine. And 3. That either before or after Josephine's death Albert shall contribute $10,000 to establish a trust fund for the benefit of Charles. Some shares of stock had already been transferred to Albert before the date of this agreement and the transfer of all of them was completed some time in September.

Charles was dissatisfied with the transfer of the stock to Albert without further provision for him and in December, 1929, Charles was put on the payroll of the company at $100 per month. Charles, still dissatisfied, induced his mother to employ an attorney and, after negotiations, a new agreement was entered into on March 19, 1930 between Josephine, Albert and Charles. This agreement confirmed the transfer of the stock to Albert and contained elaborate provisions for the benefit of Josephine, Charles and Charles' children, reserving the right to Albert to terminate his obligations thereunder at any time by retransferring the stock to Josephine. Following this agreement Albert continued to be the record owner of all of the stock, in his name and through nominees, except that in 1939 he transferred 500 shares of the preferred and 500 shares of the common stock to the Bear Film Co. as trustee for his son Robert. Albert thereafter remained in active management of the corporation until his death, March 25, 1940.

The day following Oscar's death an attorney who had done some legal business for Oscar and for Bear Film Co. was appointed assistant secretary at $200 per month. He advised Josephine and to some extent Albert during the transition period in the corporation's affairs. This attorney advised the appointment of Josephine and one Uhle who was the manager of the Oakland branch of Bear Film Co. as administrators of Oscar's estate and in petitioning for their appointment and during

their administration of the estate he acted as their attorney. This attorney, whose good faith is not impugned by the findings or judgment of the court, entered into correspondence with Virginia and her mother Fay Bixby concerning Oscar's estate. He represented to them that the estate was small and that Josephine owned all of the stock of Bear Film Co. We assume that these representations were honestly made on the attorney's part. Fay Bixby was appointed guardian of Virginia by a Michigan court in order to receive and care for the property expected to be distributed to Virginia from her father's estate. Her attorney in Michigan also had correspondence with the attorney for the administrators in San Francisco. In due course the estate was distributed to Virginia and she received a few thousand dollars and a piece of land in Oakland from which she ultimately realized an additional small amount by its sale.

Thus matters rested until after Albert's death in 1940. After Albert's death Charles again sought legal advice. He consulted Mr. Silen, one of Virginia's attorneys in this action. Certain facts were disclosed to Silen which caused him to write a letter to Virginia in Michigan under date of June 27, 1940. In July, 1940 Virginia came to San Francisco to consult Mr. Silen and on August 16, 1940 the original complaint was filed in this action.

The action went to trial on an amended complaint filed February 17, 1941. The amended complaint was in six counts. In two of these counts it was alleged that the preferred stock and common stock of Bear Film Co. respectively was never delivered by Oscar to Josephine. The trial court found against the plaintiff in these counts as recited above. One count was for a money judgment and will be discussed hereinafter. Two counts alleged that the preferred stock and the common stock respectively were transferred to Josephine by Oscar upon an express oral trust to transfer it back to Oscar at his request or to the plaintiff Virginia upon Oscar's death. The sixth count alleged a resulting trust for Oscar in the common stock. The trial court found that the preferred stock was held by Josephine upon an oral trust "to be delivered and transferred back to the said Oscar C. Hansen at his request" but that Josephine "did not promise or agree that she held said stock in trust for the heirs of Oscar C. Hansen or for the said daughter of Oscar C. Hansen upon his death." The court further found that Oscar was at all times the equitable owner of this stock and upon his death it became Josephine's duty to transfer it into his name or to his administrators for the benefit of his estate. The judgment ran against the widow of Albert, individually and as executrix of his will, his children and Bear Film Co., who are the appellants.

Appellants attack the finding of an oral trust in the preferred stock as not supported by the evidence. Respondent admits that she is compelled to rely solely on circumstantial evidence to support this finding. The trial court made elaborate findings that the transfer of the preferred stock to Josephine's name, the declaration of the dividends and the voting of the $10,000 bonus in 1926 were all a part of a single plan conceived and carried out by Oscar to enable him to acquire the common stock from Quinn and thereby to own for himself all of the stock, preferred and common, of the corporation. Oscar had built up the business of the corporation by his own efforts from almost nothing to a value of something like $100,000 by 1926. He had no other property of any considerable value. It is argued that he would not, as a prudent and indeed shrewd business man who had devoted so many years of his life to this single enterprise, have stripped himself of ownership and control of the business and transferred title absolutely by way of gift of all of the preferred stock to his mother. Weighing the probabilities there is much force in this contention. It is also argued that he would not have entirely cut off his daughter, for whom the court found he had "a paternal affection" to make his mother the exclusive beneficiary of his bounty, but while the court found that Oscar had a paternal affection for his daughter it was found that at all times he "entertained a great love and affection for his mother * * * and was devotedly attached to her." Respondent also points to Oscar's continued management and domination of the business. But wherever the probabilities may lie the fundamental question upon this phase of the case is this: can a court, under the settled rules of law laid down by our California courts, spell out of circumstances however strong an express oral trust, in the absence of any specific evidence of any character of the terms or conditions of the trust?

[1] In Lefrooth v. Prentice, 202 Cal. 215, 227, 228, 259 P. 947; and Chard v. O'Connell, 7 Cal.2d 663, 666, 62 P.2d 369, our Supreme Court quoted the following with approval from Pomeroy on Equity Jurisprudence, 4th Ed., sec. 1009:

"The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail."

In Estate of Gaines, 15 Cal.2d 255, 266, 100 P.2d 1055, 1060, the Supreme Court said:

"The most that can possibly be inferred from the evidence is that the decedent may have intended to create a trust, for some purpose, or for someone's benefit, but failed to disclose that purpose, or the beneficiary, and therefore failed to create the trust. (Citations.) Since the question is one of admissibility of the evidence, the proof of a trust must be clear and convincing before it could be deemed sufficient to overcome the legal effect of the joint tenancy agreements."

[2] There would seem to be no purpose in the multiplication of citations. Many of the earlier cases on the same subject are collected in the three cases above cited. They all announce the rule that in order to support a finding of an express trust the evidence must disclose the terms of the trust with reasonable certainty. If a court cannot discover support for a finding of an express trust in the language of the parties where that language does not express the terms of the trust with certainty, we fail to see how support for such a finding can be discovered in the complete absence of evidence of any language of the parties whatsoever. Conceding that the transaction viewed as an outright gift by Oscar to Josephine is completely unnatural and that Oscar must be assumed to have had some oral agreement with Josephine for his protection the question still remains unanswered by any shred of evidence what were the terms of that oral agreement. We may suppose another oral agreement equally possible with the one found by the trial court and which would equally protect Oscar during his lifetime: that Oscar and Josephine agreed that Josephine would hold in trust for Oscar during his lifetime but that it was likewise agreed between them that if Oscar died before Josephine the property should become hers absolutely. Such a trust agreement could as well be spelled out of the circumstantial evidence as the one actually found by the court, but neither can be spelled out with the reasonable certainty required for the establishment of an express oral trust.

Respondent in support of the finding of an express oral trust from purely circumstantial evidence cites: Gunter v. Janes, 9 Cal. 643, 655; Airola v. Gorham, 56 Cal. App.2d 42, 48, 133 P.2d 78; Arnold v. Loomis, 170 Cal. 95, 98, 148 P. 518; 2 Bogert on Trusts and Trustees, § 453, p. 1353; 1 Scott on Trusts 146; and 65 C.J. 268.

In Airola v. Gorham, supra, and Arnold v. Loomis, supra, the terms of the trust were shown with certainty by express language of the parties. In the Airola case by admissible declarations and in the Arnold case by a written agreement and oral evidence of conversations. Each case went no further than to hold that where the existence and terms of the trust are established with certainty a party may be bound by the trust where he accepts a conveyance of the property with knowledge of the existence and terms of the trust agreement. In Gunter v. Janes, supra, in addition to other circumstances the trustee, Starkey, not only described himself as "trustee" in written documents but he entered a charge upon his books against the beneficiary which the court held "inexplicable upon any other theory than the one which supposes Starkey to have acted for Gunter in making the arrangement with Wells." 9 Cal. at page 657. The full passage from the text of 65 C.J. reads (pp. 265–268):

"The creation of a trust depends upon intention; some act evidencing the intention is essential, but unless otherwise required by statute, no particular formality or form of words is necessary, so long as the intent is sufficiently expressed, but it must be clear that a trust was intended, and it is also necessary that there be an unequivocal, explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created."

An examination of the cases cited in note 19 at p. 268 indicates that one of the necessary "circumstances which show beyond reasonable doubt that a trust was intended to be created" is language by way of declarations, admissions or otherwise from which the terms of the trust can be certainly determined. The passages cited from Bogert and Scott are not supported by citation of authority and are not inconsistent with our conclusion that the evidence in this case is not sufficient to support the finding of the express oral trust in the preferred stock found by the court.

[3] Respondent seems to argue also for a constructive or resulting trust in the preferred stock. Insofar as this argument is based on the claimed confidential relations of the parties no overreaching of Oscar by Josephine appears in the evidence. Quite to the contrary Oscar went to his own lawyer without Josephine and had him draw the agreement of transfer quoted above and it should be noted that that document drawn by his attorney at Oscar's direction contained an express recital that "O. C. Hansen intends to divest himself of title to the said stock and vest such title absolutely in Josephine T. Hansen"; and Oscar according to the evidence was the dominant one in their dealings and relations and Josephine the subservient one. If the claim is based on the failure of an express trust it was a failure because no agreement of the parties to create a trust was proved and the following language from Estate of Gaines, supra, 15 Cal.2d at page 266, 100 P.2d at page 1061, furnishes the answer:

"The argument that appellant may be considered a constructive trustee simply begs the question. If an attempt were made to create a trust and the record showed the basic elements of intent, purpose, and subject matter, but it was unenforceable because of the statute of frauds or some other invalidating cause, the trustee could not keep the property individually, but would be declared a constructive trustee. This result, however, presupposes the establishment of the basic elements of a trust. Here the evidence is wholly insufficient to establish these elements, for the object or purpose of such a trust is entirely lacking. The record does not therefore support respondent's claim that the written transfer in joint tenancy was accompanied by and subject to a collateral trust agreement. The writing creating the joint tenancy remains the sole competent evidence of the agreement between the parties, and respondent's assumption of an unproved trust agreement as the basis for the further assumption of its breach, as ground for imposing a constructive trust, must necessarily fail."

[4, 5] We should perhaps refer to evidence of declarations, oral and written, of Oscar not made in the presence, or to the proved knowledge, of Josephine that Oscar owned the stock of Bear Film Co. These declarations were made after the transfer to Josephine. They were properly admissible on the issue of delivery to Josephine. Williams v. Kidd, 170 Cal. 631, 648–652, 151 P. 1, Ann.Cas.1916E, 703; Dinneen v. Younger, 57 Cal.App.2d 200, 205, 134 P.2d 323. But here the court found against respondent's claim of non-delivery. Upon the delivery as found the legal title passed to Josephine and it did not lie in the power of Oscar to disparage that title by any subsequent declaration. Francoeur v. Beatty, 170 Cal. 740, 746, 747, 151 P. 123; Chard v. O'Connell, supra, 7 Cal.2d at page 667, 62 P.2d 369; Taylor v. Bunnell, 77 Cal.App. 525, 534, 247 P. 240; Miller v. Miller, 55 Cal.App.2d 199, 207, 130 P.2d 438.

With reference to the common stock the court found both an express oral trust and a resulting trust. We may dismiss the finding of an express oral trust by reference to the discussion of the similar finding with regard to the preferred stock.

[6, 7] The validity of the finding of a resulting trust in the common stock depends upon whether the evidence will support the conclusion that 1. The consideration was paid by Oscar and 2. The conveyance was made to Josephine. 25 Cal.Jur. p. 178; Civ.Code, sec. 853. While the code section refers only to real property a resulting trust may nevertheless be created in personal property. 25 Cal.Jur. p. 181; Goes v. Perry, 18 Cal.2d 373, 379, 115 P.2d 441.

Appellants argue that neither of these necessary conditions exists in this case. They point to the court's finding above quoted that Quinn delivered all of the certificates to Oscar, and that Oscar caused 2490 of said shares to be immediately placed in the name of Josephine on the books of the corporation. They point out that a resulting trust cannot be created by the voluntary transfer by the owner of property to another (Tillaux v. Tillaux, 115 Cal. 663,

667, 669, 47 P. 691; Smith v. Butler, 84 Cal.App. 90, 257 P. 581) and to the rule that title to shares of stock is transferred by the delivery of the certificate properly endorsed. Powers v. Pacific Diesel Engine Co., 206 Cal. 334, 337, 274 P. 512, 73 A.L.R. 1398; Fowles v. National Bank of California, 167 Cal. 653, 658, 140 P. 271. From this they argue that no trust could result because Quinn transferred to Oscar and Oscar in turn transferred to Josephine. In making this argument appellants take too narrow and technical a view of the finding. The finding is quoted fully hereinabove. The court found that Quinn delivered the certificates to Oscar and that Oscar immediately caused 2490 shares to be transferred on the corporate books to Josephine and the certificates evidencing said shares were delivered to Josephine at the time of such transfer. The transfer from Quinn to Josephine was one continuous transaction. In receiving the physical delivery of the certificates from Quinn Oscar had the present purpose and intent to take legal title in the name of Josephine and he immediately effectuated that purpose and intent by causing the transfer to Josephine to be made on the books of the corporation.

[8, 9] The practical effect of Oscar taking the certificates from Quinn and immediately causing the transfer of legal title to Josephine was no different than if Quinn had delivered them directly to the secretary of the corporation and Oscar had directed the secretary to make the transfer of legal title to Josephine. Purchase money resulting trusts are based upon "the ancient equitable principle that the beneficial estate follows consideration and attaches to the party from whom the consideration comes." 4 Pomeroy's Equity Jurisprudence, 5th Ed., p. 71, sec. 1037. The mere incident that Oscar made himself the medium by which legal title was transferred from Quinn to Josephine should not affect the operation of that equitable principle.

[10] Appellants also argue that the down payment of $10,000 and the first instalment of $750 were each paid to Quinn by Josephine with her own money and that at least pro tanto there could be no resulting trust in Oscar's favor. 25 Cal.Jur. pp. 188, 189. The payment of $750 may be summarily disposed of. The obligation to make the payment was Oscar's under his agreement with Quinn. The source of the payment was Oscar's money. He endorsed his salary check for that amount to Josephine and she in turn paid Quinn with her own check. The trial judge acted well within his sound discretion in drawing the inference that this payment of $750 was in fact made by Oscar through the agency of Josephine.

[11] The down payment of $10,000 was made by Josephine's check from the dividend received by her on the preferred stock. The dividend was earned before the transfer of the preferred stock to Josephine but it was declared and paid after the stock stood in her name. The right to receive dividends is an incident to ownership of stock and the owner of the stock at the date the dividend is payable is entitled to receive it without regard to when the earnings were accumulated. Smith v. Taecker, 133 Cal.App. 351, 24 P.2d 182. In the absence of other facts it would follow that the $10,000 down payment was made by Josephine with her own money.

[12, 13] If the purchase price is paid *for* the beneficiary *by* the grantee a trust will result in the beneficiary's favor. Breitenbucher v. Oppenheim, 160 Cal. 98, 103, 116 P. 55; Watson v. Poore, 18 Cal. 2d 302, 318, 115 P.2d 478. In this case the obligation to make the payments had been assumed by Oscar by his agreement with Quinn. It is sufficient to raise a resulting trust that the beneficiary has assumed a binding legal obligation to pay for the property. 2 Restatement of the Law of Trusts, sec. 456; 3 Scott on Trusts, p. 2297, sec. 456. If the evidence in this case will support the inference that Josephine made the $10,000 payment for the benefit of Oscar and in pro tanto satisfaction of Oscar's obligation to Quinn such payment would in legal effect operate as a payment by Oscar.

[14] In this connection it may be pointed out that the source of the dividend from which the payment was made was Oscar's voluntary transfer of his preferred stock to Josephine. In view of their close and affectionate relationship and Josephine's natural gratitude as the recipient of Oscar's bounty it would not be unnatural for Josephine to repay Oscar in part by making the $10,000 payment for him out of the money which he had made available to her by his generosity. When we add to this Josephine's knowledge of the condition of the promissory note given by Oscar to Quinn, that the full unpaid balance would immediately become due and payable in the event that Oscar should voluntarily dis-

pose of his controlling interest in Bear Film Co. a strong inference arises that Josephine did, in fact, make the $10,000 payment for the benefit of Oscar.

Josephine knew that legal title to only one share of the preferred stock stood in Oscar's name. She therefore knew that unless he had the beneficial interest in all of the common stock which was being acquired from Quinn he would not own a controlling interest of Bear Film Co. She participated in the meeting of February 5, 1927, at which the resolution was adopted authorizing the guarantee of Oscar's note, including the condition referred to. She thereby acquiesced in the representation that upon the acquisition of Quinn's stock Oscar would own the controlling interest in the corporation. These facts are inconsistent with any conclusion other than the one that Oscar upon its acquisition would own the entire beneficial interest in all of the common stock. Considering all of the circumstances we are satisfied that the evidence supports the finding that the $10,000 payment was in legal effect made by Oscar.

[15] The payments of the other instalments were all made by the corporation and charged to Oscar's account. They were in actual fact payments by Oscar.

[16, 17] Appellants also made the point that by reason of the relationship of the parties we must presume that Oscar made a gift of the common stock to Josephine. We need not decide whether a voluntary transfer from son to mother raises such a presumption. See 3 Scott on Trusts, p. 2258. If there is any such presumption the circumstances in this case amply rebut it. It would be completely unnatural for Oscar to strip himself completely of control of the business which was the result of years of effort on his part, and at the same time divest himself of practically his entire assets. The condition in the promissory note to Quinn against Oscar voluntarily disposing of his controlling interest is persuasive that he did not do so. His domination of the affairs of the corporation with the acquiescence of Josephine including the payment to himself of a $10,000 bonus in 1927 without formal corporate action and his guaranteeing notes of the corporation, thus risking his personal credit for the corporate liabilities, all argue against any such presumption. Add to this that Oscar had already transferred to Josephine the preferred stock representing 70% of the corporate assets. He had for his daughter, the respondent herein, a paternal affection and he owed her a natural and legal duty of care and support. The fact that other objects of the payor's bounty would be unjustly discriminated against if the transfer was construed as a gift is entitled to be weighed against the claimed presumption. Parks v. Parks, 179 Cal. 472, 478, 479, 177 P. 455. If there is any presumption of gift in this case it was sufficiently rebutted. 25 Cal. Jur. p. 194.

[18] It is next urged that in any event Albert was a purchaser for value and without notice of any trust. The trial judge found that Albert did not in good faith believe that the stock belonged to Josephine as her own property; that as president, director and manager of the corporation he had access to and controlled the books of the corporation and became possessed of sufficient knowledge and information to put him, as a prudent man, on inquiry as to the true ownership of the stock; that among other facts that he learned was the fact that the purchase price of the common stock was paid for by the money and earnings of Oscar, that the instalments had all been, and were still being, charged against Oscar even after his death; and that at all times after the transfers to Josephine Oscar had continued, as theretofore, to control and manage the corporation and that Josephine had taken no part whatever in such control and management. The finding is ample to show that Albert took with notice of the equities of Oscar's estate, and finds ample support in the evidence. Taking with notice of the equities it is immaterial whether the transfers to Albert were for legal or adequate consideration. 25 Cal.Jur. pp. 222–225.

[19] Appellants by amendment to their answer after trial set up as an affirmative defense that the transfers of stock from Oscar to Josephine were made to evade payment of Federal income taxes. The trial court made no finding on this defense. The only support in the evidence for this defense is found in the saving of income tax on the dividend declared on the preferred stock, since Quinn received the dividend on the common. With our holding that the evidence does not support the finding of a trust for Oscar in the preferred stock the failure to find on this issue becomes immaterial. Oscar saved no income tax by the transfer of the common stock to Josephine. Instead of causing dividends

to be declared on that stock after its transfer, he caused a $10,000 bonus to be paid to himself by the corporation in 1927 and one to be credited to him in 1928, and paid income tax on both.

Appellants pleaded as defenses the statute of limitations and laches. The trial court found against them on both issues. The court found in this connection that as early as May, 1929, Albert wrote plaintiff informing her that Oscar owned no stock in the corporation at the time of his death and that all of said stock belonged to Josephine; that the attorney for the corporation and for the administrators of Oscar's estate informed plaintiff through her guardian Fay Bixby and her guardian's attorney in 1929 and 1930 that Oscar owned none of said stock and that Josephine owned all of it; that plaintiff and her guardian and her guardian's attorney relied upon these statements and were influenced by such statements; that they had no other source of information than the statements of Albert, Josephine and the attorney; that plaintiff, who was thirteen years old at the time of Oscar's death, believed that her father owned the Bear Film Co. and deemed it strange and peculiar that she did not receive whatever would represent or show her interest in said business but that she had the utmost confidence in her grandmother, Josephine, and confidence in her uncle Albert and their attorney, and in the other persons in control of the business all of whom had been closely associated with and close friends of her father, and having such confidence she was not suspicious that her rights had been violated because of such confidence and a definite conviction that neither her father, nor her grandmother, nor her uncle Albert, nor any of her father's friends or business associates would do anything to cause her rights to be violated; that as early as 1933 plaintiff received an anonymous letter telling her that her father, Oscar, had been the owner of said corporation at the time of his death and that she had been defrauded of property which rightfully belonged to her and that she should start an investigation. The court further found that plaintiff had no further information concerning the facts than she learned from the representations of Josephine, Albert and their attorney, except the statements heretofore referred to, until she came to San Francisco in 1940 after receiving Mr. Silen's letter. From these facts the court concluded that the action was not barred by the statute of limitations.

In weighing the evidence in support of this conclusion it is important to notice that Josephine was administratrix of the estate of her son Oscar, and that she occupied the inconsistent position at the same time of claimant of ownership of all of the stock of Bear Film Co. by gift from Oscar. On June 3, 1929 Josephine wrote a letter to Charles which said in part:

"I am writing this to ask you not to write to Virginia, or at least look out that you are not unintentionally doing me harm that would mean that you would be doing harm to yourself too, because you and Albert get it after me.

"If her mother should take another lawyer we are sunk. This morning a letter came here from Virginia to Albert, in it she says, that she heard Oskar say that he was the sole owner of the Bear Film Co., and if so (she says) it belongs to me, he kept Grandma all his life and she will be getting the furniture where she lives. Now Carl what do you think of that? Her mother would just love to throw me in the gutter and leave me there, but fortunately Oskar did not intend for her to do so."

[20, 21] From this and other letters the trial court was justified in believing that Josephine deliberately set out to conceal the true facts from the thirteen year old plaintiff and her guardian. Josephine occupied a fiduciary position as administratrix. She was trusted by the plaintiff also because of their relationship. The facts justified the conclusion of the trial court that the statute of limitations did not commence to run before the plaintiff's actual discovery of the facts in 1940, by reason of the misrepresentations and wrongful concealment of Josephine, Albert and those acting under Josephine's direction. It is well settled by the decisions of our Supreme Court that "when the defendant is guilty of fraudulent concealment of the cause of action the statute (of limitations) is deemed not to become operative until the aggrieved party discovers the existence of the cause of action." Pashley v. Pacific Elec. Co., 25 Cal.2d 226, 229, 153 P.2d 325, 327; Kimball v. Pacific Gas & Electric Co., 220 Cal. 203, 30 P.2d 39; Kane v. Cook, 8 Cal. 449. This case falls well within this rule.

It was for the trial court to weigh the evidence and determine whether the statute

started to run before Virginia's actual discovery of the facts. In the face of the express representations made to her by those in whom she had confidence it was a question for the trier of the facts whether an anonymous letter in 1933 or her belief that her father had owned the Bear Film Co. at his death should have led her to sooner make an investigation, particularly in view of the fact that the action was actually commenced within less than three years after she attained her majority.

[22] Appellants insist, however, that because Josephine's co-administrator Uhle could have brought action on behalf of Oscar's estate the statute of limitations commenced to run against the estate and therefore continued to run against plaintiff after distribution of the estate to her, citing: 16 Cal.Jur. 557; California Sav., etc., Soc. v. Culver, 127 Cal. 107, 111, 59 P. 292; Congregational Church, etc., v. Osborn, 153 Cal. 197, 203, 94 P. 881; McLeran v. Benton, 73 Cal. 329, 342, 14 P. 879, 2 Am.St. Rep. 814; Patchett v. Pacific Coast Ry. Co., 100 Cal. 505, 35 P. 73; Dennis v. Bint, 122 Cal. 39, 44, 54 P. 378 and other cases. It is a complete answer to this contention that Uhle himself testified that he made no independent investigation to ascertain what property belonged to Oscar's estate, but got his information entirely from Josephine, Albert, the attorney and an auditor who testified that after Oscar died Josephine was the boss and he took his orders from her. If the concealment of the facts from plaintiff, her guardian and her guardian's attorney operated to prevent the statute of limitations from running until actual discovery, the concealment of the facts from Josephine's co-administrator Uhle must be held to have had the same effect during the administration of Oscar's estate.

[23] In view of our conclusion on the statute of limitations the question of laches was also one for the trial court's determination. Austin v. Hallmark Oil Co., 21 Cal.2d 718, 734, 735, 134 P.2d 777. It would not do to hold that a party was guilty of laches under circumstances tolling the statute of limitations until discovery, when the action was commenced almost immediately after discovery first started the statute to run.

This brings us to a consideration of the money judgment against the corporation. A part of the money judgment was for dividends paid on the preferred stock. This must be reversed because of our holding that the finding of the court that the preferred stock was held on an express oral trust is not supported by the evidence. The dividends actually paid on both classes of stock was found to be $61,000 and judgment was entered for that amount with $17,676.09 interest thereon. 70% of these amounts is referable to the preferred stock, amounting to $42,700 principal and $12,373.26 interest. The money judgment should accordingly be reduced by those amounts.

The balance of the money judgment was made up of the following items: The $10,000 bonus credited to Oscar on the books of the corporation at the end of 1928; $5000 which the court found was lent to the corporation by Oscar for the use of its Oakland branch; $2250 representing balance of unpaid salary at $750 per month for February, March and April, 1929; a charge of $1500 made on the books of the corporation after Oscar's death with a corresponding credit to Josephine; and $200 paid to the attorney by the corporation after Oscar's death and charged against his account.

[24, 25] Concerning the latter two items appellants are compelled to admit that the procedure was irregular. The corporation, as a matter of law, was not entitled to pay alleged debts of Oscar after his death, and take credits for those payments in accounting to Oscar's estate. The law on the subject is clear. If Josephine asserted that Oscar owed her $1500 at the time of his death her proper recourse as an administratrix was to present a claim against his estate for that amount. The claim would then have faced the scrutiny of the probate judge, who could approve or reject it as the proof made to him warranted. Probate Code, sec. 703, formerly Code Civ. Proc. sec. 1510. If Oscar owed the attorney $200 the legal course was for him to present his claim for that amount for the approval of the administrators and the probate judge. Probate Code, secs. 710 and 711, formerly Code Civ. Proc. sec. 1496. Instead the corporation elected to pay these amounts and deduct them from the balance paid by it into the estate. It had no legal authority to do this. No claims for these amounts having been presented to the estate they are barred under the express provisions of our law. 11a Cal.Jur. p. 734. The corporation by its conduct having prevented

the allowance and payment of these claims in the only manner contemplated by the law is not in a position to claim credit for them. It was a volunteer and must suffer the fate of an officious intermeddler in other men's affairs. Brown v. Ayres, 33 Cal. 525, 528, 529, 91 Am.Dec. 655. "One who thus officiously intrudes himself into business which does not concern him has no right to compel reimbursement in the absence of a subsequent promise on the part of the debtor to repay." 20 Cal.Jur. p. 907.

[26] Admittedly in accounting to the estate of Oscar the corporation did not include any unpaid salary after January, 1929. The court allowed $2250 at the rate of $750 for February, March and April. Appellants argue that the April salary should have been prorated to the date of Oscar's death. Apparently it was the practice of the corporation to pay Oscar $500 on account of his salary and credit the balance of $750 to him in advance each month. The only case which we have found on the precise question is Mendenhall v. Davis, 52 Wash. 169, 100 P. 336, 21 L.R.A.,N.S., 914, 17 Ann.Cas. 179. In that case the Supreme Court of Washington held that where an employee is prepaid and the employee then dies before the full period of service for which he has been paid the employer is entitled to a pro tanto recovery. The result seems just and we are satisfied to follow the same rule.

Appellant also points to evidence showing that Oscar after being credited with $750 per month for January, February and March 1926 was paid the $750 check which he endorsed to Josephine and from which she made the first $750 payment to Quinn, and that this $750 was not charged against Oscar. Respondent makes no satisfactory answer to this point. It results that the money judgment should be reduced by $958, $750 plus $208 referable to the part of April after Oscar's death.

The allowance of the $10,000 credited to Oscar on the books at the end of 1928 depends primarily on the finding of the trial court that the minutes of a purported meeting of March 29, 1929, were actually written and placed in the minute book after Oscar's death. Those minutes recite that:

"Mr. Hansen (Oscar) stated that * * * he wished * * * to return the Bonus of $10,000.00 voted him for the year of 1928, as the Company was short of ready funds, and he wishes to make other investments for the Company, which he hoped would be more beneficial."

The minutes then show a resolution adopted accepting the offered refund. The minute book also contains the purported minutes of a meeting of December 31, 1928 in which is recited the adoption of a resolution that the "customary yearly bonus of $10,000.00" be paid to Oscar. The evidence is in dispute as to whether such meeting was held on December 31, 1928. The purported minutes of this December 31 meeting were admittedly typed after Oscar's death and pasted in the minute book to justify the position of the corporation in a dispute with the Federal income tax authorities over its deduction of this $10,000 item in its 1928 income tax return.

[27, 28] The witness Lida Mae Bolling who typed the minutes of both purported meetings testified that the minutes of the March 29, 1929 meeting were dictated to her by Albert after Oscar's death. Her testimony was contradicted by Neita Drake who was secretary of the corporation at the time of the purported meeting, by the auditor for the corporation and by an expert on disputed documents produced by appellants. The trial court chose to believe the witness Bolling. However appellants claim that the witness Bolling was so shaken on cross-examination that her testimony on direct furnishes no substantial support for this finding. It is for the trial court to weigh the evidence and even where the witness gives conflicting or inconsistent testimony on direct and cross-examination to determine which is true and which is false. High v. Pacific Gas & Electric Co., 52 Cal.App.2d 701, 709, 126 P.2d 911, 127 P.2d 588; Jones v. Re-Mine Oil Co., 47 Cal.App.2d 832, 836, 119 P.2d 219; Turner v. Whittel, 2 Cal.App.2d 585, 588, 38 P.2d 835. The testimony of Mrs. Bolling that the minutes of March 29, 1929 were dictated and typed after Oscar's death finds corroboration in the fact that the minutes of December 31, 1928 were admittedly typed after Oscar had died. It is difficult to believe that the minutes of the March 29 meeting would have been typed and pasted in the minute book at an earlier time than the minutes of the meeting of December 31, particularly in view of the fact that the minutes of the March 29 meeting dealt in large part with the subject matter of the December 31 meeting and rescinded the recited voting of the $10,000 bonus at the earlier meeting. The witness

Drake attempted to explain the delay in typing the minutes of the December 31 meeting by testimony that because every one was busy celebrating the New Year the preparation of the minutes was overlooked. But it is obvious that the oversight, if there had been one, would have been noted when the meeting of March 29, if it in fact occurred, was held and the minutes of that meeting written up. It was for the trial court to weigh all of the evidence and determine the inferences to be drawn therefrom.

[29] The trial court found that the purported meeting of December 31 did not in fact take place but that Oscar caused the $10,000 bonus to be credited to him without formal corporate action. Appellants seize on this finding to urge that the findings do not support the judgment for this item. A similar credit was given Oscar in 1927 without formal corporate action. Oscar was in complete control of the operations of the corporation with Josephine's consent. She was the only other stockholder. Oscar caused the income tax return for the corporation for 1928 to show the $10,000 bonus as an expenditure of the corporation and his own income tax return showed the bonus as income. The court was entitled to infer from all the facts and circumstances, including the payment of a similar bonus to Oscar in 1927 without formal corporate action, that Josephine knew of and consented to the crediting of the $10,000 bonus to Oscar in 1928.

[30] The $5000 item depends on a credit originally given to Oscar on the books of the Oakland branch of the corporation for money lent by Oscar. At some later date Oscar's name was scratched out and Josephine's inserted over it in this entry. Respondent was able to produce the transcript of Oscar's bank account for this period which showed a $5000 check drawn by Oscar practically contemporaneous with the date of this entry. The check itself was not produced, to establish to whom it was drawn. No check for that amount drawn by Josephine was produced and she had no bank account of that amount at the time. The auditor testified that the erasure of Oscar's name and the substitution of Josephine's was made at Oscar's direction before his death. The evidence showed other changes made by the auditor in the same books to correct other errors of the bookkeeper in making her original entries and it is claimed that this was a similar correction of the bookkeeper's error. The testimony of the auditor as to this transaction was impeached by the court's finding that the entries made by him concerning the asserted surrender of the $10,000 bonus by Oscar were made after Oscar's death. The trial court weighed the evidence and concluded that the $5000 was actually advanced to the corporation by Oscar. This finding is sufficiently supported by the evidence and the reasonable inferences to be drawn therefrom.

[31] After Oscar's death an action was commenced by Bear Film Co. against the administrators of Oscar's estate to determine the interest, if any, of Oscar's estate in Bear Photo Service of Oakland which was the name under which Bear Film Co. operated its Oakland branch. The decree in that case determined that Bear Photo Service was in fact a branch of Bear Film Co. and not the personal venture of Oscar. The trial court in this action reexamined the question and came to the same conclusion. As a part of the decree in the original action against the administrators the court directed and ordered the plaintiff, Bear Film Co. "to pay to said defendants the sum of Six Hundred and Forty-four Dollars and Forty-six Cents ($644.46) salary due to the said Oscar C. Hansen at his death and when such sum is so paid * * * it shall constitute a full and final settlement of the matter herein between the above named plaintiff and defendants as Administrators of the Estate of Oscar C. Hansen * * *." It is claimed by appellants that this judgment is res adjudicata of the $5000 item.

To this contention it is sufficient to point out that the parties to the action were Bear Film Co., at that time dominated and controlled by Josephine on the one side, and Josephine as administratrix of Oscar's estate with Uhle, who testified that he made no independent investigation of the assets of the estate, on the other. The judgment under the circumstances could not conclude the plaintiff as Oscar's successor in interest.

In accordance with our conclusions hereinabove announced: All those portions of the judgment adjudicating any right of plaintiff in and to the preferred stock of Bear Film Co. are reversed, the trial court is directed to amend its findings to find that Josephine T. Hansen did not hold said, or any of said, shares of the preferred stock upon an oral, or any trust, and to modify the judgment accordingly to decree that defendants, as their interests appear,

are the owners of all of the shares of such preferred stock free and clear of any trust; that portion of the judgment decreeing that "plaintiff do have and recover judgment against the defendant Bear Film Co. for the sum of $18,950.00, principal, together with interest thereon in the sum of $18,688.91" is modified by reducing the principal sum to $17,992.00 and the interest to $17,744.11; that portion of the judgment decreeing that "plaintiff do have and recover against Bear Film Co. for the sum of $61,000.00, principal, representing dividends * * * together with interest thereon in the sum of $17,676.09" is modified by reducing the principal sum to $18,300 and the interest to $5302.83; and the remaining portions of the judgment are affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

On Petition for Rehearing.

PER CURIAM.

On petition for rehearing appellants cite section 450, Restatement of Trusts, in support of their contention that the $10,000 down payment made by Josephine's check to Quinn could not operate to create a resulting trust pro tanto for Oscar. The argument is that if the payment was intended as a gift to Oscar it did not become effective because there was no delivery. If the obligation to pay Quinn had been Josephine's obligation the argument might be valid. Her payment of her own obligation intending a gift to Oscar might be held to fail for want of delivery. This is the situation covered by the illustration of sec. 450 in 2 Restatement of Trusts, p. 1371, and discussed in the second paragraph of Comment a (Id. p. 1370). Even in that situation the decisions are not in agreement. Scott cites four cases on each side of this question. 3 Scott on Trusts 2275, notes 2 and 3.

[32, 33] But in our case the contract to purchase the common stock was made by Oscar, not by Josephine, and Oscar, not Josephine, assumed the obligation to pay for it. One may satisfy the debt of another by payment to the creditor if the creditor accepts the payment. Martin v. Quinn, 37 Cal. 55; Dodds v. Spring, 174 Cal. 412, 163 P. 351. In paying Oscar's obligation, if Josephine intended to pay it *for* Oscar, she completely accomplished her purpose and she thereby satisfied the requirement of Civ. Code, sec. 853 that the consideration be "paid by or *for* another." We have held that the evidence supports the conclusion that this was her intention.

[34] The further argument is made that Oscar assumed no obligation to pay the $10,000 because the agreement with Quinn recites that the $10,000 is "payable upon the execution of this agreement, receipt whereof is hereby acknowledged." The payment was made pursuant to the obligation of Oscar to pay "upon the execution of this agreement", and in satisfaction of that obligation. The fact that the agreement acknowledges the payment indicates that the obligation was immediately performed, but does not change the fact that it was performed pursuant to the terms of the agreement by which Oscar bound himself to make the payment.

We wish to correct a statement of fact, in the opinion previously filed, concerning the $5000 item. When Oscar's name was scratched out in the entry in the Oakland cash book the words "Bear Film Co." were written over it, not the name of Josephine. The credit was actually given to Josephine in the books of the corporation kept in San Francisco. The effect of the transaction was the same, to give Josephine the credit instead of Oscar.

[35] Appellants also argue that paragraph 6 of the judgment cancelling the dividends declared but unpaid should be modified to allow payment of such dividends on the preferred stock. We cannot agree. These dividends were declared at a time when the common stock was, under the portion of the judgment herein affirmed, wrongfully withheld from respondent and without her participation or consent. Equity can properly preserve the status quo as to the unpaid dividends until the respondent can assume her position as the owner of the common stock.

[36] In view of our holding that there is no evidence in the record to support the finding that the preferred stock was held by Josephine in trust for Oscar, appellants have petitioned us to modify our order in this case to direct the trial court to enter judgment that the defendants as legal owners of the preferred stock hold the same free from any trust in favor of plaintiff. We have decided that this should be done. The trial court found that Oscar delivered the preferred stock to Josephine. The effect of that delivery was to vest legal title in her. The trial consumed many weeks and the parties were afforded every oppor-

tunity to produce all available evidence. Respondent called a great number of witnesses but she was not able to produce a single person to testify to any agreement by Josephine to hold the preferred stock in trust. On the evidence we are satisfied that the trial court should have entered judgment for appellants on the issue of the preferred stock and this court has the power to order that to be done. Code Civ.Proc. sec. 956a; Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884; Hanchett v. Wiseley, 107 Cal.App. 230, 290 P. 311.

The order heretofore made herein is accordingly modified by striking therefrom the following portion thereof: "That portion of the judgment which decrees that 'at the time of his death Oscar C. Hansen was the equitable owner of all the shares of preferred stock, towit 2500 shares of Bear Film Co., and that accordingly the plaintiff, Virginia J. Hansen, as his sole heir at law, is now the equitable owner of the whole thereof' is reversed," and inserting in place of the language so stricken the following: "All those portions of the judgment adjudicating any right of plaintiff in and to the preferred stock of Bear Film Co. are reversed, the trial court is directed to amend its findings to find that Josephine T. Hansen did not hold said, or any of said, shares of the preferred stock upon an oral, or any trust, and to modify the judgment accordingly to decree that defendants, as their interests appear, are the owners of all of the shares of such preferred stock free and clear of any trust."

The petition for rehearing is denied.

69 Cal.App.2d 280

**FORNERIS v. KRELL et al.**

**Civ. 12785.**

District Court of Appeal, First District, Division 2, California.

May 22, 1945.

**Dismissal and nonsuit ⇐60(1)**

Where defendants' affidavits supporting their motions to dismiss action on judgment for delay in service of summons did not show that anything was paid on judgment, except amount admitted in complaint, that there was any defense to action, or that defendants were harmed by delay, trial court erred in granting motions.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Michael Forneris against Wilber L. Krell and another for the balance due on a judgment. From an order granting defendants' motion to dismiss the action because of delay in service of summons, plaintiff appeals.

Reversed.

Carl William Anderson, of Burlingame, for appellant.

F. E. Hoffmann, of San Mateo, for respondent.

GOODELL, Justice.

This is an appeal from an order granting defendants' motions to dismiss because of delay in the service of summons.

The complaint, filed on January 18, 1943, shows that on February 15, 1938 in the Superior Court in San Mateo County a judgment was entered in favor of this plaintiff and against these defendants, for $1,559.62 and $10.50 costs, on which $99 had been paid. The prayer is for $1,471.12 with interest. Summons was issued when the complaint was filed, and was served on both defendants on March 30, 1944 in San Mateo County, 14 months and 12 days after issuance.

On April 3, 1944 the defendants served separate notices of motions to dismiss "upon the ground of long and unnecessary delay in the service of summons * * * laches, lack of diligence and want of prosecution * * * by plaintiff" and, after hearing, both motions were granted.

The appellant contends that the court abused its discretion in granting these motions.

The notice of defendant Krell's motion was accompanied by his affidavit showing that he had been a resident of the City of San Mateo for a long time and ever since the first judgment, stating his home and business addresses, and that ever since the action was commenced in 1943 both addresses appeared in the city directory and his telephone number appeared in the telephone book and that plaintiff and his counsel knew these addresses. It showed that Krell is well acquainted with plaintiff's counsel and often meets him socially and professionally and that both of them belong to the same organizations and frequently see each other at the meetings thereof; that Krell has never attempted to secrete himself or avoid service, but could have been found if plaintiff had desired to effect service. The notice of defendant Piatt's motion was accompanied by his affidavit making a showing similar to that in Krell's affidavit.

The affidavit filed by plaintiff's counsel shows that the original action between these parties was commenced on October 28, 1931 for personal injuries resulting from the operation of an automobile by Krell, then in the employ of Piatt, and that on May 12, 1932, after a trial, judgment was entered against both defendants for $1,000 and $101.30 costs; that the defendants were then covered by insurance but that their insurance carrier became insolvent; that an examination of both judgment debtors showed they had no property which was not exempt, and that no more than $99 was paid out of the insurance carrier's assets on account of the judgment. It showed that on May 7, 1937 a complaint was filed to renew the 1932 judgment, that negotiations were had while that action was pending, and on February 15, 1938 a judgment by default was entered against both defendants. The affidavit shows further details of what went on before the filing of the present action, but it is not material on this inquiry. Four or five weeks after this action was commenced counsel for plaintiff called on Krell, told him it was pending, and suggested that if an offer of $750 were made he would recommend its acceptance; it was suggested that when the occasion arose Krell should submit said offer to Piatt, to which Krell replied that

"he would try to find the right moment to again talk to Piatt to see whether he would not contribute something in payment of the offered settlement, and to just wait awhile." Krell stated that he felt Piatt should contribute most of it. From time to time plaintiff's counsel saw Krell at fraternal gatherings and inquired as to his progress with Piatt, and Krell said that the opportunity had not arrived. About the middle of December, 1943, Krell told plaintiff's counsel that he had had a talk with Piatt, who then had no more money than he had before, and was in no position to make any offer of compromise, whereupon counsel for plaintiff told Krell that all he could do was to proceed with the action and unless he heard from him shortly he would do so. When he prepared to have the summons served it was discovered that it had been misplaced in his office files, but systematic search brought it to light. The affidavit shows that plaintiff's counsel relied upon the statements respecting the defendants' financial condition; that he believed the insurance carrier might attempt to again qualify in California, in which case the judgment would have to be paid, and it concludes with the statement that the delay in service caused no harm to the defendants and that they have no defense to the action.

The defendants' affidavits make no attempt to show that anything has been paid on the judgments since 1932 except the $99 admitted in the complaint. They make no attempt to show that there is any defense to the action, or that the defendants have been in any way harmed by the delay.

Ferris v. Wood, 144 Cal. 426, 77 P. 1037, relied on by the appellant, was likewise an action upon a judgment. In its facts and circumstances it is quite similar to the instant case. There the delay in service was 25 months while here it was 14 months and 12 days. The fact that the indebtedness was admitted, and that there was no defense, undoubtedly influenced the court in holding, as it did, that in dismissing the action the trial court had improperly exercised its discretion.

Several years before the Ferris case the Supreme Court reversed a judgment of dismissal for failure of prosecution in the case of Herman v. Pacific Jute Mfg. Co., 131 Cal. 210, 63 P. 344. In doing so the court said, "Without discussing other questions raised by appellant, it is sufficient to say that, conceding the power of a court to dismiss a case for laches, there was an abuse of discretion in the case at bar in exercising that power in favor of a defendant who admittedly has no defense, and has filed a sham answer for purposes of delay." In Ferris v. Wood [144 Cal. 426, 77 P. 1038] the court had this to say respecting the Herman case: "In the case of Herman v. Pacific Jute Mfg. Co., 131 Cal. 210, 63 P. 344, the court reversed an order dismissing the action on the ground that the defendant admittedly had no defense, and had filed a sham answer. In that case the complaint was filed in 1883, and the motion was made in 1897. Matters alleged by plaintiff in excuse for the delay were not considered. The sole issue raised by the answer in the case was ownership of the note, and was filed for purposes of delay. How far this latter fact influenced the decision does not appear, but it was put upon the ground also that defendant admittedly had no defense."

Merced Bank v. Price, 145 Cal. 436, 78 P. 949, 951, was a suit to foreclose a mortgage securing a $6,500 note. A motion to dismiss for failure to diligently prosecute the case was granted by the trial court. The answer did not deny the execution of the note or mortgage, did not plead payment, did not question the amount claimed to be due, or, indeed, raise any issue as to the merits. It merely denied that the amount claimed as an attorney's fee was reasonable. In reversing the judgment of dismissal the court said: "Conceding the power of the court in a proper case to dismiss a cause for laches, *there was an abuse of discretion in the case at bar in exercising that power in favor of these defendants, who, as shown, had no defense whatever to the action upon the merits.* Herman v. Pacific Jute Mfg. Co., 131 Cal. 210, 63 P. 344." Emphasis ours.

In Sunset Publishing House v. Cottage Gardens Nurseries, 70 Cal.App. 452, 233 P. 402, 403, the trial court had dismissed the action for want of prosecution. In reversing the judgment this court said: "From the facts recited it is apparent that the delay in prosecuting the action was caused wholly by the respondents; that, in fact, it was upon respondents' request and for their benefit that the action was not prosecuted. This fact, taken with their admission of the indebtedness upon which

the suit is based and their failure to answer the allegations of the complaint, brings the case under the rule of Ferris v. Wood, 144 Cal. 426, 429, 77 P. 1037, where the Supreme Court say: 'It seems to us that the delay was reasonably accounted for and excused, and that the order of the court did not tend to subserve, but rather to impede or defeat, the ends of substantial justice.' In that case, as here, the debt was admitted and the delay was caused by the effort to bring about a compromise. To the same effect is Herman v. Pacific Jute Mfg. Co., 131 Cal. 210, 63 P. 344."

The respondent cites Feather River, etc., Co. v. Paradise Irrigation District, 3 Cal. 2d 733, 46 P.2d 147, which was a suit to quiet title. That, in itself, is sufficient to distinguish it. See Caldwell v. Regents of University of California, 23 Cal.App. 29, 35, 136 P. 731. Furthermore, the district had filed a cross-action against the Feather River Company and summons therein was served on the Feather River Company before the latter served the district, which probably led to the belated service in the original suit. Moreover the district in its affidavit showed that the plaintiff had purposely delayed service. The court pointed out that admittedly *whatever interest the plaintiff might have in the property could be fully protected in the cross-action filed by the defendant.* Obviously then, no harm could result to the plaintiff by the dismissal.

Bryson v. Harryman, 118 Cal.App. 588, 5 P.2d 665, 666, cited by respondent, was another quiet title suit. The delay in service was 17 months, and summons was not served on any of the defendants until 12 days after notice of motion to dismiss had been given. In affirming the judgment of dismissal the court showed that in Ferris v. Wood it was "pointed out *that the indebtedness which the plaintiff was attempting to collect in that case was fully admitted, that no defense to the claim of the plaintiff had been suggested,* and that a good and valid reason for delaying the service of the summons appeared." Emphasis ours. In the Bryson case, on the other hand, a meritorious defense was claimed by the defendant, who held the legal title to the property, and the action was a cloud upon the defendant's title.

Quiet title suits are not to be compared with an action such as this. See, for illustration, Bernard v. Parmelee, 6 Cal. App. 537, 92 P. 658, 662, where a dismissal for a delay of only a little over four months in the service of summons was upheld because of the character of that litigation. The court there said that that comparatively short delay "must, under the peculiar circumstances of the record, have resulted in greater hardship to the defendants than might be entailed upon the delay of the ordinary case for a year or more." See, also, First National Bank v. Nason, 115 Cal. 626, 628, 47 P. 595.

The respondent cites Witter v. Phelps, 163 Cal. 655, 126 P. 593. That case is only one of many holding that a trial court has discretion to dismiss for a delay less than the 3 years mentioned in Code Civ.Proc. section 581a. Indeed Ferris v. Wood, supra, so holds and is cited in the Witter opinion. All the cases heretofore cited recognize this power in the court; the only question presented in any given case is as to the proper exercise of the power.

The present action is based upon the 1938 judgment which, in turn, was based upon the 1932 judgment in the personal injury action. Thirteen years have gone by since the first judgment, and the plaintiff is simply seeking herein to keep his judgment alive. The pending case was commenced a little less than a month before it would have become barred under section 336, Code Civ.Proc. No statute of limitation, therefore, can be successfully pleaded. The only defense available would be payment, and that is nowhere suggested. Taking the defendants' showing on these motions as true, it still presents a case where apparently there is no defense to a claim which is susceptible of ready proof from the court's own records. We are satisfied, on the authorities herein cited, that the trial court erred in granting the motions.

The order appealed from is reversed.

NOURSE, P. J., and STURTEVANT, J., concur.

69 Cal.App.2d 317

**PEOPLE v. ORECK et al.**

Cr. 2358.

District Court of Appeal, First District, Division 1, California.

May 25, 1945.

1. Bail ⇐47

Persons sentenced to imprisonment in county jail, instead of state prison, on convictions of violating statute respecting bookmaking on contests of skill, speed, etc., were entitled to have trial court fix bail pending their appeals from such judgments, which imposed imprisonment in cases of misdemeanors. Pen.Code, §§ 17, 337a, 1272, 1275.

2. Bail ⇐47

An appellate court may fix bail under extraordinary circumstances involving accused's health or when excessive bail has been required by trial court. Const. art. 1, § 6.

3. Bail ⇐47

Determination of amount of bail pending appeal from judgment imposing sentence on conviction of crime ordinarily should be addressed to trial court rather than appellate court. Pen.Code, § 1275.

Edward Oreck and Ben Kuhl were convicted of violating the statute relative to bookmaking on purported contests of skill, speed, etc., and after the Superior Court's refusal of their requests to fix bail pending appeal, they apply to the District Court of Appeal for an order fixing bail on appeal.

Proceeding remanded with instructions.

Stern & Grupp, of San Francisco, for appellants.

Edmund G. Brown, Dist. Atty., and Norman Elkington, Asst. Dist. Atty., both of San Francisco, for respondent.

WARD, Justice.

The proceeding herein is designated as an "Application for Order Fixing Bail on Appeal, etc." The defendant was convicted of violating Penal Code section 337a relative to book-making. That section applies to registering bets, holding stakes, etc., on purported contests of skill, speed, etc., of man or beast or in the use of mechanical apparatus upon the result of a contingent event. The penalty attached to a violation of the section is "imprisonment in a county jail or state prison for a period of not less than thirty days and not exceeding one year."

The application shows that "Judgment and sentence of said Court was entered sentencing said defendants and each of them to imprisonment in the County Jail, for a period of twelve months, 'one day suspended.'" Notice of appeal on behalf of each defendant was given, and a request to fix bail, pending appeal, "was refused by the court."

[1] The trial court in its discretion could have imposed a judgment of imprisonment in the state prison or in the county jail. (Sec. 337a, Penal Code.) Penal Code section 17 provides: "When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison." The punishment imposed in this case was "other" than imprisonment in the state prison and accordingly is "deemed a misdemeanor."

After conviction and "upon appeal" bail is "a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor." (Penal Code, sec. 1272.)

[2, 3] The application to this court is to "fix" bail. Appellate courts may, under extraordinary circumstances involving the health of an accused, fix bail (In re Ward, 127 Cal. 489, 59 P. 894, 47 L.R.A. 466; In re Pantages, 209 Cal. 535, 291 P. 831), or when excessive bail has been required (Const.Calif. Art. 1, sec. 6). Pending appeal, the determination of the amount ordinarily should be addressed to the trial court. Matter of Application of Preciado, 30 Cal.App. 323, 158 P. 1063; People v. Goddard, 83 Cal.App. 40, 256 P. 440. The trial judge is in a better position than members of an appellate court to fix the amount. The law and the facts are fresh in the mind of the trial judge. He has an opportunity to observe the conduct of the accused and to consider factors too numerous to mention herein, in addition to the matters that may be considered as set

forth in Penal Code, sec. 1275, that play a part in ascertaining an amount that will insure the presence of the accused when required.

We have considered the various theories set forth in the brief of the District Attorney offered in support of the trial court's action but find they are all without merit as applied to the facts herein.

The proceeding is remanded to the trial court with instructions to that court to fix bail as provided by law.

PETERS, P. J., and KNIGHT, J., concur.




69 Cal.App.2d 353

**KRIENKE et ux. v. STATE et al.**

**Civ. 3358.**

**District Court of Appeal, Fourth District, California.**

**May 28, 1945.**

**Rehearing Denied June 26, 1945.**

**Hearing Denied July 26, 1945.**

**1. Taxation ⇐718, 814(1)**

Generally, a landowner informed by taxing officials of amount required to redeem from tax sale and acting thereon in good faith, and changing his position without knowledge that information is erroneous and that he has paid wrong amount, will be protected, as will intervening rights of innocent third persons.

**2. Equity ⇐66**

He who asks equity must do equity.

**3. Taxation ⇐800(1)**

Generally, a landowner seeking to cancel tax sale constituting cloud on title must first pay taxes and penalties justly chargeable against land and paid by tax purchaser.

**4. Taxation ⇐814(3)**

Where landowners obtained certificate of redemption from tax sale to state inadvertently requiring less than one-third of correct amount necessary to redeem, and paid amount shown on certificate and were notified of error within a week or ten days, and several years later brought action to quiet title, they were not entitled to relief unless they paid at least the correct amount due, with interest.

**5. Taxation ⇐809(5)**

Where paragraph of landowners' complaint to quiet title to land deeded to state for taxes alleged that landowners were owners in fee and in possession, state's answer denying allegations of such paragraph and alleging that title had passed to and still remained in state under tax laws raised an issue as to the ultimate fact.

**6. Husband and wife ⇐25(5)**

In action by husband and wife to quiet title to land claimed by state under tax sale from which husband had allegedly redeemed on payment of amount which, due to deputy county auditor's inadvertence, was much less than correct amount, it could not be contended that redemption was complete as to wife, who could not claim benefit of husband's acts without assuming burdens arising therefrom.

**7. Taxation ⇐816**

In action against state and others to quiet title to land owned by state under tax sale from which plaintiffs claimed to have redeemed in 1939, judgment for defendants should provide that, if plaintiffs elected not to redeem, sum which they deposited in court to cover taxes subsequent to 1939 should be returned to plaintiffs.

Appeal from Superior Court, San Diego County; Robt. B. Burch, Judge.

Action by Albert A. Krienke and wife against the State of California and others to quiet title to certain land which had been deeded to the state because of nonpayment of taxes. From an interlocutory judgment for defendants, plaintiffs appeal.

Modified and affirmed.

F. W. Powell, of San Diego, for appellants.

Robert W. Kenny, Atty. Gen., Adrian A. Kragen, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., Carroll H. Smith, Deputy Dist. Atty., J. F. Du Paul, City Atty., and Thomas J. Fanning, Deputy City Atty., all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to a parcel of land in the city of San Diego. This land had been owned by the plaintiffs for some time prior to July 1, 1936, on which

date it was deeded to the state because of nonpayment of taxes for the fiscal year 1930-1931. The plaintiffs are husband and wife but, for convenience, the husband will at times be referred to as the plaintiff.

On February 10, 1939, the plaintiff applied to the county auditor for a certificate of redemption with respect to this land. One was given him showing the sum of $227.32 as the amount necessary to redeem. He paid this amount at the treasurer's office and the fact of payment was noted on the certificate. It appears, without dispute, that the deputy auditor who made out this certificate had inadvertently made an error in the amount necessary to redeem this property and that the correct amount that should have been entered on the certificate as of that date was $749.25, instead of $227.32. The error was discovered a week or ten days later and the auditor immediately telephoned to the plaintiff telling him of the error and requesting him to come in and adjust the matter. Subsequently, the auditor wrote two letters to the plaintiff asking him to come in and adjust the matter but the plaintiff refused to do so and at all times has relied on the certificate which he received.

While it is not very material here, it also appears that $227.32, as of February 10, 1939, was the correct amount required for the redemption of an adjoining parcel, and that the posting clerk credited the $227.32 paid by the plaintiff, on both the index and delinquent rolls, to that parcel so that the records then showed that it had been redeemed and that the parcel here involved had not. Apparently, the plaintiff discovered this second error and on March 18, 1939, he and his son secured a quitclaim deed to this adjoining parcel from the record owner, paying $75 for the same. In any event, this purchase of the adjoining lot was not only not a detriment to the plaintiff but it occurred about a month after the auditor had informed him of the mistake in the certificate relating to the property here involved.

The plaintiffs have not conveyed or encumbered the property here in question since February 10, 1939, and on July 13, 1942, they brought this action to quiet their title as against the State, the county of San Diego and the city of San Diego. By stipulation, the taxing officials of the county were later added as parties defendant. The plaintiffs deposited the sum of $225.28 in court as covering taxes which should have been assessed against said premises since February 10, 1939, the alleged date of redemption.

The court found in all respects in favor of the defendants and, in addition to the facts above noted, found that the plaintiffs never tendered or offered to pay the correct amount necessary to redeem this property, that the plaintiffs have suffered no detriment or prejudice by reason of the error or mistake that was made, and that no intervening rights of third parties are here involved. An interlocutory judgment was entered providing: 1. That the $225.28 deposited in court remain in custody of the court pending final judgment. 2. That pending final judgment the certificate of redemption issued to plaintiffs under date of February 10, 1939, remain in the custody of the court. 3. That within ninety days after this interlocutory decree shall become final the plaintiffs be permitted to redeem in full the property in question by paying (a) the difference between $749.25 and $227.32, or $521.93, with interest at 6% from February 10, 1939, to date of payment, and (b) the current taxes on this property for the fiscal year 1939-1940 up to and including the fiscal year in which payment is made, as if said property were originally on the rolls for said years, with interest at 6% on the respective amounts. 4. That the taxing officials be authorized to make the proper entries and perform all acts necessary to carry out the provisions of this decree. "5. That upon failure of plaintiffs to so redeem said property within the time and manner specified final judgment be entered decreeing that defendants refund to the plaintiffs the sum of $227.32 with interest at 6% per annum from February 10, 1939, to date of payment; that thereupon plaintiffs' complaint be dismissed with prejudice, that defendants have judgment in their favor on the merits, and that defendants recover their costs." 6. That defendants are entitled to recover their costs. From this interlocutory judgment the plaintiffs have appealed.

Appellants' first and main contention is that they had a right to rely on the correctness of the figures furnished them by the auditor as being the amount necessary to be paid in order to redeem this property and that it follows, as a matter of law, that a redemption was fully accomplished when they paid this amount to the treasurer and obtained his receipt. They rely on statements found in certain text books to

the effect that where a landowner relies on such information furnished to him by taxing officials, and pays the amount so indicated, a redemption results even though through error the amount paid is less than that properly required. They also rely on Laist v. Nichols, 139 Cal.App. 202, 33 P.2d 866, and Jones v. Sturzenberg, 59 Cal.App. 350, 210 P. 835, as establishing this rule in this state and as conclusively resolving in their favor the issue here presented.

[1] It may be conceded, as a general rule, that a landowner will be protected when he asks for and receives such information from taxing officials and in good faith acts upon it and changes his position without knowledge of the fact that the information furnished him and the amount he has paid is erroneous. And further, that when the rights of innocent third parties have intervened they will be protected. It is a different matter to extend such protection to one who has not changed his position in reliance upon the information mistakenly furnished him, who is advised of the mistake at a time when it could easily be corrected, and who comes into a court of equity seeking affirmative relief while refusing to pay the amount justly due.

Nor do we think the cases cited conclusively establish his right to relief under such circumstances. In Laist v. Nichols, 139 Cal.App. 202, 33 P.2d 866, the plaintiff's land was sold for nonpayment of the 1911 assessment of an irrigation district. A certificate of sale was issued to one Gould on February 28, 1912. A redemption was made by two amounts paid on March 14, 1912 and July 7, 1912, respectively, the total of the two payments being about $100 more than the amount actually necessary to redeem the land. In spite of these payments the successor to the district delivered a tax deed to Gould on May 21, 1923, some eleven years after the land had actually been redeemed, and about three and one half years later Gould conveyed the land to the defendant. A judgment in favor of the defendant was reversed, it being pointed out that the land had actually been redeemed before the tax deed was issued to Gould, the holder of the certificate of sale, and that the defendant had bought the land knowing that the plaintiff claimed it. It was held that while the treasurer's deed raised a prima facie presumption that the land had not been redeemed from the sale, this presumption was overcome by the receipts for the redemption payments which had been made long before, and that it thus appeared that the treasurer's deed had been improperly issued. While language used in that case, and authorities there cited, support the view that a landowner may rely on statements made to him by taxing officials as to the amounts due, it was pointed out that no such principle was applicable under the circumstances there appearing and the case was decided on the ground that the amount necessary to redeem had been fully paid long before a deed was issued.

In Jones v. Sturzenberg, 59 Cal.App. 350, 210 P. 835, the land, worth $10,000, was assessed in 1913 and sold to the state in 1914 for $50.21. Although the procedure was irregular, the land was again sold to the state in 1915, and subsequent taxes were delinquent up to 1918. On July 29, 1918, the owner of the land asked for and received an estimate of the amount necessary to redeem. The auditor made this estimate on the basis of the sale to the state in 1915, mistakingly overlooking the amount due in connection with the sale to the state in 1914. The owner paid the amount estimated by the auditor and got the usual receipts. On October 19, 1918, the owner conveyed the land to the defendant. Thereafter, and on July 8, 1919, the tax collector sold the land to one Williams for the amount involved in the sale to the state in 1914, with penalties, and gave him a deed. In 1920, Williams deeded the land to the tax collector as an individual and the latter thereupon deeded it to the plaintiff, who then brought the action to quiet his title. The court held that while the plaintiff would have had good title had there been no prior redemption the property had, in equity, become redeemed when the taxpayer paid the amount given him by the auditor as being sufficient for a redemption, and title was quieted in the defendant to whom the taxpayer had conveyed in reliance upon the information furnished. An obvious distinction appears between the circumstances involved in that case and those with which we are now concerned.

[2-4] While the Jones case supports the principle that a taxpayer who has been misled, to his detriment, by erroneous information furnished him by the tax officials should be protected if, without fault on his part, he relies upon and acts on such information, it is hardly authority for the proposition that a taxpayer who has full knowledge that a mistake has been made

before he changes his position, and who is taking advantage of the error for the purpose of avoiding the payment of taxes which he justly owes, should be protected, or that the mere making of the error, although immediately made known to him, gives him a legal right which he may enforce in equity without himself complying with long established equitable rules. One of these is that he who asks equity must do equity. In the Jones case it was pointed out that under another general rule an owner asking equitable relief to remove or cancel a tax sale which constitutes a cloud upon his title must, as a condition to obtaining such relief, first pay the taxes and penalties which were justly chargeable against his land and which have been paid by a tax purchaser. The same principle should be applicable here. The appellants are asking equitable relief as against this tax sale and conveyance to the state which is a cloud upon their title. The court even relieved them from the necessity of paying the penalties which would normally have accrued after the date of the attempted redemption. They should be required to pay the amounts which were justly chargeable up to that time and which should have been paid. Under no equitable principle are they entitled to more relief than that given to them by the judgment, which permits them to redeem upon payment of the amount due at the time the mistake was made with interest thereon, and with a credit for what they have already paid.

[5] Appellants next contend that they were not authorized by law to maintain this action against the county of San Diego, that the only real defendant is the State of California as the holder of the tax deed, and that the court erred in denying a motion for judgment on the pleadings as against the State. This is based on the contention that the answer put in by the county of San Diego may not be considered and that the answer of the State denied Paragraph III of the complaint, which set out the application for a redemption certificate and the payment of the money demanded therein, by alleging that the state had no "knowledge or information" sufficient to enable it to answer. It is argued that such a denial should be based on "information and belief" and cases are cited in which it was held that a denial in the language here used is insufficient. It is further stated in the brief that the State's answer admitted all allegations of the complaint with the exception of those contained in Paragraph III.

Assuming, without holding, that the State's answer to Paragraph III was insufficient the statement that all other allegations of the complaint were admitted by that answer is erroneous. Paragraph I of the complaint alleged that the appellants are the owners in fee and in possession of the premises in question. Paragraph I of the State's answer denies all of the allegations contained in Paragraph I of the complaint and then alleges that title to these lands had, under the laws relating to taxation in this state, passed from the appellants to the state long prior to the institution of this suit "and still so remains". This raised an issue as to the ultimate fact and the matters alleged in Paragraph III of the complaint are not controlling even though these allegations be considered as having been admitted.

[6] Some contention is made that the redemption of this property by Albert A. Krienke inured to the benefit of his wife, Mary A. Krienke, that it does not appear that he was her agent, that she is not chargeable with any dereliction of duty on his part and that it follows that the redemption was complete insofar as her interest is concerned. Insofar as here appears, she owed the taxes just as much as he did and, aside from any other consideration, she cannot claim the benefit of his acts without assuming any burdens arising therefrom.

[7] In one respect, the judgment appealed from is incomplete. While it provided that the sum of $225.28 deposited in court by the appellants should remain in the custody of the court pending final judgment, and while no question would arise in this regard in the event the appellants elect to redeem the property, no provision is made as to what shall be done with this money in the event they do not elect to so redeem. It seems clear that in that event this money should be returned to them and the judgment should so provide. Paragraph 5 of the judgment, as above quoted, is hereby modified by adding at the close thereof, the following: "The sum of $225.28 heretofore deposited in court by the plaintiffs to be then and in that event returned to them."

As so modified, the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

## PEOPLE v. PACK.

Cr. 1901.

District Court of Appeal, Third District, California.

May 21, 1945.

Rehearing Denied June 4, 1945.

Hearing Denied June 18, 1945.

1. Criminal law ⇐863(2)

Defendant could not complain that trial court's failure to read statute stating punishment for rape to jury when jury was returned into court at its own request prevented jury from exercising untrammeled discretion in fixing punishment, where trial court had already instructed jurors that in event they should find defendant guilty they should recommend in their verdict whether punishment should be by imprisonment in county jail or in state prison, and verdicts providing for recommendations either way had been presented to them. Pen.Code, § 264.

2. Criminal law ⇐863(2)

Defendant could not complain of trial court's failure to read statute relating to punishment for rape to jury when jury was returned into court at its own request, where defendant made no request that statute be read to jury. Pen.Code, § 264.

3. Criminal law ⇐863(2)

Trial court's advice to jury when jury was returned into court at its own request that length of sentence was no concern of theirs was proper. Pen.Code, § 264.

4. Criminal law ⇐1170(4)

Defendant could not complain that his counsel was unduly limited in his cross-examination of prosecuting witness, where it appeared that only question to which objection was made had been previously answered in substance by the witness in presence of jury.

5. Rape ⇐52(1)

In prosecution for rape of 13 year old girl, testimony of prosecuting witness was not so inherently improbable as to constitute no evidence.

6. Criminal law ⇐829(16)

Defendant could not complain of deletion of phrase that testimony of prosecuting witness should be examined with caution from cautionary instruction tendered by defendant, where deleted phrase was given in another instruction.

7. Criminal law ⇐438

In rape prosecution, photograph showing inside of defendant's garage, though taken after alleged offenses, was admissible for purpose of illustration and its value was for jury, where there was no contention that there had been any change in the construction between time when offenses had allegedly been committed and time photograph was taken.

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Appeal from Superior Court, Placer County; Raymond McIntosh, Judge.

Harry Pack was convicted of rape, and he appeals.

Affirmed.

Roy Daily, of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and James O. Reavis, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

An information filed in this case charged defendant in four counts of four different acts of sexual intercourse with a girl aged thirteen years who was not his wife. He was found guilty on all counts, the verdicts recommending imprisonment in the state prison. After judgment defendant filed a motion for a new trial which was denied. On this appeal he contends that the trial court erred in its instruction to the jury which prevented it from exercising an untrammeled discretion in fixing the punishment to be inflicted upon the defendant in the event they found him guilty; that the trial court erred in refusing defendant the right to cross-examine the prosecuting witness, allegedly for the purpose of determining whether any promises had been made to her by the arresting officers and prosecuting attorney to induce her to testify favorably for the prosecution; that the verdict is unsupported by and is contrary to the evidence because the testimony of the prosecuting witness is inherently improbable; that the trial court erred in denying defendant's motion for a new trial; that it erred in not giving certain cautionary instructions requested by defendant; and that it erred in permitting the introduction in evidence of a photograph, Plaintiff's Exhibit No. 4.

[1-3] Regarding the first of the foregoing assignments of error, the record shows that after the jury had retired to

consider the evidence it was returned into court at its request, whereupon the following transpired in the presence of defendant and his counsel, Mr. Bowers:

"The Court: The Court understands you have a question.

"Jury Foreman: Yes sir, as foreman of the jury, the jurors would like to have me ask you these following questions: First, the minimum and the maximum sentence in the county jail, if it is in order for us to know that; also, the next maximum sentence,—

"The Court: Just a minute: On the first question, have counsel any objection to the court answering that question? You know the answer as well as I do. Have you any objections to my answering the question?

"Mr. Bowers: No.

"Mr. Tindall: I haven't any objection.

"The Court: The length of sentence in either the county jail or in the state penitentiary is no concern of the jury.

"Jury Foreman: OK, to the other question, that eliminates three questions. The other question, is, on the four counts, are the sentences concurrently or separately, or is it none of our business?

"The Court: May I answer that? That is for the court to say.

"Jury Foreman: OK, that's all."

It is urged before this court that the trial court should have read section 264 of the Penal Code [1] to the jury, and that had this been done "they would have had an opportunity to exercise an untrammeled discretion in inflicting the lighter sentence"—that is, a jail sentence. There are several answers to this contention. In the first place, the trial court had already instructed the jurors that in the event they should find the defendant guilty they should recommend in their verdict whether punishment should be by imprisonment in the county jail or in the state prison, and verdicts providing for recommendations either way had been presented to them. In the second place, the record shows that defendant's counsel consented to the court's answering the questions asked by the jury, made no request that section 264 of the Penal Code be read to them, and made no objection to the answers given by the court. And in the third place, the court's advice to the jury that the length of the sentence was no concern of theirs was correct in point of law. People v. Lee, 17 Cal. 76, 79; People v. Lopez, 210 Cal. 55, 58, 290 P. 582; People v. Hoyt, 20 Cal.2d 306, 317, 318, 125 P.2d 29; People v. Ramos, 3 Cal. 2d 269, 272, 273, 44 P.2d 301; People v. Bruno, 49 Cal.App. 372, 377, 193 P. 511.

[4] As to appellant's next contention, that his counsel was unduly limited in his cross-examination of the prosecuting witness in that he was not permitted to show that she had some motive in giving her testimony and was actuated by threats or promises made by the prosecuting authorities, or by hopes of reward, just what questions bearing upon this subject were asked of the witness and disallowed by the court appellant does not set forth in his brief, and we find nowhere in the record any restriction in this connection. We are asked to peruse pages 163 to 185 of the reporter's transcript and have done so, but nothing appears therein appertaining to cross-examination of the witness for the purpose of showing any promises, threats or inducements which might have affected the testimony of this witness. The aforementioned pages of the record contain argument between the court and counsel for the respective parties, as to whether the prosecuting witness was "under arrest" when she told the officers about defendant Pack, or was merely under detention by the juvenile authorities. The only portion of the record pointed out by appellant as showing error is that the court—in the absence of the jury—denied an offer of proof made by him as follows:

"Mr. Bowers: I want to make an offer of proof. I want to make an offer of proof

[1] "Rape is punishable by imprisonment in the state prison not more than fifty years, except where the offense is under subdivision one of section two hundred sixty-one of the Penal Code, in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or in the state prison; provided, that when the defendant pleads guilty of an offense under subdivision one of section 261 of the Penal Code the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years."

at this time that the witness, complaining witness, prosecutrix, made no mention to the officers of any relationship with Pack until she had been placed in custody of the authorities, and until—and that she was placed in custody of the officers for another offense, and not any alleged offense of Pack, and that while she was in such custody, for the first time, she communicated to the officers her relationship with Pack, at least approximately a month after the last of the alleged offenses charged against the defendant.

"Mr. Sargent: To which the objection would be that the evidence offered is immaterial and irrelevant, outside the issues, and not proper cross examination under Section 2048 of the Code of Civil Procedure.

"Mr. Bowers: As far as the cross examination, it is proper to go into the motives or mind of the witnesses any time on cross examination.

"Mr. Sargent: That has nothing to do with motives.

"Mr. Bowers: A man steals something, or doesn't steal something, is seen fleeing from the scene of the crime, it is a circumstance surrounding the commission.

"The Court: The court refuses the offer of proof, and states that all except two points raised by counsel are already in evidence. The witness has testified that she made no complaint about this until after the proceedings in the juvenile court. She has stated that.

"Mr. Bowers: Yes, but the jury may think she was brought into the juvenile court because of Pack, and that seems to me to be—

"The Court: You have already the evidence. I don't see how any person could understand that, when she stated in her examination that, on your cross examination, that she made no complaint about Mr. Pack until after her, or until after her 'trial', as she calls it, in the juvenile court."

This colloquy had been preceded by testimony as follows:

"Q. At the time you told the officers about Mr. Pack, you were under arrest, weren't you? A. Yes.

"Q. And what were you under arrest for? A. I think it was for going out with boys. I was picked up with a soldier.

"Q. What? A. I was under arrest with a soldier

"Q. You were arrested with a soldier? A. Yes.

"Mr. Sargent: I don't believe the record will show she was ever arrested. There may have been a juvenile complaint; isn't that correct?

"Mr. Tindall: That is right.

"Mr. Sargent: Not a technical arrest.

"Mr. Bowers: I don't care what this record shows. The question is whether or not she was, and what her—

"The Court: I think the record shows she was made a ward of the juvenile court, but I don't think she was—

"Mr. Tindall: She was never arrested.

"The Court:—she was what you would call arrested.

"Mr. Tindall: I don't think the girl knows what an arrest means, as far as that goes.

"Mr. Bowers. Q. You were, on the night of the 17th of June, at twenty-six minutes past twelve o'clock, in Woodbridge Park, in Roseville—

"Mr. Tindall: To which we object.

"Mr. Bowers: Q.—arrested, weren't you?

"Mr. Tindall: It has nothing to do with this case at all.

"Mr. Bowers: It does. I am going to explain to the court why it does."

It therefore appears that the only question to which objection was made had been previously answered in substance by the witness, in the presence of the jury. While appellant states in his brief that it was pertinent to ascertain whether or not the child had discussed the case with the District Attorney's staff or the police officers concerned with the case, we are directed to nothing in the record showing that appellant was restricted in this behalf. On the contrary, she had already been interrogated without objection regarding conversations had by her with the District Attorney and others. We find no merit in this alleged assignment of error.

[5] As to the next contention of appellant that the testimony of the prosecuting witness is so inherently improbable as to constitute no evidence, we find it unnecessary to detail such evidence; but we find nothing therein that is inherently improbable. See People v. Jackson, 63 Cal. App.2d 586, 147 P.2d 94, People v. Toney, 64 Cal.App.2d 675, 149 P.2d 189. It cannot even be said that her testimony is un-

usual. Though defendant made categorical denials of same, and testified that he never even saw the prosecuting witness during the month in which the offenses charged were committed, this testimony was denied by other disinterested witnesses.

[6] Regarding the contention of appellant that the trial court erred in not giving two instructions requested by defendant, the record shows that both of these instructions were given by the court except that the first was modified by the insertion of the words set forth in capital letters, and the second was modified by the insertion of the words in capitals and the omission of the portion in parenthesis:

"Ladies and Gentlemen: I instruct you that the information in this case charges the defendant with four separate and distinct offenses of rape, alleged to have been committed by him upon the person of [naming the prosecuting witness] on Or About the 8th day of May, 1944; on Or About the 16th day of May, 1944; on Or About the 22nd day of May, 1944; and on Or About the 24th day of May, 1944.

"Each count in the information charges a separate and distinct crime.

"Before you can lawfully find the defendant, Harry Pack, guilty of any specific offense charged, the prosecution must name, identify and prove that particular, specific offense to the satisfaction of each juror, beyond a reasonable doubt.

"If, after hearing and weighing all of the evidence in this case, any juror feels that the prosecution has not named, identified and proved the specific act charged in Any Count Of the information, beyond a reasonable doubt, such juror should vote for a verdict of not guilty On That Count."

"The Court instructs the jury that a charge of this nature is particularly difficult for a defendant to clear himself of.

"No charge can be more easily made and no charge is more difficult to disprove.

"By the very nature of the act charged, there are no witnesses to the commission of the act, except the parties involved, (you should weigh the evidence of the prosecutrix with caution.)

"If the jury finds any doubt as to the commission of any act alleged in the information, they are instructed to find for the defendant As To That Act and acquit him Of That Charge Of Which Said Act Is A Part."

In addition to the foregoing the court elsewhere in its charge instructed: "You can not, under the law, convict the defendant upon mere suspicion, however strong that suspicion appears to be. A charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. The law does not require in this character of case that the prosecuting witness be supported by another witness or other corroborating circumstances. It does require that you examine her testimony with caution."

It therefore appears that the jury was given a cautionary instruction not once but twice; and that the phrase deleted from the instruction tendered by defendant, that the testimony of the prosecuting witness should be examined with caution, was given in the instruction last quoted. This was sufficient. People v. Jackson, supra.

[7] The next ground for reversal relied upon by appellant is that the trial court erred in admitting in evidence plaintiff's Exhibit 4, it being urged that though the use of same was limited as for a map for illustration, it was taken October 21, 1944, while the offenses charged were committed in May of that year. There is no merit in this assignment of error. The exhibit was admitted subject to a motion to strike which motion was not made. It is a photograph showing the inside of defendant's garage. The prosecuting witness had testified that the acts with which defendant was charged had been committed in his home; that she had entered defendant's automobile in downtown Roseville, concealed herself in the back of the car which had then been driven by defendant to his home; that on arriving at this house defendant had driven the car into the garage and closed the garage doors, and that she had then entered the house through a window from the garage into the house. The exhibit was shown to the girl and she identified the window through which she had entered the house. There is no contention that there had been any change in the construction of the house between the time when the offenses had been committed and the time the photograph was taken. It was introduced for illustration, and was proper for that purpose. It was for the trial court to determine whether it was a correct rep-

resentation of the scene, and its value was for the jury. 10 Cal.Jur. 896; 32 C.J.S., Evidence, §§ 709, 713, pp. 611, 618, 619; People v. Singh, 78 Cal.App. 476, 483, 248 P. 981; People v. Sliscovich, 193 Cal. 544, 549, 550, 226 P. 611.

Appellant also asserts that the trial court erred in denying his motion for a new trial, but the grounds urged on that motion do not differ from those urged here.

The judgment and the order denying a new trial are affirmed.

PEEK and THOMPSON, JJ., concur.




69 Cal.App.2d 181

**CALIFORNIA EMPLOYMENT COMMISSION v. SUTTON et al.**

**Civ. 7089; Sac. 5667.**

District Court of Appeal, Third District, California.

May 15, 1945.

**1. Taxation ⇐584**

The term "civil action", as used in section of Unemployment Insurance Act authorizing Employment Commission to bring civil action against defaulting employer to collect contributions due under act, is used in commonly accepted sense of the term, involving a trial of issues raised by the pleadings, independent of any previous hearing by the commission. Gen.Laws Supp.1939, Act 8780d, §§ 45, 45.1, 45.3; Code Civ. Proc. §§ 21–23, 1063 et seq.; St.1943, p. 3034, § 82.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Action".

**2. Action ⇐20**

The distinction between a "special proceeding" and an "action" is well recognized, and the terms are not to be used interchangeably. Code Civ.Proc. §§ 21-23, 1063 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Action" and "Special Proceeding".

**3. Taxation ⇐593(1)**

In action by Employment Commission to recover contributions allegedly due under Unemployment Insurance Act, trial court did not err in excluding record of proceedings before commission other than the certificate of delinquency, or in admitting evidence in support of allegations of defendant's answer, since court was not limited to review of record before the commission. Gen.Laws Supp.1939, Act 8780d, §§ 45, 45.1; Code Civ.Proc. §§ 21–23, 1063 et seq.

**4. Appeal and error ⇐931(1), 989**

District Court of Appeal was required to consider evidence and all reasonable inferences therefrom in light most favorable to respondent and to disregard conflicting testimony.

**5. Taxation ⇐593(3)**

Evidence supported finding that defendant who owned necessary equipment and was engaged in sheep shearing was not an independent contractor, but that he and his co-workers were employees of various sheep growers, so that defendant was not liable for contributions under Unemployment Insurance Act on wages paid to his coemployees. Gen.Laws 1937, Act 8780d, §§ 6.5, 9.

**6. Master and servant ⇐5**

An "independent contractor" is a person who is engaged in an independent employment or occupation, responsible to his principal only for the result and not for the manner or means by which it is accomplished.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

**7. Master and servant ⇐5**

In determining whether an individual is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired, and if the employer has the power to exercise complete control, whether exercised with respect to all details or not, an employer-employee relationship exists.

**8. Master and servant ⇐1**

Employer's right to discharge at will without cause is strong evidence of employer's control over the manner and means of performing the work, on question of

whether relationship of employer and employee exists.

**9. Taxation ⇐59**

Where defendant while engaged in sheepshearing was an employee of the various sheep growers and not an independent contractor, one who was employed by defendant as a tier and who was paid out of the 3½ cents per head, which defendant received also, became an employee of the growers, and was not an employee for whom defendant became liable for contributions under Unemployment Insurance Act. Gen.Laws 1937, Act 8780d, § 8.5.

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Appeal from Superior Court, Glenn County; W. T. Belieu, Judge.

Action by California Employment Commission, formerly Unemployment Reserves Commission, against J. W. Sutton and others to recover contributions, interest, and penalties allegedly due under the California Unemployment Insurance Act. From a judgment for named defendant, the plaintiff appeals.

Affirmed.

Robt. W. Kenny, Atty. Gen., and Clarence A. Linn and Doris H. Maier, Deputy Attys. Gen., for appellant.

Rogers & Clark, John H. Painter and John W. Broad, all of San Francisco, for respondent.

ADAMS, Presiding Justice.

Plaintiff brought this action under section 45 of the Unemployment Insurance Act, Deering's Gen.Laws, Act 8780d, as amended in 1939, Supp.1939, alleging in its complaint that defendant Sutton was at all times mentioned an employer within the terms of section 9 of the aforesaid act, that between January 1, 1938, and December 31, 1940, he paid wages in the amounts shown on an attached schedule, Exhibit "A," that, without good cause shown, he failed to pay contributions required of him as such employer, and that he was indebted to plaintiff in the sum of $755.57 including penalties and interest.

Defendant in his answer denied the aforesaid allegations except as to one employee for a short time, and set up, as a special defense, that both he and said employee were engaged in agricultural labor.

The action came on for trial before the court sitting without a jury, and plaintiff, in support of its complaint, offered in evidence a certified assessment of the commission showing the amount claimed to be due, a decision of the commission authorizing the assessment, and the entire record of proceedings which had been had before the commission culminating in its decision and assessment. Defendant objected to the admission of anything but the certificate, and his objection was sustained. Thereupon plaintiff rested. Defendant then offered evidence in support of his answer, which was admitted over the objection of plaintiff which contended that with the filing of the certificate there was nothing for the court to do but enter judgment for plaintiff.

At the conclusion of the trial the court made findings in favor of defendant, found that he was not an employer except as to one person in 1939 and 1940, and that he and said employee were engaged in agricultural labor within the meaning of section 7(a) of the act. From the judgment in favor of defendant, plaintiff has appealed, contending that the trial court erred in refusing to admit in evidence the transcript of the prior proceedings before the commission, that the court should have considered the evidence before the commission and sustained its findings if there was any substantial evidence to sustain them and it was not shown that the commission acted arbitrarily or capriciously, that the trial court, in this action, was, in effect, a reviewing court, and while it could exercise an independent judgment on the facts as shown by the record before the commission, there was a strong presumption in favor of the conclusion of the commission, and that this case does not differ from cited cases in which review of the decisions of the commissioner were under review in proceedings by mandamus or certiorari. Appellant also contends that the evidence is insufficient to show that defendant was not an employer within the meaning of the act, or that he and his one employee were engaged in agricultural labor.

[1, 2] The first matter to be decided is what the legislature intended should be the scope of the "civil action" authorized by section 45 of the act, supra. That section, as it read when this action was filed, provided:

"If any employer fails to make any payment required of him, or fails to deduct and pay to the commission the contributions of his workers, in accordance with the provi-

sions of this act and of the rules and regulations adopted by the commission, he shall become additionally liable for interest on such payments at the rate of twelve per cent per annum from the date such payment becomes due, both principal and interest being payable in the same manner as the contributions. *Such payment and interest shall be collectible in the name of the commission in any manner practicable, including civil action by the commission against the defaulting employer.*" (Italics ours.)

Appellant contends that by such "civil action" it was intended only that the trial court should review the record before the commission, and apply the principles announced in such cases as Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P. 2d 304; Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425, Vaughn v. Board of Police Commissioners, 59 Cal.App.2d 771, 140 P.2d 130; Madruga v. Borden Co., 63 Cal.App. 2d 116, 146 P.2d 273; and National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170. Respondent, on the other hand, contends that the term "civil action" was used in the commonly accepted sense of that term, involving a trial of issues raised by the pleadings, independent of any previous hearing by the commission except that, as provided by section 45.1 of the act, a certificate attested by the commission or its duly authorized agent showing a delinquency on the part of defendant shall be prima facie evidence of the payment by the employing unit of the amount of wages for employment by employers set forth therein, of the levy of contributions, of the delinquency, and of the compliance by the commission with all of the provisions of the act in relation to the computation and levy of the contributions specified in such certificate.

The trial court adopted respondent's contention, and we are of the opinion that its conclusion was correct. Proceedings in mandamus, certiorari and the like are not generally classified as "civil actions" but as "special proceedings of a civil nature." They are so denominated in our Code of Civil Procedure, Part III; and sections 21, 22 and 23 of that code likewise distinguish civil actions from special proceedings. It is said in 1 Cal.Jur., pp. 325, 326, sec. 16, that the distinction between a special proceeding and an action is well recognized, and that the terms are not to be used interchangeably. Also see Carroll v. Carroll, 16 Cal.2d 761, 768, 108 P.2d 420; In re Central Irrigation District, 117 Cal. 382, 387, 49 P. 354; In re Estate of Joseph, 118 Cal. 660, 662, 663, 50 P. 768; In re Estate of Harris, 3 Cof.Prob.Dec. 1; Sheehan v. Board of Police Commissioners, 188 Cal. 525, 535, 206 P. 70.

It is to be assumed that the legislature, in enacting section 45, supra, had in mind the distinction between civil actions and special proceedings such as were before the court in the cases relied upon by appellant, and that they meant by use of the term civil action such action as is defined in section 22 of the Code of Civil Procedure, wherein the court should take testimony as to the issues made by the pleadings and from such evidence make its own decision independent of any prior proceeding before the Commission. This conclusion finds support in section 45.1 of the act which provides:

"In any civil action brought by or against the commission, all of the courts of this State shall give preference to such action on their calendar over all civil litigation except equity cases, cases involving extraordinary writs, or summary proceedings. In any such action a certificate attested to by the commission or its duly authorized agent showing the delinquency shall be prima facie evidence of the payment by the employing unit of the amount of wages for employment by employers set forth therein; of the levy of the contributions; of the delinquency; and of the compliance by the commission with all the provisions of this act in relation to the computation and levy of the contributions specified in such certificate."

It also finds support in section 45.3, which gives evidentiary effect to a finding of the commission that there exists no good cause excusing the delinquency of an employer, or that such employer's failure is due to intentional fraud, stating that such findings shall be prima facie evidence of the existence of such facts. No other findings of the commission are made even prima facie evidence, and such omission indicates that all other issues presented in such a civil action are to be tried by the court regardless of any findings thereon by the commission.

In the recent case of California Employment, etc., Commission v. Smileage Co., 68 Cal.App.2d 249, 156 P.2d 454, 455, the court said regarding the certificate mentioned in section 45.1:

"The certificate being prima facie evidence of the facts it sets forth, it established the allegations necessary to make out a case for plaintiff until contradicted and overcome by other evidence. Any evidence in the case contrary to the prima facie case established by the certificate of delinquency merely created a conflict in the evidence to be resolved by the trial court."

The form of appellant's pleadings suggests too, that it so construed the act, for it did not plead that it had made findings that defendant was an employer, etc., and that said findings were sustained by the evidence before the commission and were not unreasonable or arbitrary, and thus present those issues for the trial court's determination. On the contrary, the only issues presented were that defendant was an employer, that he had made payment of wages, that he had failed to make contributions, and that he was indebted for the amount thereof with penalties and interest.

Appellant cites section 82 of the act, enacted in 1943, St.1943, p. 3034, and in effect subsequent to the trial of this action, as showing a legislative intent to give "as much finality as possible" to the decisions of the commission, since it provides that "The decision of the appeals board is final, except for such action as may be taken by judicial tribunal as permitted or required by law." But the very statement of the exception embodied in that provision appears to be a recognition of the provisions of section 45, supra. In Scripps Memorial Hospital v. California Employment Commission, 24 Cal.2d 669, 151 P.2d 109, where plaintiff brought an action under section 45.10 of the act to recover contributions which it had paid under protest, it was contended by the commission that plaintiff had failed to exhaust its administrative remedy and was, therefore, not entitled to maintain its action. The court said, 24 Cal. 2d at page 674, 151 P.2d at page 112:

"The right to pay under protest and bring such an action is directly given in this statute without qualification, and it is not for the courts to add conditions to the exercise of that right which are not imposed by the statute. Assuming that an administrative remedy existed the most that can be said is that alternative remedies were available to the respondent, and the court correctly refused to grant the motions to dismiss."

Also in W. R. Grace & Co. v. California Employment Commission, 24 Cal.2d 720, 727, 728, 151 P.2d 215, the court said that actions brought under section 45.10 and section 41.1 of the act differ substantially from proceedings in mandamus; that the petition for mandamus there under consideration was in effect an appeal to the courts.

[3] We therefore conclude that the trial court did not err in excluding the record of the proceeding before the commission and in admitting evidence in support of the allegations of defendant's answer.

[4] The next question presented is whether there is sufficient evidence in the record to support the findings of the trial court that defendant Sutton was not an employer. Considering the evidence and all reasonable inferences therefrom in the light most favorable to respondent, and disregarding conflicting testimony as we must do on this appeal (Mah See v. North American Accident Insurance Company, 190 Cal. 421, 426, 213 P. 42, 26 A.L.R. 123; City of Los Angeles v. Knapp, 7 Cal.2d 168, 172, 173, 60 P.2d 127), it shows the following: Sutton was, and had been for many years engaged in sheep shearing. He owned certain equipment which consisted of a truck upon which were mounted a gasoline engine, motors and a generator designed to operate sheep shears electrically. He did not furnish shears, same being furnished by the shearers who also furnished their own cutters and combs. During the sheep shearing season each year he moved his equipment from one sheep ranch to another where his services were desired by the growers, using the shearing sheds, pens, etc., on such ranches. Because of his contact with shearers and his knowledge of their capabilities he was often requested by the wool growers for whom he worked, to locate good shearers for them. Consequently, he often rounded up sheep shearers to do the work. On some occasions wool growers instructed him to bring certain specified shearers with him or not to bring certain men, and on such occasions he complied with their instructions. For the same reason, on some occasions he located wranglers and sackers to assist in the work, but those men were often located and hired directly by the growers.

Unlike a contractor who does a job with his own employees, Sutton had no control

over the wages of the shearers and other men who worked with him. He did not negotiate with the growers regarding the amount to be paid to the shearers and other men and he did not determine their compensation in any way. They were paid the prevailing wage, and Sutton's earnings on a job were not affected by the amount paid to the other men. The only compensation in which he had any interest was his own wage and the portion of same which he paid to a wool tier. The growers instructed him regarding the number of shearers, wranglers and sackers to be used on a job and that was not Sutton's concern. If the number of persons working was kept at a minimum so as to avoid excessive costs, Sutton's compensation was not increased in any way. Neither was his compensation decreased if an excessive number of men were hired or if their wages were excessive.

The shearing operations were carried on on the ranches of the growers, and the sheds and pens in which the shearing was done were supplied by them. All of the men, including Sutton, were furnished board and room by and at the expense of the growers. These accommodations were usually furnished on the grower's premises and were not controlled by Sutton.

The date upon which the shearing for any grower commenced did not depend upon the volition of Sutton, but rather upon the grower's analysis of weather conditions and the danger of flies and burrs. Successive shearing dates were agreed upon between Sutton and the growers on the basis of their mutual convenience and necessities.

During the shearing operations the growers maintained constant control over all of the men. Either the grower or his foreman was always present and instructed the shearers and the other men how they wanted the work done, told the men whether they were doing their work properly, and inspected the sheep in the inspection pens after they were shorn. Likewise the grower, or his foreman, counted the sheep and kept the records of the number of sheep shorn by each of the shearers. Those records furnished the basis for the wages paid to the shearers, and to Sutton when he was not paid by the day. Sutton gave no instructions to the shearers regarding the manner of doing the work unless he was requested by the grower or the grower's foreman to do so.

Sutton, the shearers and all other men working with him were subject to immediate dismissal by the grower for any reason, without any resulting liability upon the grower. It was understood by all of them that a grower could fire any of them at any time. Also, Sutton and the other men were free to quit their work at any time without any liability to the growers.

Sutton carried no workmen's compensation insurance on any of the men. The growers carried such insurance upon the entire crew including Sutton and the tier. Sutton had no office, kept no records, had no stationery or business cards, and did no advertising. He did not maintain anything which could be claimed to be a business establishment. The sackers and wranglers were paid on a daily basis and were customarily paid directly by the growers. The shearers, tier and Sutton were, in every year but 1938, paid on the basis of the number of sheep shorn. Most of the growers paid all of these men directly; but some of the growers, usually those having small bands of sheep, computed the entire amount payable and paid it to Sutton who distributed the pay to the others. However, on such occasions Sutton did not retain any share of the pay for the services of the other men.

In 1938 Sutton received a fixed sum of $45 per day for his own services and for his own equipment. No portion of that sum was paid for the services of any other person. He did not locate any of the shearers, wranglers, sackers or tiers during that year. They were hired directly by the grower. Also, Sutton did not distribute the pay to any of the men during that year. All of them were paid directly by the growers.

[5] We think the foregoing amply supports the finding of the trial court that Sutton was not an independent contractor, and that he and his coworkers were employees of the various growers.

[6–8] In its recent decision in California Employment Commission v. Los Angeles Downtown Shopping News Corporation, 24 Cal.2d 421, 150 P.2d 186, the Supreme Court said that an independent contractor is a person who is engaged in an independent employment or occupation, responsible to his principal only for the result and not for the manner or means by which it is accomplished; that in determining wheth-

er an individual is an employee or an independent contractor the most important factor is the *right* to control the manner and means of accomplishing the result desired, and that if the employer has the power to exercise complete control, whether or not that potential control is exercised with respect to all details, an employer-employee relationship exists. It also said that strong evidence of the employer's control is his right to discharge at will without cause.

In the case before us the testimony shows that the various sheep growers for whom Sutton and the crew of shearers worked had and exercised the right to control the manner and means by which their sheep were shorn, and that they had, and exercised, the right to discharge any of them at will. Two wool growers for whom Sutton had worked so testified in this action, as did Sutton himself.

Section 6.5 of the Unemployment Insurance Act provides that " 'Employment,' subject to the other provisions of this act, means service * * * performed for wages or under any contract of hire, written or oral, express or implied. * * *" There is no evidence here that Sutton had any contract of hire with the men who made up the crew, except the one tier. He did not fix the wages of the men nor did he pay them. They were furnished board and room by and at the expense of the growers, and all records upon which their compensation could be computed were kept exclusively by the growers, and this was true even during the times that Sutton himself was paid so much per head of sheep shorn. And Sutton made no profit out of the enterprises except the sums paid directly to him for his services and the use of his equipment.

[9] The only remaining question is whether the one tier who, during a portion of the period under consideration was paid out of the 3½ cents per head which Sutton received, was an employee of Sutton and one for whom Sutton became liable for contributions under the act. Section 8.5 of said act appears to cover just such a situation. It provides:

" 'Employing unit,' as used in this act, means any individual or type of organization * * * which has, or subsequent to January 1, 1936, had, in its employ one or more individuals performing services for it within this State. * * *

"Each individual employed to perform or to assist in performing the work of any individual employed by an employing unit shall be deemed to be employed by such employing unit for all the purposes of this act, whether such individual was hired or paid directly by such employing unit or by such individual so employed, providing the employing unit had actual or constructive knowledge of the work."

Since it cannot be denied that the growers—the employing units in this case—had knowledge of the work of the tier who was paid out of Sutton's 3½ cents per head, the foregoing section apparently brought such tier within the scope of the above section and constituted him an employee of the growers.

Our conclusion that the evidence is sufficient to show that Sutton and all of the crew working with him were employees of the growers renders it unnecessary for us to pass upon the question whether such employees were engaged in agricultural labor.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.




## RODRIGUEZ v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. *

Civ. 12875.

District Court of Appeal, First District, Division 1, California.

May 18, 1945.

Hearing Granted July 16, 1945.

1. Criminal law ⇐290, 1086(9)
Prohibition ⇐20

The record on appeal or on petition for prohibition should show definitely the entry of a plea of former acquittal or former jeopardy, and a motion to dismiss is not the proper remedy.

2. Prohibition ⇐24

Where alternative writ of prohibition has been issued, the question should be disposed of on the merits if possible, instead

* Subsequent opinion 165 P.2d 1.

of dismissing writ for some technical defect.

**3. Infants ⇐20**

One who commits rape upon a minor commits an offense under statute defining offense of contributing to delinquency of a minor. St.1937, p. 1033, § 702.

**4. Criminal law ⇐878(3)**

In prosecution for statutory rape and contributing to the delinquency of a minor, where count in information charged that defendant contributed to delinquency of minor by acts short of rape, and jury acquitted defendant of charge of statutory rape and disagreed on charge of contributing to delinquency of minor, fact that jury acquitted defendant of statutory rape did not amount to an acquittal on both counts, since the offenses were separate and jury could have convicted defendant of either offense. St.1937, p. 1033, § 702; Pen.Code, §§ 261, 954.

**5. Criminal law ⇐878(1)**

Where accused is charged in several counts, the granting of leniency by jury on one offense and a conviction or disagreement on a second offense should not necessarily be declared an acquittal of the second offense. Pen.Code, § 954.

**6. Criminal law ⇐878(3)**

An acquittal on one count is not an acquittal on another count unless one is necessarily included in the other. Pen.Code, § 954.

**7. Criminal law ⇐878(4)**

The statutory proviso that two or more different offenses may be charged in one indictment, and that acquittal on one or more counts will not be acquittal on others, manifests intent that apparently inconsistent verdicts shall afford no basis for reversal where conviction is supported by evidence. Pen.Code, § 954.

**8. Criminal law ⇐186**

The rule that two or more different offenses may be charged in one indictment, and that acquittal on one or more counts will not be acquittal on others, may not be used to violate constitutional provision that no person shall be twice put in jeopardy for same offense. Pen.Code, § 954; Const. art. 1, § 13.

**9. Prohibition ⇐11**

Where a court is vested with jurisdiction of the person and offense charged, a writ of prohibition will not issue to restrain or correct mere error.

**10. Prohibition ⇐11**

The determination of sufficiency of a defense is a matter for court or tribunal having jurisdiction of the proceedings, and the remedy for any error in such regard is not to be found in prohibition.

**11. Criminal law ⇐739(4)**

In prosecution for rape and contributing to delinquency of a minor where issue of former acquittal was based on alleged inconsistency of verdict acquitting petitioner of the former charge, and disagreeing on the latter, a jury should determine on retrial whether the charges are identical in fact. St.1937, p. 1033, § 702; Pen.Code §§ 261, 954; Const. art. 1, § 13. (Per WARD, J.)

**12. Prohibition ⇐25**

Where issue of former acquittal based on alleged inconsistency of verdict acquitting petitioner of charge of statutory rape and disagreeing on charge of contributing to delinquency of minor was presented for determination on allegations of petition for writ of prohibition, and demurrer thereto, court could properly consider all the allegations of the petition, including those pertaining to evidence adduced at former trial, and was not limited to a consideration of the information in determining claimed inconsistency of verdict. St.1937, p. 1033, § 702; Pen.Code, §§ 261, 954; Const. art. 1, § 13. (Per PETERS, P. J., and KNIGHT, J.)

**13. Judgment ⇐648**

Where petitioner presented issue of former acquittal based on claim of inconsistency of verdict acquitting petitioner of statutory rape and disagreeing on charge of contributing to delinquency of a minor by way of proceeding in prohibition based on a petition setting forth state of record and of evidence adduced at trial, decision of District Court of Appeal on issue of former acquittal was not open to consideration upon second trial on charge of contributing to delinquency of a minor. St. 1937, p. 1033, § 702; Pen.Code, §§ 261, 954; Const. art. 1, § 13. (Per PETERS, P. J., and KNIGHT, J.)

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Proceeding by Nicholas Rodriguez against the Superior Court of the State of Califor-

nia in and for the City and County of San Francisco, and Honorable Frank T. Deasy, Judge thereof, for a writ of prohibition to restrain the respondent from trying petitioner for a violation of statute defining the offense of contributing to the delinquency of a minor.

Demurrer to the petition sustained and alternative writ discharged.

Morris Oppenheim, of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondents.

WARD, Justice.

Petitioner seeks by writ of prohibition to restrain the superior court of San Francisco from trying him for a violation of section 702 of the Welfare and Institutions Code, St. 1937, p. 1033, which defines the offense of contributing to the delinquency of a minor. The offense is charged in an information containing two counts, the first charging rape, the second an offense under section 702. Upon the trial of petitioner on both counts the jury found him not guilty of rape, not guilty of attempt to commit rape, and disagreed as to the count alleging a violation of section 702. Petitioner contends that since both charges were based on the same incident the effect of the acquittal of rape and attempt to commit rape was to acquit him also of the offense charged under section 702, with the result that he has been in jeopardy and cannot be tried a second time on the charge as set forth in the information.

The first count charges a felony, to-wit, rape upon a female of the age of fourteen years who was not the wife of defendant. The second count is as follows: "For a further and separate cause of action, being a different offense of the same class of crimes and offenses as the charge set forth in Count 1 hereof, and connected in its commission, the said Nicholas Rodriguez is accused * * * of the crime of misdemeanor, to-wit: Violating section 702 Welfare and Institutions Code of the State of California, committed as follows: The said Nicholas Rodriguez * * * did willfully, unlawfully and lewdly touch the private parts of [the minor child] * * *, who was then and there a female child under the age of twenty-one years, to-wit, of the age of fourteen years, with the private parts of him, the said Nick Rodriguez, all of which willful and unlawful acts and course of conduct of the said Nicholas Rodriguez as aforesaid did thereby, then and there, manifestly tend to, and did encourage, cause and contribute to the said [child] * * * becoming and remaining such a person as is described in Section 700 of said Welfare and Institutions Code, St.1939, p. 3027, to-wit, a person under the age of twenty-one years who is leading, or from any cause is in danger of leading an idle, lewd, dissolute or immoral life."

The question is whether defendant may be tried a second time upon the second count of the information as to which the jury disagreed on the first trial. If he had been acquitted on that count, as he was upon the first count, he could not be tried again upon either count. If he had been tried upon an information charging only an offense under section 702 and the jury had disagreed, he could be tried a second time. In defendant's analysis if he did not commit the offense of rape, and the jury has exonerated of that offense, it necessarily follows that he did not commit the violation of section 702 charged in the information.

[1, 2] The petition for the alternative writ might have been denied upon the ground that it showed there was no entry of a plea of former acquittal or once in jeopardy, but that a motion to dismiss upon the ground of former acquittal and once in jeopardy was made and denied subsequent to acquittal on the rape charge. The record on appeal or on petition for prohibition should show definitely the entry of the plea of former acquittal or former jeopardy. People v. McFarlane, 138 Cal. 481, 71 P. 568, 72 P. 48, 61 L.R.A. 245; People v. Bennett, 114 Cal. 56, 45 P. 1013; People v. Lachuk, 5 Cal.App.2d 729, 43 P.2d 579; People v. Frank, 134 Cal.App. 211, 25 P.2d 486. A motion to dismiss is not the proper remedy. People v. Strickler, 167 Cal. 627, 140 P. 270. It would have been a relatively easy matter to have the accused enter the proper plea, but this procedure would have delayed the determination of the question involved upon its merits. The alternative writ having issued, the well-settled practice of disposing of the question, if possible, on the merits "rather than to dismiss it for some technical defect" should be followed. People v. Guerrero, 22 Cal.2d 183, 185, 137 P.2d 21, 23.

The problem of inconsistent verdicts most frequently arises where there is a conviction on one count and acquittal on another. In such cases where an acquittal on one count is inconsistent with conviction on the other, it is frequently contended that the acquittal pravails and operates also as an acquittal of the count as to which there has been a conviction—that the acquittal on one count is in legal effect an acquittal on both. The problem is the same when instead of an acquittal and conviction there is an acquittal and a disagreement of the jury. In either situation the question is whether the acquittal upon one count operates as an acquittal on the other. In cases of both types the questions are, first, whether there is inconsistency, and, second, what is its effect? Even where inconsistency exists a strong argument can be made that the acquittal of one count should not work an acquittal of the other. The acquittal may represent the jury's desire to extend leniency by convicting upon one count only, rather than its finding that the defendant had not committed the offense as to which he has been acquitted.

[3] The case herein is one in which there is no inconsistency. It is true that one who commits rape upon a minor commits an offense under section 702 as the rape necessarily and inevitably contributes to the delinquency of the minor. Acts indicating rape of a minor may be prosecuted as an offense under section 702. It is also true that a defendant may commit acts with relation to a minor girl which fall short of a completed rape and short of an attempt to commit rape, but which nevertheless constitute an offense under section 702. In the case herein the second count of the information does not charge that defendant violated section 702 in that he committed rape upon the person of a minor girl. It charges that he contributed to the delinquency of the minor by acts short of rape, but which plainly constitute an offense under section 702.

An acquittal of rape may represent the jury's view that the defendant has not completed the offense of rape, but has done enough to subject him to prosecution under section 702. A jury may disbelieve evidence as to the completion of an act of rape, but nevertheless be satisfied that the defendant has done acts attributed to him in a separate count which constitute an offense under section 702. In such event there is no inconsistency to serve as the basis for a contention that an acquittal of the rape operates as an acquittal of the section 702 count. If instead of a conviction on the section 702 count, there is a disagreement, the defendant may be tried a second time just as if he had originally been tried on the 702 count alone and his trial had resulted in a disagreement of the jury. Upon the second trial the evidence may be sufficient to convince all members of the jury that he should be convicted or acquitted of the offense charged under section 702, or that though guilty he has been previously placed in jeopardy.

Petitioner herein relies on the decision of this court in People v. Krupa, 64 Cal. App.2d 592, 149 P.2d 416. That case did not involve any problem of inconsistent verdicts returned by a single jury before whom the defendant had been tried on an information containing two counts. Nor did that case present any question as to whether an *acquittal* on one count should operate as an acquittal on another as to which the jury had convicted or disagreed. In that case the defendant pleaded guilty to the second count of an information charging a violation of section 702. Judgment was entered on his plea and he satisfied the sentence imposed on him. Thereafter, over his objection that the judgment on the second count was a bar, he was tried and convicted on the first count charging a violation of section 11714, Health and Safety Code, St.1939, p. 772. The judgment was reversed on appeal. There the question was whether the defendant could be convicted of the two crimes, rather than whether he was to escape punishment altogether.

The first count of the information in the Krupa case charged that defendant on January 18, 1943, hired, employed and used a minor in unlawfully transporting and carrying a quantity of cigarettes containing marihuana. The second count of the information made the same act of the defendant the basis of an offense under section 702. The majority opinion held that a violation of section 11714 necessarily and inevitably involved a violation of section 702. A defendant could not commit an offense under section 11714 without at the same time and by the same acts violating section 702, wherefore an offense under section 702 was necessarily included in every violation of section 11714.

In view of the rule that a conviction or acquittal of an included offense bars a conviction for the inclusive offense, the defendant could not be held upon the first count, charging an offense under section 11714, after judgment against him on the second count based on exactly the same charging allegations as the basis of the first offense. In other words, the same alleged act of the defendant in using the minor to transport and carry marihuana was the basis of both counts. In such a case if he had been tried simultaneously on both counts and convicted on one and acquitted on the other, there would be a plain case of inconsistent verdicts. By its conviction the jury would affirm that defendant had used the minor to transport and carry marihuana; by its acquittal it would declare that he had not done so. The Krupa case stands for the rule that where an offense cannot under any circumstances be committed without at the same time committing another offense, such other offense is an included offense.

[4] The present case presents a different situation. Here the 702 count is based on allegations in the information which fall short of constituting rape, which is the charge in the first count. An acquittal of rape, therefore, is not inconsistent with a conviction of lesser acts which are made the basis of a second count charging an offense under section 702. Since there is no inconsistency, there is no basis for an argument that the effect of the verdict on the count of rape or attempt to commit rape is to acquit on both counts.

In People v. Stangler, 18 Cal.2d 688, 695, 117 P.2d 321, 324, the court said: "It is also claimed that the acquittal of the defendant on the charges of violation of section 288 of the Penal Code amounted to an acquittal on the charges of rape, because, so it is asserted, both charges depended on the same act committed by the defendant. The defendant argues that having been found guilty of rape he must necessarily have been found guilty of the charges under section 288, therefore, having been acquitted of the latter charges, he should also be deemed to have been acquitted of the former. The only acts proved were the acts of rape. It is conceivable that in some cases circumstances may be presented to support convictions on both charges relating to the same event. People v. O'Donnell, 11 Cal.2d 666, 81 P.2d 939; People v. Hickman, 31 Cal.App.2d 4[11], 87 P.2d 80. But it does not follow that where the act of rape only is involved the defendant must be found guilty of both charges or neither."

The allegations in the present information charging a violation of section 702 are not sufficient to charge the higher offense of rape but the acts alleged are of the same class of crimes as rape and it is alleged that the offense under section 702 was connected in its commission with the crime charged in the first cause of action. The procedure adopted in setting forth the several causes of action is in accord with the directions of Penal Code section 954, which provides in part: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count."

There are a few cases in California not in accord with the above rule. People v. Andursky, 75 Cal.App. 16, 241 P. 591, is a fair sample. People v. Amick, Cal.App., 118 P.2d 490, an opinion prepared by Mr. Justice Griffin, was taken over by the Supreme Court, which, without dissent, determined that Mr. Justice Griffin had correctly stated the law, and adopted such opinion as the opinion of the Supreme Court. People v. Amick, 20 Cal.2d 247, 125 P.2d 25. At pages 250, 251 of 20 Cal. 2d, at page 27 of 125 P.2d, considering the Andursky case and People v. Day, 199 Cal. 78, 248 P. 250, the court said:

" 'In support of the contention appellant cites People v. Andursky, 1925, 75 Cal.App. 16, 241 P. 591, where it was held that where a defendant was charged in one count of an information with the crime of rape alleged to have been committed upon a female of the age of 15 years and in a second count of the same information, charging him with a violation of the Juvenile Court Act * * *, where it was alleged, among other things, that the defendant, on the same day charged in the first count, induced her to remain away from her home and usual place of abode and induced her to go with him to a room in a rooming house and there occupied the same bed with her and there accomplished acts of sexual intercourse with her, and the same evidence was relied on to convict on both counts, a verdict finding the defendant guilty on the first count and not guilty on the second count was inconsistent and conflicting, and insufficient to support a conviction. * * *

"'It should be noted that the Andursky and Day cases were decided in 1925 and 1926 respectively. In 1927, the legislature amended several sections of the Penal Code relating to pleading of various crimes (Stats.1927, p. 1042). There was added to the last sentence of section 954 the following: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." We might well assume that the decision in the first two above-mentioned cases prompted or had considerable to do with the legislative determination to amend section 954 as above quoted. The remaining cases cited by appellant were however, decided subsequent to that amendment, each of which quotes from or refers to the case of People v. Day, supra, to the effect that where a person is convicted on one count of an information and acquitted on another he is entitled to an acquittal on both counts if both counts state precisely the same offense. Both of these recent cases [People v. Coltrin, 5 Cal.2d 649, 55 P.2d 1161; People v. Hickman, 31 Cal.App.2d 4, 87 P.2d 80] do not discuss the 1927 amendment to section 954.'"

Referring to the Horowitz case (People v. Horowitz, 131 Cal.App., Supp., 791, 19 P.2d 874), the opinion in People v. Amick further said, 20 Cal.2d at page 252, 125 P.2d at page 28: "'"Appellants' most strongly urged argument is that the dismissal of the second count was an acquittal on that charge and that, as an acquittal, it is so inconsistent with the finding of guilt under count I that the latter cannot stand. * * * Authorities could be cited which would seem to support a reversal. People v. Andursky, 1925, 75 Cal.App. 16, 241 P. 591; People v. Puppilo, 1929, 100 Cal.App. 559, 280 P. 545. But we find more persuasive cases recognizing that such inconsistent verdicts may be caused, not by the confusion, but the mercy of the jury, of which the appellant can neither complain nor gain further advantage. (Citing cases.) Moreover, probably to avoid the result of those cases which interpret inconsistent verdicts as acts of stupidity rather than acts of leniency, section 954, Penal Code, was amended in 1927 so that it now reads" (as above quoted). "We conclude that even if the dismissal be regarded as an acquittal, that is no reason why the judgment of conviction, based on ample evidence, should be reversed."'"

[5] It is indeed refreshing to note the realistic view expressed by Judge Bishop, the author of the opinion in the Horowitz case on the conduct of juries. The Supreme Court's approval (People v. Amick, supra) may be regarded as an acknowledgment of the truth of the fact that the probability of severity of punishment that may be inflicted often acts as an incentive in the determination of the guilt or innocence of an accused. "If the jurors paltered with their oaths and with the law, they must make their own peace with conscience. If appellant was wrongfully acquitted on the first and second counts, the error was in his favor, and he cannot be heard to complain. The fact that the jurors relieved him on two counts does not oblige this court to relieve him on the third." People v. Edwards, 72 Cal.App. 102, 117, 236 P. 944, 950. It is not the intent herein to hold that the jury's action in acquitting defendant on the rape charge, so far as this petition for a writ of prohibition is concerned, was an act of mercy. The entire transcript of the evidence is not before us. It is only the intent to hold herein that in any case wherein an accused is charged in several counts that the granting of leniency by the jury on one offense and a conviction or disagreement on a second offense should not necessarily be declared by an appellate court as an acquittal of the second offense. To do so would be the extension of mercy far beyond the possible intention of the jury.

[6] California has adopted the attitude that an acquittal on one count is not an acquittal on another count unless one is necessarily included in the other. Penal Code, sec. 954; People v. Krupa, supra; People v. Kearney, 20 Cal.2d 435, 126 P.2d 612; People v. Amick, supra; People v. Horowitz, supra; People v. Stangler, supra; People v. McCollum, 116 Cal.App. 55, 2 P.2d 432; People v. Jameson, 136 Cal.App. 10, 27 P.2d 935; People v. Bevans, 19 Cal.App.2d 288, 65 P.2d 92; People v. Ranney, 123 Cal.App. 403, 11 P.2d 405; People v. Vanderbilt, 199 Cal. 461, 249 P. 867; People v. Stovall, 94 Cal.App. 635, 271 P. 576; People v. Moody, 62 Cal.App.2d 18, 143 P.2d 978. People v. Lopez, 46 Cal.App.2d 857, 117 P.2d 10, cited by appellant, seems to hold contrary to the tests laid down herein and is incompatible with the above cited cases, but the court explained the reason therefor. In that

case it was held that one charged with aiding and abetting in the commission of statutory rape may be convicted of a violation of section 702. The trial judge discounted and disbelieved part of the testimony on the aiding and abetting the rape charge. The appellate court in effect determined that the evidence, which could be considered in that case on appeal, was such that the aiding and abetting was in fact contributory to the delinquency of the minor. The court explained its realistic attitude as follows 46 Cal.App.2d at pages 858, 859, 117 P.2d at page 11: "There is some slight conflict in the decisions as to the law on this subject, but it is the better rule to hold that, where the acts committed tended to show the commission of the acts charged and where such acts in themselves actually constituted the lesser offense, i. e., contributing to the delinquency of the minor, a conviction had of the lesser offense should be sustained. The judgment rendered would prevent the retrial of appellant upon the original charge, for the reason that it amounted to an acquittal of the greater crime, to-wit: aiding and abetting in the commission of the crime of statutory rape, which is a felony, while the lesser offense, of which appellant was found guilty, is a misdemeanor."

People v. Mendoza, 55 Cal.App.2d 625, 131 P.2d 622, cited by petitioner, is not in point. The defendant was charged with attempted rape and kidnapping. To the plea of "not guilty" to the attempted rape charge was added a plea of once in jeopardy, based upon a conviction on a battery charge founded upon the identical state of facts alleged in the attempted rape charge. At pages 628, 629 of 55 Cal.App.2d, at page 624 of 131 P.2d, the court said: "Battery includes and implies an assault, and there can be no battery without an assault. * * * an analysis of the allegations contained in count one of the amended indictment herein clearly and unequivocally shows that the assault which formed the basis of the battery charge in the municipal court was the gravamen of the charge of attempted rape and was specifically pleaded in the amended indictment as well as relied upon at the trial to prove the offense there charged against appellant." In the Mendoza case the battery was a completed assault. In the present case the acts alleged fell short of rape, an attempt to rape or an assault with intent to commit rape. At most it was mere preparation to rape. The acts alleged in the information are in themselves denounced by the legislature irrespective of rape or one of the included offenses. Battery may be a necessary part of any physical assault but a violation of section 702 as alleged in the information is not necessarily a part of a rape. A violation of section 702 is not an included offense but a separate crime denounced primarily because of the interest of the state in the protection of infants as that word is understood in legal parlance in reference to society and the purposes of civil life. The offense designated in section 702 may be committed without resort to an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. Penal Code, sec. 240.

[7] It is not inconsistent to cite Penal Code section 954 and cases holding that a verdict of acquittal of one count shall not be deemed to be an acquittal of any other count, and to hold that upon the present record that there is no such repugnancy between the allegations of counts one and two as would justify a holding, as a matter of law, that an acquittal on the first count ipso facto is not an acquittal on the second count. The purpose of the enactment of section 954 as it now reads appears in a habeas corpus proceeding, In re Johnston, 3 Cal.2d 32, 36, 43 P.2d 541, 543, as follows: "The section was manifestly adopted for the purpose of enabling the prosecutor to designate or name the offenses by two or more names or designations and of making it impossible for the defendant to escape by reason of an error in designation of the crime. The proviso was written into the section for the purpose of declaring the law that a verdict apparently inconsistent shall afford no basis for a reversal where the evidence is sufficient to support the conclusion that the defendant is guilty of the offense of which he stands convicted."

[8] It seems to be a logical development of the law in this field that an acquittal on one charge should not operate too broadly on others. The adoption of that portion of section 954 providing that an acquittal on one count shall not be deemed an acquittal on another count, without reference to a conviction on one count being a bar to a prosecution on an identical or included offense, People v. Krupa, supra, was in fact a declaration by the legislature that even the effect of inconsistency should

not be used to release the defendant on all counts wherein there has been an acquittal of only one count and no conviction. Each count must be weighed separately. A verdict of guilty should be and is generally considered a bar to further prosecution upon the theory that the defendant should not be punished twice for offenses growing out of the same facts except in cases where the elements in each case are different, such as murder and abortion and others that need not be mentioned. Justice is not served by reversing a conviction, supported by evidence satisfying a jury beyond a reasonable doubt, because the accused was acquitted by the same or another jury of a similar but not identical offense. However, the rule set forth in section 954 may not be used to violate the constitutional provision that "No person shall be twice put in jeopardy for the same offense." Calif.Const., Art. 1, sec. 13.

Up to this point the conclusion reached is based solely upon an analysis of the allegations of each count in the information and the record of acquittal, disagreement, etc., without reference to any part of the evidence. The result reached is that the acquittal of the major offense, as alleged in the information, is not per se inconsistent with a conviction or disagreement under section 702. This conclusion is fortified by the admission of petitioner that an offense under section 702 is not necessarily included in rape. It is true that the problem of consistency or inconsistency may not always be definitely determined without resort to an analysis of the evidence *after* a plea of former acquittal, former conviction or once in jeopardy. Such problems are heard on appeal and not on a petition for a writ of prohibition. The disposition that the trier of the facts will make of the present case is problematical. If the accused should be convicted the decision on appeal may not be foretold without comparison of the evidence presented on the first trial with that offered on a future trial.

[9, 10] The consistency or inconsistency of judgments in criminal cases is seldom passed upon, except on appeal. Generally when the plea of former conviction, an acquittal or once in jeopardy has been interposed, and the case tried and appealed, the record of the evidence is available. Prohibition is not usually the remedy sought because "as in other cases, where a court is vested with jurisdiction of the person and offense, the writ will not issue to restrain or correct mere error. So determination of the sufficiency of a defense is a matter for the court or tribunal having jurisdiction of the proceeding, and the remedy for any error in this regard is not to be found in prohibition." 21 Cal.Jur., p. 619.

On application for prohibition and on the hearing it has been the general custom to entertain the matter from the standpoint of the record of pleadings *without the evidence*. All matters tending to establish a defense are appropriate as pleas. A former judgment of conviction, acquittal or once in jeopardy (Penal Code, sec. 1016) and evidence in support thereof are admissible when such plea has been interposed and the merits thereof heard by the trial court. In Rebstock v. Superior Court, 146 Cal. 308, 80 P. 65, the writ was sought in an effort to protect an informer before the grand jury from trial under the provisions of Penal Code section 64. At pages 310, 311 of 146 Cal., at page 66 of 80 P. the court said: "* * * but his position, so far as the jurisdiction of the court in which the indictment is pending is concerned, is precisely the same as if he here alleged that the statute of limitations had run against the offense prior to the finding of the indictment, or that he had heretofore been acquitted of the offense, or had once been in jeopardy for such offense. His claim, if well founded in fact, is a full and complete defense to the charge against him; but it is, like the other defenses just enumerated, nothing more than a defense, and, like all other defenses, including that of a denial of the truth of the allegations of the indictment, must be presented for determination as to its sufficiency to the tribunal having jurisdiction of the proceeding, which, in the exercise of its jurisdiction, will determine as to the sufficiency of the defense, and any error committed by such court in the exercise of its jurisdiction in regard thereto can be corrected on an appeal." Note that the court did not examine the evidence but accepted the record simply to the effect that Rebstock had testified before the grand jury. Whether the testimony was incriminating, etc., was left to a future trial by jury. At page 311 of 146 Cal. at page 66 of 80 P., the court further said: "Section 1020 of the Penal Code provides that 'all matters of fact tending to establish a defense, other than that specified in the third and fourth subdivisions of section one

thousand and sixteen (former conviction or acquittal and once in jeopardy), may be given in evidence under a plea of not guilty.' Under his plea of not guilty defendant may therefore show the facts here alleged, just as he could show a defense under the statute of limitations, and, if improperly denied his rights in this regard, may have the error corrected on appeal."

In re Harron, 191 Cal. 457, 217 P. 728, is a habeas corpus proceeding. In that matter a portion of the reporter's transcript was considered but only for the purpose of determining whether a previous charge had been dismissed. In the Harron case it was held that if the accused does not enter a plea of once in jeopardy it is waived. People v. Grunhof, 115 Cal.App. Supp. 771, 299 P. 519; People v. Rogers, 112 Cal.App. 615, 297 P. 924; People v. Solani, 6 Cal.App. 103, 91 P. 654; People v. Fry, 137 Cal.App. 525, 31 P.2d 204.

In Huntington v. Superior Court, 5 Cal. App. 288, 90 P.2d 141, defendant had been charged with murder and convicted of manslaughter, which had been reversed. The court determined that defendant could only be tried for manslaughter but based its decision upon the record without resort to the evidence except in so far as reference was necessary to statements made in a previous trial wherein the Supreme Court had quoted certain evidence.

In Oliver v. Superior Court, 92 Cal.App. 94, 267 P. 764, a writ was issued after an analysis of thirty-three counts prohibiting the trial court from trying a thirty-fourth count, but the evidence was not considered. The same procedure was adopted in Jackson v. Superior Court, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422.

An exception to the rule that in prohibition the evidence will not be considered in the instance of the return of an indictment without *any* evidence to support it. An indictment must be supported by evidence that if unexplained or uncontradicted would warrant a conviction (Penal Code, sec. 921) though such evidence may be incompetent evidence. Morehouse v. Superior Court, 124 Cal.App. 38, 12 P.2d 133. "It has long been settled in most jurisdictions that an indictment is invalid if it is unsupported by any evidence before the grand jury. See cases collected in 59 A.L.R. 567. If there is some evidence to support the indictment the courts will not inquire into its sufficiency (see cases collected in 59 A.L.R. 573), but the lack of any evidence conclusively establishes that the grand jury has exceeded its authority in returning an indictment." Greenberg v. Superior Court, 19 Cal.2d 319, 322, 121 P.2d 713, 715. In State ex rel. O'Brien v. Police Court of Seattle, 14 Wash.2d 340, 128 P.2d 332, 335, 141 A.L.R. 1257, the question arose whether a case had been merely stricken from the calendar or dismissed. It was held that the court had power "to consider the evidence and determine the facts." The evidence, however, consisted of a transcipt of the proceedings relative to continuances. The transcript was used only to determine the reason for the continuances.

It appears that "testimony," as that word is used to indicate the oral declarations of a witness which are reduced to writing, is not admissible on a prohibition hearing except for a limited purpose, such as interpreting a written instrument, State ex rel O'Brien v. Police Court of Seattle, supra, or as in the case of determining whether there is any evidence to support an indictment, which goes to the root of the subject of jurisdiction. Greenberg v. Superior Court, supra.

The only question herein is whether the superior court is authorized by law to retry the 702 charge. If the superior court acquired jurisdiction of the defendant and the subject matter, that is, the nature of the offense, the jurisdiction is complete. Fels v. Justice's Court, 28 Cal.App.2d 739, 83 P.2d 721.

The claim that an acquittal on a charge under Penal Code section 261 is a bar to a prosecution on the offense designated in Welfare and Institutions Code, sec. 702, is not a direct but a collateral attack on the proceedings. On collateral attack the only evidence admissible are the pleadings. Other evidence is inadmissible "even though it might show that jurisdiction did not in fact exist." McAllister v. Superior Court, 28 Cal.App.2d 160, 162, 82 P.2d 462, 464, approved in People v. McAllister, 15 Cal. 2d 519, 102 P.2d 1072. That the error must appear on the face of the record is the rule in civil as well as criminal proceedings. In re Keet's Estate 15 Cal.2d 328, 100 P.2d 1045; Security-First Nat. Bank v. Superior Court, 1 Cal.2d 749, 37 P.2d 69; Rico v. Nasser Bros. Realty Co., 58 Cal.App.2d 878, 137 P.2d 861.

If the information shows on its face that the superior court has jurisdiction, prohibi-

tion will not lie to prevent the trial court from acting. Hogan v. Superior Court, 16 Cal.App. 783, 117 P.2d 947. The information shows the jurisdiction of the trial court substantiated by the record presented on this petition. That should be the end of this case, but appellant, petitioner, quotes certain evidence and contends that the acquittal on count one, based on such evidence, is an acquittal on count two.

Former jeopardy is a mixed question of law and fact. It is within the jurisdiction of the court to determine whether the allegations in each count are in law the same. The questions to be decided by the jury are the identity of the parties and the identity of the facts. The first point, the legal question, is determined herein against the position of the petitioner. Whether the *facts* are all a part of the rape charge, or the attempt to commit that offense, or constitute a separate and distinct crime, are questions for the jury to determine upon a proper plea.

It has been suggested that the failure heretofore to enter pleas of former acquittal or once in jeopardy and the filing of this petition amount to a waiver of the right to hereafter present such pleas in the trial court. A plea is one method of presenting grounds of defense to an accusation. Penal Code, secs. 990 and 1002. It is a right accorded to all accused persons.

It is claimed, however, that a determination that jeopardy has not attached based on the record, including a portion of the evidence, becomes the law of the case, and that a plea of once in jeopardy or former acquittal would be futile. It is also claimed that the demurrer filed in this court by the *Attorney General* forecloses *the accused* from presenting further evidence to support the special pleas.

The demurrer admits the truth of the allegations of the petition, namely, that such evidence appears in the record. The demurrer does not admit the sufficiency of the evidence to establish petitioner's contention and does not admit the legal deductions from the facts alleged. Fey v. Rossi Improvement Co., 23 Cal.App. 766, 770, 139 P. 908. "Only those facts are admitted by a demurrer which it is necessary to allege in the pleading." French v. Senate, 146 Cal. 604, 607, 80 P. 1031, 1033, 69 L.R.A. 556, 2 Ann.Cas. 756. The demurrer, as demonstrated by the accompanying points and authorities, ignores the evidence and is based upon the following considerations.

A demurrer to a petition for a writ of prohibition will be tested upon the theory that allegations of evidentiary matter appearing in the petition are true, dispensing with the necessity of investigating their truth. Hevren v. Reed, 126 Cal. 219, 58 P. 536. "A demurrer only admits matters material." Riverside v. Yawman & Erbe Mfg. Co., 3 Cal.App. 691, 694, 86 P. 900, 901. If allegations in the petition are immaterial then such allegations, evidentiary or otherwise, may be treated as surplusage. Burlingame v. Traeger, 101 Cal.App. 365, 281 P. 1051. "* * * whatever of surplusage allegations there are to be found not necessary to a statement of said cause of action are to be disregarded. This is a general rule of pleading." Monk v. Ehret, 192 Cal. 186, 190, 219 P. 452, 453. The failure of the respondent in the prohibition proceedings to file a motion to strike the immaterial matter from the petition does not give an appellate court the right to weigh the evidence and pass upon its sufficiency in the face of mandate of the Constitution that jeopardy shall not attach twice, or the definite provision of the code that such question may only be passed upon by the trier of the facts. Passing upon the evidence at this time is, in effect, prejudging the evidence that may be given hereafter. Pleas of once in jeopardy, former conviction or former acquittal present "issues of fact." Penal Code, sec. 1041. Issues of fact "shall be tried" (Penal Code, sec. 1042) by a jury, a right which is inviolate unless waived (Const. Calif., Art. 1, sec. 7), in which event the trial, not the reviewing, court determines the facts.

The determination of facts as a matter of first instance, by a reviewing court without statutory authority, in declaring the truthfulness or falsity of testimony reduced to writing, would be an infringement upon the duty of the trial court and a "direct violation of law." Salisbury v. Shirley, 66 Cal. 223, 228, 5 P. 104, 108. "* * * except for the limited extension of power granted to reviewing courts by section 4¾ of article 6 of the Constitution * * *, and section 956a of Code of Civil Procedure," Taylor v. Bunnell, 211 Cal. 601, 605, 606, 296 P. 288, 290, and the additional power granted by Rules on Appeal effective July 1, 1943, pursuant to the authority contained in Art. VI, section 1a of the California Constitution, which are not applicable herein, reviewing courts are not permitted to weigh the evidence. "* * * an

appellate court cannot draw inferences of fact from the facts found or find an ultimate fact from probative facts unless it follows as a conclusion of law." 2 Cal.Jur., pp. 914, 915.

To adopt the theory that upon the entry of the plea of once in jeopardy an accused could apply to a reviewing court to pass upon the facts instead of a trial court or a jury, would be to furnish the accused with a weapon of delay and give to reviewing courts instead of jurors the right to weigh evidence and declare its truth or falsity without observing the witnesses.

Assume that under certain circumstances, in the interest of justice, testimony should be considered by a reviewing court, or that, upon the theory that this court is acting in its original jurisdiction, evidence might be admissible. Let us apply the theory to the introduction of evidence on this particular hearing and find out if it would be in the interest of justice.

If the testimony pertinent to count one in the information should be considered, this court could not draw an inference from the facts contrary to the finding of the verdict on that count. On the second count there are no findings, there is no verdict—the jury disagreed. Let it be assumed that we should find not from part but from the whole of the reporter's transcript of evidence that jeopardy has *not* attached. The case would be retried, and the jury instructed as a matter of law based upon such facts that jeopardy has not attached. On a second trial additional evidence not theretofore available to the state or defendant is often introduced. The evidence as a whole presents a different aspect. Would it be in the interest of justice to force the jury to determine that jeopardy had not attached if they could conscientiously determine from the new evidence that jeopardy had attached?

That a jury could determine that the completed crime was all part of rape or attempt to commit rape appears from the following testimony in addition to that quoted by Mr. Presiding Justice PETERS:

"So he pulled down my panties, and he opened my legs, and unbuttoned his own, and got his private parts, and then he put his private parts in mine, and then I pushed away.

"Q. You say you pushed away; did you scream at all? A. Well, I cried.

"Q. Did you cry out 'Help,' or anything like that? A. I didn't cry out 'Help,' but I just said, 'It hurts.'

"Q. And did you cry, did you have tears. A. Yes, sir.

"Q. And how long was Mr. Rodriguez with you in that position? A. Just a few minutes.

"Q. And did you see his private parts? A. Yes, sir.

"Q. Did you see anything on his private parts, Martha? A. Yes sir.

"Q. What was it? A. It was a rubber."

It was proper to grant the alternative writ, if for no other reason than to differentiate this case from the Krupa case, and to determine as a matter of law that the allegations of the offense in count one are not necessarily included in the allegations of count two. The trial court should not be restrained from proceeding with the trial. A jury should determine whether the rape and the 702 charge are identical in fact.

The demurrer to the petition is sustained and the alternative writ discharged.

PETERS, Presiding Justice (concurring).

I concur.

I agree with the holding in the main opinion written by Mr. Justice WARD that the petition for the writ should be denied, but my reasons for denying the writ are somewhat different from those set forth in his opinion.

The question in this case is whether the acquittal of rape and attempted rape in legal effect operates also as an acquittal of the charge of violation of § 702, as to which the jury disagreed. Petitioner contends that the acquittals have this effect for the reason that in the light of the pleadings and the evidence introduced upon his trial any other verdict upon the § 702 count except an acquittal would be inconsistent with the acquittal of rape. In petitioner's view if the jury had acquitted him of rape but convicted him of a violation of § 702 such verdicts would be inconsistent and he urges that the effect of the inconsistency would be to acquit him on both counts. He contends that the verdict of acquittal of rape has a like effect where, as here, the jury instead of convicting him on the § 702 count disagreed as to that count.

There can be no doubt that if the jury had returned a verdict expressly acquitting the defendant of a violation of § 702, he could not be tried a second time on that count. The principle that a person shall not be placed twice in jeopardy for the same offense would preclude such a retrial. The contention of petitioner in the present case is that the acquittal on the rape count is in legal effect an acquittal on the § 702 count, and that such acquittal, in like manner as an express verdict of acquittal, if such a verdict had been returned by the jury, operates to bar a retrial. The contention that the acquittal of rape has this effect is, as said above, based on the premise that any verdict except an acquittal on the § 702 count would be inconsistent with the acquittal of rape, and this is so, petitioner maintains, because the "only evidence that petitioner committed any violation of section 702 of the Welfare and Institutions Code is the testimony that he committed a rape upon a female under the age of consent."

This case presents two questions: (1) Are the verdicts of acquittal and disagreement inconsistent, and (2), if so, what is the effect of the inconsistency? Is it as petitioner contends to acquit him on the charge of violating § 702?

The main opinion discusses the effect of inconsistency at some length. The author says: "Even where inconsistency exists a strong argument can be made that the acquittal of one count should not work an acquittal of the other." 158 P.2d 957. But the conclusion that petitioner may be tried a second time on the § 702 count is not placed on that ground, but, rather, on the ground that a disagreement on the § 702 count is not inconsistent with an acquittal of rape. The opinion reads: "The case herein is one in which there is no inconsistency." 158 P.2d 957. The author goes on to hold that this court in determining the claim of inconsistency in this prohibition proceeding may consider only the allegations of the information, that the evidence on the trial, brought before this court by averments of the petition for the writ which are admitted by the state's demurrer to the petition, may not be considered by this court in this proceeding; that upon the allegations of the information the charge of rape and the violation of § 702 are not per se as a matter of law inconsistent. It follows, according to Mr. Justice WARD, that this court will not grant a writ of prohibition to restrain a second trial. But, the opinion proceeds, upon a second trial on the § 702 count, if the defendant pleads double jeopardy it will be for the jury on that trial to determine whether the acquittal of rape upon the first trial constituted in legal operation an acquittal also on the § 702 count, and in passing on that plea the jury may consider the evidence, apparently the transcript of testimony introduced upon the first trial, and new evidence as well. The opinion reads: "It is true that the problem of consistency or inconsistency may not always be definitely determined without resort to an analysis of the evidence *after* a plea of former acquittal, former conviction or once in jeopardy. * * * The disposition that the trier of the facts will make of the present case is problematical." 158 P.2d 961. (Italics the author's.) Near the end of the discussion is the following: "Would it be in the interest of justice to force the jury to determine that jeopardy had not attached if they could conscientiously determine from the new evidence that jeopardy had attached?" 158 P.2d 964.

Thus it appears that in the view of the author of the main opinion it will not finally be determined upon this prohibition proceeding whether petitioner has been in jeopardy on the § 702 count, that is, whether the acquittal of rape in legal effect was also an acquittal on the § 702 count. All this court should determine, considering only the allegations of the information, is that it cannot be said per se, as a matter of law, that the acquittal of rape was also an acquittal on the charged offenses under § 702, in the view of Mr. Justice WARD.

[12, 13] I am unable to agree with the proposition that in this prohibition proceeding this court is limited to a consideration of the information in determining the claim of inconsistency, and cannot consider evidence introduced upon the former trial. I also disagree that the question whether the acquittal of rape operates an an acquittal of the § 702 count is not to be determined finally in this court, but by a jury upon a second trial after petitioner in such trial makes a plea of double jeopardy. Finally, I am unable to see how "new evidence" introduced upon a second trial can have any possible bearing on the question whether verdicts upon the first trial were inconsistent, and whether the effect of such inconsistency, if any, was to acquit petitioner on both counts. The answer to the

problem of inconsistency depends on the proceedings of the first trial, and on those proceedings alone, and presents a question of law which this court should determine in this proceeding. The evidence which the prosecution may be in a position to produce, and would produce, upon a second trial, can have no possible bearing on whether the legal effect of the acquittal of rape on the first trial was to acquit petitioner also on the § 702 count.

There are numerous decisions which hold that the remedy by prohibition is available to prevent trial on a charge as to which the defendant has been in jeopardy by virtue of a prior acquittal or conviction. Huntington v. Superior Court, 5 Cal.App. 288, 90 P. 141; Oliver v. Superior Court, 92 Cal.App. 94, 267 P. 764; In re Berman, 104 Cal.App. 259, 286 P. 1043; In re Getzoff, 104 Cal.App. 261, 286 P. 1044; Jackson v. Superior Court, 10 Cal.2d 350, 74 P.2d 243, 113 A.L.R. 1422. If the determination of the question of double jeopardy depends on evidence introduced on the trial in which the prior acquittal or conviction was had, then this court should consider that evidence in the prohibition proceeding. If the defendant has been in jeopardy for an offense, then the trial court is without jurisdiction to try him a second time. I know of no rule that on an application for writ of prohibition the evidence upon a prior proceeding cannot be considered if the jurisdiction of the court below to proceed depends on the state of the evidence in that proceeding. The main opinion does not finally determine whether petitioner has been in jeopardy for the charged violation of § 702, but leaves that question to be decided by the jury upon his second trial upon his making the plea of once in jeopardy upon that trial. The main opinion decides only that it cannot be held on the information that petitioner has been in jeopardy as to the offense charged under § 702. In my view the question of double jeopardy should be determined finally in this prohibition proceeding.

Cases are cited in the main opinion to the effect that on prohibition an appellate court will not normally take evidence dehors the record, that is, an appellate court will not normally consider evidence not introduced before the trial court. The petitioner herein does not ask that evidence not introduced upon his trial be considered. His contention is, precisely, that the evidence introduced on the trial should be considered, that it demonstrates as a matter of law that any verdict on the § 702 count except an acquittal is inconsistent with the acquittal on the charge of rape, and that the effect of such inconsistency is to acquit him on the § 702 count.

I agree with petitioner's contention that the evidence properly may be considered to determine whether verdicts returned upon the separate counts of an indictment are inconsistent, but I am of the view that such evidence does not demonstrate inconsistency in the present case. I am further of the view that, even if the verdicts should be held to be inconsistent, the effect of such inconsistency is not to acquit petitioner on the § 702 count, as to which the jury disagreed. The opinion of Mr. Justice WARD states that "even where inconsistency exists a strong argument can be made that the acquittal of one count should not work an acquittal of the other," 158 P.2d 957, but does not place the decision on that ground, but, rather, on the ground that considering the information the verdicts are not inconsistent, and whether they may be so in the light of the evidence cannot be determined in this prohibition proceeding.

Petitioner herein contends that the evidence upon his trial demonstrates that the acquittal of rape is also an acquittal of the § 702 charge because the only evidence to substantiate the misdemeanor charge is that such a rape was committed; that "the only evidence that the defendant did any act which would constitute a crime under § 702 is that on the day in question he had an act of sexual intercourse with the prosecutrix and she was under the age of consent."

I agree with the holding in the main opinion that an acquittal of rape or attempted rape is not per se, as a matter of law, inconsistent with a conviction or disagreement on a charge of violating § 702. While every statutory rape necessarily involves a violation of § 702, in that an act of rape upon a minor is a violation of § 702, the converse is not true. Section 702 may be violated by many acts in no way related to rape or attempted rape, and without completing an act of rape a defendant may commit acts of a nature preliminary to an act of rape, and which constitute a violation of § 702, but fall short of rape or attempted rape. An acquittal of rape with a conviction of violation of § 702 may represent the jury's view that although a de-

fendant has not completed an act of rape he has been guilty of acts which amount to a violation of § 702. People v. McAfee, 82 Cal.App. 389, 255 P. 839; People v. McCollum, 116 Cal.App. 55, 2 P.2d 432; People v. Andursky, 75 Cal.App. 16, 241 P. 591; People v. Jameson, 136 Cal.App. 10, 27 P.2d 935.

In the present case the § 702 count does not rely on a completed act of rape as the basis of the charge, but alleges that defendant "did wilfully, unlawfully and lewdly touch the private parts of [one] * * *, who was then and there a female child under the age of twenty-one years, to-wit, of the age of fourteen years, with the private parts of him, the said Nick Rodriguez." A rape completed by penetration cannot in the nature of the act be accomplished without first doing what defendant is alleged to have done in the second count. But a defendant may do that with which petitioner is charged in the second count without completing a rape, or necessarily, an attempt at rape.

In the case herein petitioner set forth the brief testimony of the prosecutrix in his petition for the writ and averred that such evidence was the only evidence bearing on his guilt. The respondent by the demurrer admitted the allegations of the petition. The testimony of the prosecutrix shows, if the jury believed her, that defendant completed the crime of rape. However, in my opinion, it was within the province of the jury to disbelieve her testimony that an act of rape had been completed, but to believe that petitioner had done what was charged against him in the second count. For this reason the acquittal of rape would not have been inconsistent with a conviction of the charged violation of § 702, and is not inconsistent with a disagreement of the jury as to that count.

Furthermore, the prosecutrix testified to other acts of a preliminary nature sufficient to constitute an offense under § 702. She testified that on the day in question she and defendant were in a room of the house where they lived and that then the following occurred: "Well, he took me in the bedroom—he called me in the bedroom, so I went in. He was supposed to be looking for a book or something, and I went in, and he threw me on the bed—there is a double bed there. He threw me on the bed and he held my legs and I closed them, and he slapped me on the thighs, and I closed them again and he slapped me again on the legs." She then testified that he raped her. The jury may have believed that these preliminary acts less than rape or an attempted rape were committed, but disbelieved the evidence that she was raped. For this reason the verdicts are in fact consistent.

People v. Krupa, 64 Cal.App.2d 592, 149 P.2d 416, does not support petitioner. I agree with Mr. Justice WARD that the decision in that case is not controlling here. It did not involve any contention as to inconsistent verdicts resulting in the defendant going free altogether, but the problem was whether he could be convicted of two offenses, a violation of § 11714, Health and Safety Code, and a violation of § 702, Welfare and Institutions Code, on exactly the same facts. It was held that in the circumstances of that case he could not be. It is true that an acquittal of either offense in that case would have been inconsistent with a conviction or disagreement as to the other. But where one count of an information charges rape, the other a violation of § 702 based not on rape but on acts which fall short of rape, an acquittal of rape is not necessarily inconsistent with a conviction of violating § 702, which, as said above, may represent the jury's finding that the defendant has not completed a rape, but that he has accomplished the violation of § 702 charged against him.

I am further of the view that, if it be assumed under the facts that the verdicts are logically inconsistent, nevertheless the legal effect of such inconsistency would not be to acquit the defendant on a charge as to which the jury has convicted or disagreed. Where a defendant has been charged in one indictment or information with two offenses, one serious and one less serious, and the jury acquits of the serious offense and finds the defendant guilty of the less serious, and the evidence shows that if any crime was committed it was the serious offense, of course the verdicts are logically inconsistent, but it does not follow that the defendant should go entirely free. It simply represents a result of the jury system. The jury has determined that although the defendant committed the serious offense, justice will best be served by leniency, which the jury grants the defendant by finding him guilty of the less serious offense. Or the jury may have found that although defendant has committed both offenses, he will suffer enough if he

is punished for one offense only. Because a jury determines that a defendant shall be punished for a less serious offense than he has committed, or that he shall be punished only for one offense although he has committed two, it does not follow that because he cannot be punished twice for the same offense that the effect of the jury's leniency should be that he cannot be punished at all.

These principles have not always been recognized by the courts. (See, for example, People v. Day, 199 Cal. 78, 248 P. 250, where the court tacitly assumed that the effect of inconsistent verdicts is to acquit on both counts; People v. Andursky, 75 Cal.App. 16, 241 P. 591; People v. Puppilo, 100 Cal.App. 559, 280 P. 545; for a general discussion of the problem, see 43 Harv.L.Rev. 657; 28 Mich.L.Rev. 339; 14 Cal.L.Rev. 336; 10 So.Cal.L.Rev. 208.) But in 1927 the legislature, by amendments to § 954, Penal Code, gave legislative force to the rule that inconsistent verdicts should not operate to acquit on all counts. The section now provides: "An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts. * * * *A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.*" (Italics added.)

This provision was applied in People v. Amick, 20 Cal.2d 247, 125 P.2d 25; People v. Stangler, 18 Cal.2d 688, 117 P.2d 321; People v. Ranney, 123 Cal.App. 403, 11 P.2d 405 (hearing by Supreme Court denied), and People v. Horowitz, Appellate Department, Superior Court, Los Angeles, 131 Cal.App.Supp. 791, 19 P.2d 874. In People v. Stovall, 94 Cal.App. 635, 271 P. 576, and People v. Smith, 117 Cal.App. 530, 4 P.2d 268, decided after the 1927 amendment to § 954, but without express reference to it, a result consistent with the section was reached. In People v. Vanderbilt, 199 Cal. 461, 249 P. 867, and People v. Edwards, 72 Cal.App. 102, 236 P. 944, decided before the 1927 amendment, it was held that the effect of inconsistency was not to acquit on all counts.

The opinion of Mr. Justice WARD quotes at length from the decision in People v. Amick, supra. In People v. Stangler, supra, § 954 was briefly made an alternative ground of decision. The cogent language of the court in People v. Horowitz, supra, may well be quoted here. There the defendants were charged by complaint in the first counts of putting on an immoral or indecent show, and in the second counts with putting on an immoral scene or part of a show. The defendants were convicted under the first counts and the second counts dismissed. It was urged that the dismissals were tantamount to acquittals, and that the legal effect of the acquittals under the second counts was to acquit of the first counts. The court held that the dismissals were not the equivalent of acquittals and that the dismissals were proper. The court then went on to hold:

"If we admit, for the moment only, that the dismissal was an acquittal, and that one not guilty of participating in an indecent part of a show could not be guilty of participating in an indecent show, still it does not follow that the judgments must be reversed. Authorities could be cited which would seem to support a reversal. People v. Andursky, 1925, 75 Cal.App. 16, 241 P. 591; People v. Puppilo, 1929, 100 Cal.App. 559, 280 P. 545. But we find more persuasive cases recognizing that such inconsistent verdicts may be caused, not by the confusion, but the mercy of the jury, of which the appellant can neither complain nor gain further advantage. People v. Stovall, 1928, 94 Cal.App. 635, 271 P. 576; People v. Smith, 1931, 117 Cal.App. 530, 4 P.2d 268; State v. Jackson, 1926, 121 Kan. 711, 249 P. 688; State v. Axley, 1926, 121 Kan. 881, 250 P. 284. Moreover, probably to avoid the result of those cases which interpret inconsistent verdicts as acts of stupidity rather than acts of leniency, section 954, Penal Code, was amended in 1927 so that it now reads in the part here controlling:

"'An indictment * * * or complaint may charge * * * different statements of the same offense * * * under separate counts. * * * A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count.' This last sentence is applied in People v. Ranney, 1932, 123 Cal.App. 403, 11 P.2d 405, 406, where a contention has been made that a conviction on two counts could not stand because of an acquittal on five counts. In part the court said: 'Each count must stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy

adversely to the contention of appellant.' Nowhere do we find the validity of the amended section questioned; nowhere else do we find that it came to the attention of the court. We conclude that even if the dismissal be regarded as an acquittal, that is no reason why the judgment of conviction, based on ample evidence, should be reversed." 131 Cal.App.Supp. 791, at pages 793, 794, 19 P.2d 874, 875.

In People v. Stovall, 94 Cal.App. 635, 271 P. 576, 577, (hearing by Supreme Court denied), the court said: "The real question—one to be mentioned again later—is whether the evidence was sufficient to establish guilt of grand theft. If it was, it is immaterial that the jury acquitted on the other charge. Perhaps a conviction should have resulted on both. Under a state of facts somewhat similar to that here presented we once said: 'It may be conceded, for the purpose of the argument, that under the evidence the jury has as much reason for finding appellant guilty on the first and second counts as it had for finding him guilty on the third; but even so, the fact remains that the evidence was sufficient to justify the verdict on the third count, and we must conclude that the jurors were convinced of his guilt thereon. If the jurors paltered with their oaths and with the law they must make their own peace with conscience. If appellant was wrongfully acquitted on the first and second counts the error was in his favor, and he cannot be heard to complain. The fact that the jurors relieved him on two counts does not oblige this court to relieve him on the third.' People v. Edwards, 72 Cal.App. 102, 236 P. 944."

A very interesting case on the effect of inconsistent verdicts is People v. Vanderbilt, 199 Cal. 461, 249 P. 867, decided before the 1927 amendment to § 954. The defendant was charged in one count with sodomy, in a second with contributing to the delinquency of a minor based on the sodomy, and in a third with attempt at sodomy. He was acquitted of sodomy and convicted on the second and third counts. He contended the verdicts were totally inconsistent and that the verdicts of guilty on the contributing and attempt counts could not stand. The case was appealed to the appellate court. 49 Cal.App.Dec. 514. That court divided two to one. Judge Works wrote the majority opinion, and Judge Finlayson dissented. The majority opinion said that there was nothing in the evidence from which the jury could have concluded that, rather than the crime itself, the accused had been guilty of an attempt to commit it, "that if, in strictness, guilt of the completed crime was not proven, nothing was proven." (p. 517.) The majority held that the convictions on counts two and three could not stand in view of the acquittal on the sodomy count.

Judge Finlayson in his dissent expounded his view that the verdicts, though inconsistent, could stand. The Supreme Court adopted his opinion, with a few interpolations. That court said of the evidence: "'(It will be conceded that the evidence discloses that appellant was guilty of the crime of sodomy instead of an attempt to commit sodomy.)'" 199 Cal. 461, 464, 249 P. 867, 868. But the court held that nevertheless the inconsistent verdicts could stand.

This case is directly in point in the present case, and is direct authority that even if the evidence here shows a completed rape, or if disbelieved shows nothing, the inconsistent verdict of guilty or a disagreement on § 702 based on rape may stand.

Inconsistent with these cases is In re Johnston, 3 Cal.2d 32, 43 P.2d 541, where the defendants were charged with several violations of the Corporate Securities Act, St.1917, p. 673, as amended, in separate counts, and by a succeeding count with conspiracy. The overt acts alleged to have been committed in the conspiracy count were identical with and a mere repetition of the crimes charged in the preceding counts. There was a conviction on the conspiracy counts, with acquittal on all the counts preceding. It was held that the conviction on the conspiracy count could not stand, that § 954 was manifestly not adopted to save such a verdict. Perhaps conspiracy is unique in this respect. If it is not, the decision is inconsistent with the Vanderbilt case, with People v. Stangler, supra, and People v. Amick, supra, which are not cited. See, also, People v. Novo, 12 Cal.App.2d 525, 55 P.2d 915, 56 P.2d 560, where the court overlooked § 954, Penal Code.

From this review of the authorities it is apparent that even though the evidence in the present case is in such a condition that it would support a verdict of guilty of rape, and if disbelieved, would show no

offense at all, nevertheless the verdicts of not guilty of rape and a disagreement (or a verdict of guilty) on the § 702 count, although inconsistent, may stand.

There is a patent contradiction in the opinion of Mr. Justice WARD. He devotes the first part of his opinion to a discussion of the legal effect of inconsistent verdicts, and there indicates that he would approve the rule that, even if the verdicts here involved are inconsistent, under § 954 of the Penal Code, both may stand. Then in disregard of this portion of his opinion he holds that on the second trial the issue must be submitted to a jury, and if it finds the verdicts to be inconsistent then defendant has been once in jeopardy.

Where the question of inconsistent verdicts comes before an appellate court on appeal, as in the situation where there is an acquittal on one count and judgment of conviction on the other, from which an appeal is taken, the questions whether the verdicts are inconsistent, and the effect thereof, are determined by the appellate court as questions of law. They were so determined in cases cited by Mr. Justice WARD. People v. Amick, 20 Cal.2d 247, 125 P.2d 25; People v. Stangler, 18 Cal.2d 688, 117 P.2d 321; People v. Vanderbilt, 199 Cal. 461, 249 P. 867; People v. Horowitz, 131 Cal.App.Supp. 791, 19 P.2d 874; People v. Andursky, 75 Cal.App. 16, 241 P. 591. These questions are no less questions of law where, as here, there is an acquittal and a disagreement, and the problem of inconsistency is presented on an application for a writ of prohibition. There are situations where the issue of double jeopardy presents questions of fact for a jury. (§ 1041, Penal Code), but the present case, in my opinion, is not one. Here petitioner contends that the evidence as a matter of law is such that any verdict except an acquittal on the § 702 count is inconsistent with the acquittal of rape. Whether the plea of double jeopardy raises a question of fact or a question of law depends on the circumstances of the case to be determined by the rules and principles applicable to issues generally. 22 C.J.S., Criminal Law, § 446, p. 695, and 14 Am.Jur. p. 959, § 284, citing cases. If the acquittal of one count is not in legal effect an acquittal on another as to which the jury disagreed, and in my view, as set forth above, it is not, then there is no violation of the double jeopardy provision of the constitution in trying the defendant a second time on that count. In such event the general rule would prevail that failure of the jury to agree on a verdict is not a bar to a subsequent prosecution. People v. Lavine, 115 Cal.App. 289, 298, 1 P.2d 496; People v. Messerly, 46 Cal.App.2d 718, 116 P.2d 781; 7 Cal.Jur. p. 954, § 96.

For the above reasons I am of the opinion that the petition for a writ of prohibition to restrain the second trial of petitioner on the § 702 count should be denied, and the alternative writ heretofore issued should be discharged.

KNIGHT, Justice (concurring).

With respect to the main question presented by this proceeding—once in jeopardy—it is my conclusion that the allegations of the petition for the writ established as a matter of law that the acquittal by the jury on the charges included in the first count (rape and attempted rape) does not bar the prosecution and conviction of the petitioner on the charge set forth in the second count (contributing to the delinquency of a minor), upon which the jury disagreed. I therefore concur in the judgment denying the writ.

[12] It is also my conclusion that in determining the question of once in jeopardy this court may properly and should take into consideration all of the allegations of the petition including those pertaining to the state of the evidence adduced at the trial. As has been said, since the question of once in jeopardy is presented for determination on the allegations of the petition for the writ and the demurrer thereto, it must be deemed for all the purposes of this proceeding that all of the allegations of the petition are true, including those allegations purporting to set forth the evidence adduced at the trial. That being so, in deciding the question at issue this court may not, in my opinion, exclude from consideration those uncontroverted allegations relating to evidentiary matters.

[13] Furthermore, it is my conclusion that since petitioner has seen fit to present the question of once in jeopardy by way of a proceeding in prohibition based on a petition setting forth the state of the record and of the evidence adduced at the trial, the decision of this court becomes the law of the case on that ques-

tion, and therefore is final and conclusive and not open to consideration on the future trial on the second count.

As will be observed, in dealing with the subjects of inconsistent verdicts and once in jeopardy, much of the preceding opinions is devoted to a discussion of cases based on hypothetical facts. I am not in full accord with all that has been said in those respects, and it would seem to me that such discussion may lead to further confusion apparently brought about by the majority decision in the case of People v. Krupa, 64 Cal.App.2d 592, 149 P.2d 416, upon which petitioner principally relies in support of his position herein. For that reason I desire to rest my concurrence in the judgment denying the writ in the present case upon the grounds herein assigned.




69 Cal.App.2d 301

## PEOPLE v. CAGIGAS.

Cr. 492.

District Court of Appeal, Fourth District, California.

May 23, 1945.

1. Bastards ⇐6

In prosecution for failing to support minor son, evidence, though conflicting, was sufficient to sustain finding that, though parents had previously separated, they had resumed marital relations when child was conceived, and supported implied finding that defendant was father of child.

2. Bastards ⇐6

In prosecution for failure to support minor son, fact that deputy district attorney, in referring to child exhibited to jury, made mistake in child's given name did not sustain defendant's contention that evidence of paternity was insufficient to support implied finding against defendant, where defendant did not follow up matter nor make any claim in trial court that there was variance between child named in information and name of child of which mother claimed defendant was father.

3. Witnesses ⇐246(2)

The trial judge may propound proper questions to a witness.

4. Criminal law ⇐823(9)

In prosecution against father for failing to support minor son, any error in instruction placing on defendant burden of proving illegitimacy of child was cured by another instruction unequivocally telling jury that they could not find defendant guilty unless evidence satisfied them beyond reasonable doubt that defendant was father of child. Civ.Code, § 193; Pen.Code, § 270e.

Appeal from Superior Court, Imperial County; Elmer W. Heald, Judge.

Eugenio Cagigas was convicted of failing to support his minor son, and he appeals.

Affirmed.

Edward B. Patterson, of El Centro, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and C. G. Halliday, Dist. Atty., and Don C. Bitler, Deputy Dist. Atty., both of El Centro, for respondent.

MARKS, Justice.

This is an appeal from a judgment and an order denying a motion for a new trial in a case in which defendant was prosecuted for failing to support his minor son.

Defendant and Guillermina Fierro were married in San Luis, Sonora, Mexico, on March 19, 1939. They separated frequently, living together only intermittently. A son, Rolando Efrain, was born to Guillermina on August 27, 1943, in Los Angeles. Defendant did not contribute to the child's support although he was regularly employed in Mexicali, Mexico. Defendant denied that he was the father of the child.

[1] The couple separated about August 18, 1942. Defendant testified that they had never lived together as husband and wife after that date. Mrs. Cagigas testified that they resumed marital relations in October, 1942, at the home of her mother in National City, California, and finally separated about February 1, 1943; that defendant was the father of the child. This evidence was corroborated by her mother.

[2] Defendant maintains that the evidence of paternity was not sufficient to support the implied finding against him. This argument is based largely on the fact that a child was exhibited to the jury without naming or otherwise identifying it, and on the following question which was put to the mother, and her answer: "Q. Did you then have the baby, Refugio? A. I had the baby with me, yes."

We have read the record and have found no indication that defendant made any claim during the trial that the baby exhibited to the jury was not the Rolando Efrain Cagigas named in the information. The question we have quoted was put to Mrs. Cagigas by the deputy district attorney, and the use of the name "Refugio", in referring to the child, seems to have been a mistake on his part. Mrs. Cagigas' mother's first name was "Refugio", which might explain the mistake. In any event, defendant did not follow the matter up, and he made no claim in the trial court that there was any variance between the child named in the information and the name of the child of which Mrs. Cagigas claimed he was the father. The record satisfies us that but one child was born to Mrs. Cagigas which was named Rolando Efrain Cagigas and that the jury concluded defendant was its father.

After defendant had been arrested in August, 1944, on the charge of failure to provide, he filed, in the courts of Mexicali, Mexico, an action for divorce from Mrs. Cagigas on the ground of abandonment. His petition or complaint, which bore his signature, contained the following:

"Article II. That to our union there was born a child who actually is of the age of eleven months, which can be verified in the City of Los Angeles, California, United States of America, and which is not registered in the Republic of Mexico. * * *

"Article IV. That since about six months ago my wife abandoned me, our conjugal home, establishing herself, without any justification, left my home without any justification. * * *

"3. And after you have opportunity, in case I am granted a divorce as I solicit, the loss of custody over our son * * *."

The attorney who represented defendant in the divorce action testified that the allegations contained in Article II were necessary under Mexican law and procedure when the cause of action is based on abandonment, and that the statements in the quoted paragraph numbered "3" would permit Cagigas to deny paternity of the child at the trial of the divorce action; that abandonment must continue for six months under the Mexican law to entitle the abandoned party to a divorce.

This does not entirely explain the allegations of Article IV concerning the time of separation, and the admission there set forth may tend to corroborate the testimony of Mrs. Cagigas that she and her husband lived together after August 18, 1942.

While the evidence on the question is sharply conflicting, there is substantial evidence to the effect that the couple cohabited together as husband and wife until early in 1943, which supports the implied finding of the jury on the question of the paternity of the child.

[3] Complaint is made of alleged misconduct on the part of the trial judge in asking defendant certain questions when he was a witness in his own behalf. The questions were proper and germain to the issues being tried and showed no animus, bias or prejudice on the part of the trial judge who was entirely fair during the trial. It is within the province of a trial judge to propound proper questions to a witness and we find no error in his doing so in this case.

[4] Defendant complains of instruction Number 14, given to the jury, as follows:

"You are instructed that Section 193 of the California Civil Code reads as follows:

" 'All children born in wedlock are presumed to be legitimate.'

"That means that as long as a man and woman are married any children born to the wife are supposed to be legitimate children of the husband and wife. This presumption of legitimacy can only be overcome by competent evidence on the part of the one who questions the legitimacy."

It is argued that the instruction erroneously placed on defendant the burden of proving the illegitimacy of the child. Assuming, without holding, that the instruction had that effect, any possible error was cured by instruction number 10, which unequivocally told the jury that they could not find defendant guilty unless the evidence satisfied them beyond a reason-

able doubt that defendant was the father of the child. See, Sec. 270e, Penal Code; People v. Wallach, 62 Cal.App. 385, 398, 399, 217 P. 81; People v. Martin, 100 Cal. App. 435, 280 P. 151.

We find no error in the record sufficient to justify a reversal of the judgment or order.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.




69 Cal.App.2d 262

**NEVADA IRR. DIST. v. JONES et al.**

**Civ. 7139; Sac. 5695.**

District Court of Appeal, Third District, California.

May 21, 1945.

**1. Judgment ⇐855(1)**

In proceedings to condemn land which a judgment debtor had acquired as "trustee" for his adopted minor daughter, judgment creditor's cross-complaint, seeking proceeds of condemnation in partial satisfaction of the judgment on ground that judgment debtor owned the land, stated cause of action.

**2. Pleading ⇐212**

Cross-defendant's demurrer to cross-complaint was waived by cross-defendant's subsequent answer to cross-complaint before demurrer had been determined. Code Civ. Proc. § 472a.

**3. Limitation of actions ⇐180(6)**

Where cross-complaint was demurred to on ground that cause of action stated therein was barred by limitations, cross-defendant who waived demurrer by subsequent filing of answer was privileged to again plead the statute of limitations. Code Civ.Proc. § 472a.

**4. Trusts ⇐215**

Where "Harry Leon Jones, Trustee for Genevieve Jones", his adopted daughter, was named as grantee in deed, court could not hold as matter of law that deed clearly indicated that parties intended that title should be conveyed to grantee individually.

**5. Deeds ⇐97**

If granting clause of deed is irreconcilable with language of habendum clause, the former prevails.

**6. Deeds ⇐105**

In determining who is intended as grantee, deed should be considered as a whole, reconciling, if possible, all its provisions with relation thereto.

**7. Appeal and error ⇐999(1), 1008(1)**

Where direct issue of fact is tendered by pleadings whether judgment debtor is the owner of land condemned, as distinguished from mere legal construction of deed which conveyed land to judgment debtor as "trustee" for another, which is dependent upon evidence adduced extrinsic of deed, it becomes a question for determination of trial judge or jury.

**8. Judgment ⇐855(1)**

Evidence sustained finding that judgment debtor owned land condemned in his individual capacity, and not as trustee for his minor daughter, notwithstanding deed which conveyed land to judgment debtor described him as "trustee" for such daughter, and hence such land was subject to judgment lien which could be partially satisfied from proceeds of condemnation. Code Civ.Proc. § 674.

**9. Eminent domain ⇐262(4)**

In proceeding to condemn judgment debtor's land wherein judgment creditor sought to apply proceeds of condemnation in partial satisfaction of judgment on ground that judgment debtor owned land individually and not as trustee for his minor daughter, judgment debtor's good faith in transactions involved was for trial court.

**10. Fraudulent conveyances ⇐199**

The mere recording of a deed in which grantee is designated "as trustee" for named beneficiary does not become constructive notice that grantee is holding the realty in that manner to defraud his creditors.

**11. Limitation of actions ⇐95(1)**

Where land was conveyed to grantee as "trustee" on April 23, 1937, deed was recorded the following month, judgment against grantee was recorded on February 21, 1938, and proceeding to condemn the land was commenced in September, 1941, judgment creditor's cross-complaint seeking to apply condemnation proceeds in partial satisfaction of judgment lien was not barred

by three-year statute of limitations even if statute applied, since under statute cause of action for fraud does not accrue until discovery, and recording of deed did not become constructive notice that grantee was holding the land as "trustee" to defraud creditors. Code Civ.Proc. § 338, subd. 4; § 674.

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Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Condemnation proceeding by the Nevada Irrigation District, a public corporation, against Harry Leon Jones and others, wherein Mrs. Ann Bastear filed a cross-complaint against named defendant, and Genevieve Jones, a minor, who filed a demurrer to the cross-complaint. From a judgment in favor of the cross-complainant, the cross-defendant Genevieve Jones, a minor, appeals.

Affirmed.

A. J. Just, of Downieville, for appellant.

Chas. F. Metteer, of Sacramento, and James Snell, of Grass Valley, for Mrs. Ann Bastear, respondent.

THOMPSON, Justice.

The cross-defendant, Genevieve Jones, has appealed from a judgment rendered against her on the cross-complaint filed in this suit in eminent domain, determining that she has no interest in the land condemned for public use.

September 4, 1941, plaintiff, a duly organized irrigation district in Nevada County, brought suit to condemn 1.25 acres of land in that county for public use. Harry Leon Jones, Genevieve Jones, his adopted minor daughter, Harry Leon Jones, as Trustee of his said daughter, and Ann Bastear were made defendants. Mr. Jones, in his individual capacity, filed a disclaimer. As guardian ad litem of his daughter he filed an answer claiming that the land belonged to her and that he held the title as trustee only. Ann Bastear filed an answer and a cross-complaint against Harry and Genevieve Jones, alleging that he was the owner in fee of the land and that Genevieve had no right, title or interest therein; that on July 10, 1934, Harry Leon Jones was indebted to cross-complainant in the sum of $1,000 and accumulated interest; that on February 21, 1938, she recovered and recorded a judgment against him in Nevada County upon said indebtedness for the aggregate sum of $1,450, no part of which has been paid. She further alleged, in effect, that in anticipation of said judgment and to defraud her and other creditors, Mr. Jones, on and after July 1, 1934, fraudulently transferred "all of his property," including the land involved herein, to his said minor daughter. Mrs. Bastear thereupon asked for judgment declaring that Harry Leon Jones was the owner in fee of said land subject to her lien thereon to satisfy her said judgment against him.

The appellant moved to strike the amended answer and cross-complaint from the record, which was denied. April 21, 1942, the appellant filed a demurrer to the amended answer and cross-complaint on the ground that the cross-complaint failed to state facts sufficient to constitute a cause of action and because the action for alleged fraudulent conveyance of property was barred by Section 338, subdivision 4, of the Code of Civil Procedure. April 28th, seven days after filing the demurrer, and before it had been determined, appellant filed her answer to the cross-complaint, also setting up the statute of limitations. A motion to strike out the demurrer as functus officio was denied. The court subsequently made an order pursuant to Section 472a of the Code of Civil Procedure, in effect that since the answer was not filed "at the same time" as the demurrer the last mentioned pleading "is deemed withdrawn for decision."

Pursuant to written stipulations signed by the attorneys representing all parties to this action, a judgment was rendered in favor of plaintiff condemning the property as prayed for, and the sum of $500, which was the agreed consideration therefor, was paid to the clerk subject to order of the court after determining the party to whom it belonged.

The cross-defendant, Genevieve Jones, moved for judgment on the pleadings, which was denied. The cause was thereupon tried on the issues presented by the cross-complaint and answer thereto. The chief issues were the questions as to whether Harry Leon Jones was the owner of the property sought to be condemned or whether he merely held title thereto as trustee for the benefit of his daughter Genevieve, and, if the property belonged to him, whether the judgment creditor, Ann Bastear, was entitled to the proceeds of the condemnation price therefor in partial satisfaction of her judgment lien.

The court adopted findings favorable to the cross-complainant in every essential respect. It found that Harry Leon Jones acquired and held title to the land in his individual capacity and not as trustee for his daughter Genevieve, and that she had no right, title or interest in the land; that the cross-complainant held a valid unsatisfied judgment lien against the land and was entitled to the proceeds of the condemnation price therefor in partial satisfaction of her lien, and that the statute of limitations did not bar her action. Judgment was accordingly rendered against the appellant determining that Ann Bastear was entitled to the money paid by stipulation into court in compensation for the condemned land, to be applied in partial satisfaction of her lien to secure her judgment debt against Harry Leon Jones. From that judgment this appeal was perfected.

[1, 2] There is no merit in the appellant's contention that the cross-complaint fails to state facts sufficient to constitute a cause of action. Certainly it states a cause based on a valid unpaid judgment lien on the particular parcel of land which was sought to be condemned for public use, and the application to apply the proceeds of the amount thereof to a partial satisfaction of that judgment lien. The appellant filed a general demurrer to the cross-complaint in which she also pleaded the statute of limitations. But seven days later, before that demurrer had been determined, she filed an answer to the cross-complaint. The court properly held that the demurrer was thereby waived. Sec. 472a, Code Civ.Proc.; Moran v. Abbey, 58 Cal. 163; Minehan v. Silveria, 131 Cal. App. 317, 21 P.2d 617; 1 Bancroft's Code Pleading, Ten Year Supplement, 405, sec. 721. In the authority last cited it is said:

"A defendant who answers prior to the decision on his demurrer thereby waives all grounds of demurrer except those that are urgeable at any stage of a case."

[3] The appellant, however, again pleaded the statute of limitations in her answer, which she was privileged to do. 16 Cal.Jur. 604, sec. 200. We are of the opinion the action alleged in the cross-complaint for satisfaction of the judgment lien was not barred by the provisions of Section 338, Subdivision 4, of the Code of Civil Procedure.

[4, 5] The respondent contends that it is apparent from the language of the deed to the property in question that the title was conveyed to Harry Leon Jones individually and not as a "trustee." It is argued that the habendum clause of the deed confirms that conclusion. We are of the opinion the mere construction of the language of the deed does not necessarily lead to that conclusion. We are unable to find that the deed was introduced in evidence. It is true that paragraph VI of the "Second Defense" in Ann Bastear's First Amended Answer and Cross-Complaint alleges that Fred A. Mellor executed and delivered the deed on April 23, 1937, in which "Harry Leon Jones, *Trustee for Genevieve Jones, is named as grantee,*" and that the instrument was recorded on the 26th day of May, 1937. The appellant's answer admitted that the deed contained that language and that it was duly recorded on the date last mentioned. Construing the deed as a whole, even though we consider the language of the habendum clause in spite of the fact that the deed was apparently not offered in evidence, we may not hold, as a mere matter of law, that it clearly indicates the parties thereto intended that the title should be conveyed to Mr. Jones individually since the granting clause specifically mentions Genevieve Jones as the beneficiary of the alleged trust. It is true that when real property is conveyed to a person "designated 'trustee' or 'as trustee,' * * * it shall be presumed that the grantee * * * holds * * * the title to the estate * * * absolutely in his * * * own individual right and free from any trust." Civ.Code, § 869a. But that presumption is limited to an instrument in which the designation of the beneficiary of the trust is not named or indicated. That section specifically states that the presumption of a conveyance of absolute title to the named grantee, free from the trust, applies only when "*no beneficiary* be indicated or named in said conveyance." In the present case the deed specifically mentions Genevieve Jones as the beneficiary of the alleged trust. That section of the code therefore has no application to the deed which is involved in this case. Since the beneficiary is named in this deed, the habendum clause, which provides that the title is to be held by "said party of the second part, and to his heirs and assigns forever," may be reasonably reconciled to mean that title is to be held by Genevieve Jones as designated beneficiary of the alleged trust. If the granting clause of the deed is irreconcilable with the language of the habendum clause, the former prevails.

In re Shoemake, 211 Cal. 457, 295 P. 830; 26 C.J.S., Deeds, p. 350, sec. 99 b.

[6] In construing the language of a deed to determine who is intended as the grantee, the instrument should be considered as a whole, reconciling, if possible, all the provisions of the deed with relation thereto. Boyer v. Murphy, 202 Cal. 23, 259 P. 38; 9 Cal.Jur. 251, sec. 125, and p. 255, sec. 128. In 26 Corpus Juris Secundum, Deeds, at page 356, § 99f, it is said in that regard:

"In determining whether a grantee takes individually or in a trust or representative capacity where words referring to him as a trustee or representative appear in the deed, it has been held or recognized that the court will apply applicable rules of construction to ascertain the purpose or intention, considering the instrument as a whole, reconciling repugnant parts if possible, and keeping in view the relative force and effect of the various clauses."

[7] The mere construction of the language of the deed is, however, not controlling in determining who actually owned the land. In the present case a direct issue of fact was tendered by the pleadings as to whether Harry Leon Jones, the judgment debtor, was the owner of the land condemned. When such an issue of fact is presented, as distinguished from the mere legal construction of a deed, which is dependent upon the evidence adduced extrinsic of the deed, it becomes a question for the determination of the trial judge or the jury. Passantino v. American Trust Co., 23 Cal. App.2d 202, 72 P.2d 223; 26 C.J.S., Deeds, p. 356, § 99g. In the text last cited it is said in that regard:

"Although the court should decide who holds title where it rests on the legal effect of the deed, yet, where there is an issue as to the identity of the grantee, the question is one of fact for the jury under proper instructions by the court."

[8] The chief issue raised by the cross-complaint in this case was whether Harry Leon Jones owned the land in question in his individual capacity, or merely as trustee for his daughter Genevieve Jones. That issue was decided against the appellant. It was definitely determined that Mr. Jones owned the property in his individual capacity and that it is subject to the judgment lien of the respondent Ann Bastear. There is ample evidence to support the findings in that regard. The record shows without conflict that Ann Bastear recovered and recorded a judgment for the sum of $1,450 against Harry Leon Jones, in Nevada County, wherein the land is located, on February 21, 1938. That judgment created a lien on the real property in that county which continued in force for five years from the date of the entry of the judgment. Code of Civil Procedure, sec. 674. The land in question was conveyed to Harry Leon Jones by deed dated April 23, 1937. The cross-complaint was filed in this case March 26, 1942. The judgment lien was unpaid and in force at the time of the commencement of this action. The statute of limitations had not expired.

In support of his claim that the land in question belonged to his daughter Genevieve, Harry Leon Jones testified that she was adopted by him in 1924; that when they moved to Nevada County he deposited to her account in the Bank of America the sum of $1,244.35, which belonged to her; that on December 26, 1935, he purchased with her funds a Chevrolet truck which cost $1,090.98; that he traded the truck for the lot in question and received the deed therefor, in his name as trustee for Genevieve Jones on April 23, 1937, and that the land belonged to her. He was the only witness called in behalf of the appellant. His evidence in that regard is not convincing. The court was justified in questioning its credibility. The witness contradicted himself on material facts. An examination of the bank statements which were received in evidence, together with the fact that the witness failed to comply with the court's order to produce his account books and later bank statements covering the time of the actual transactions in question, raises a serious doubt regarding his contention that the property was held by him in trust for his daughter. The bank statements which were received in evidence show that Genevieve Jones had only $1,244.35 in cash on September 20, 1932. She owned no other property. That account was exhausted by withdrawing the balance of $33.49 on November 9, 1935, about a month before the Chevrolet truck which was traded for the land in question was purchased. The bank statements contain no item corresponding to the amount paid for the truck. No evidence was adduced satisfactorily indicating that the purchase price of the truck was paid from her funds. The witness first said he kept complete book accounts and that he had later

bank statements. When he was directed to produce them he testified that they had been destroyed by rats in a garage where he kept them. He conducted an active business of his own, and he first said that he kept a separate personal bank account. When he was later directed to produce statements of his personal bank account, he finally testified that "I didn't have any." The alleged bank account of Genevieve Jones was apparently too active an account for a mere fund which was to be used only for the necessary personal maintenance of a minor child. An average of ten or fifteen checks per month were drawn upon that small fund. Some of those checks were for sums amounting to several hundred dollars. Numerous deposits were made in that fund. Several of them exceeded the sum of $1,000. June 6, 1934, $1,139.93 was deposited. July 24th of the same year $1,500 was deposited. October 14, 1935, $1,800 was deposited. In less than a month from the last date the entire fund was exhausted. No bank statement covers the period of time since the last mentioned date. It is not reasonable to believe such transactions involved only the small vanishing fund of Genevieve Jones. The record justified the court in finding that Mr. Jones took a deed to the property in question and maintained his own bank account "as trustee" to place his property beyond the reach of creditors. In the caption to an annotation on the subject of the effect of holding property in the name of "trustee," it is said in 137 American Law Reports at page 461:

"The reasons for doing so are many. It is likely that many such transfers are made merely for the sake of convenience, although it seems more likely that the usual reason is to put property beyond the reach of creditors while at the same time permitting the real owner to exercise some measure of control over it."

[9] It was the sole province of the trial court to determine the good faith of the trustee in said transactions.

Upon this record we may not hold, as a matter of law, that the court erred in determining that Harry Leon Jones was the real owner of the land in question, and that it was subject to the judgment lien which was in full force at the time of the commencement of this action.

The cross-complaint did not ask to set aside the deed of conveyance. If the deed were set aside the record title would not remain in Harry Leon Jones. The pleading therefore merely asked the court to determine that the land belonged to Mr. Jones, and that it was subject to the judgment lien, which the court did. The land in Nevada County was conveyed to him as trustee on April 23, 1937. That deed was recorded the following month. Ann Bastear's judgment against Mr. Jones was recovered and recorded in that county February 21, 1938. If that land really belonged to Harry Leon Jones individually, the recording of the judgment created a judgment lien on the property on the last mentioned date, which lien would remain valid for five years thereafter. Code of Civil Procedure, sec. 674. The land was never conveyed by Jones to any other person to fraudulently defeat creditors, or otherwise. It remained in his name, as trustee, at the time of the trial. The court merely determined that the property belonged to Jones subject to the judgment lien and awarded the consideration paid on condemnation thereof to the cross-complainant in partial satisfaction of her lien. We think the gist of this action on the cross-complaint was the question of whether a valid judgment lien existed against the land in favor of the judgment creditor.

The appellant assumes that the cause presented by the cross-complaint was founded on an alleged fraudulent conveyance of real property to defeat creditors, and that since the action was not commenced until more than three years had elapsed after the recording of the deed, the action was barred by the provisions of Section 338, Subdivision 4, of the Code of Civil Procedure. That section provides that "An action for relief on the ground of fraud or mistake" shall be commenced within three years. But it further provides that:

"The cause of action in such case not to be deemed to have accrued *until the discovery,* by the aggrieved party, of the facts constituting the fraud or mistake." (Italics added)

[10, 11] Assuming, without so deciding, that the foregoing section applies to the circumstances of this case, we may not assume the mere recording of a deed to real property, in which a judgment debtor is designated grantee "as trustee" for a named beneficiary, becomes constructive notice that he is holding the property in that manner to defraud creditors. If Jones had conveyed land, standing in his name as the owner thereof, to another person, the

recording of the deed might, under proper circumstances, constitute constructive notice to a judgment creditor of a transfer to defraud creditors. No authority is cited, and we have been unable to find any such, which holds that the mere reception and recording of a deed in the name of a judgment debtor "as a trustee" imputes constructive notice to the judgment debtor of a conveyance to defraud creditors. There is no evidence in this case which would have placed the judgment creditor on inquiry to determine whether Jones was holding the property as trustee to defraud creditors. We are persuaded that the action to apply the proceeds of the funds secured as compensation for the land in the condemnation proceeding, in partial satisfaction of the judgment lien, was not barred by the statute of limitations.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.




69 Cal.App.2d 341

**FOSTER v. EINER et al.**

**Civ. 3356.**

District Court of Appeal, Fourth District, California.

May 28, 1945.

**Hearing Denied July 26, 1945.**

**1. Schools and school districts ⇐120**

In action for injuries to pupil alighting from school bus when struck by another automobile, no reliance could be had on regulation forbidding school bus to stop except at regularly designated stops, where it was neither alleged nor proved that place in question was not a regularly designated stop.

**2. Schools and school districts ⇐122**

In action against school district by boy who alighted from school bus and was struck by automobile, whether bus driver should have anticipated that boy would pass around rear of bus instead of in front as required by departmental regulation was for jury.

**3. Schools and school districts ⇐122**

In action against school district by boy who, when no vehicles were visible on highway, alighted from southbound school bus and, after passing around rear thereof, was struck by northbound automobile, whether bus driver should have prevented boy from crossing or escorted him as contemplated by departmental regulation whenever such action is necessary, was for jury.

**4. Schools and school districts ⇐122**

Contributory negligence of 13 year old boy, who, seeing parents in parked automobile alighted from southbound school bus and, assuming that warnings both by parents and bus driver referred to a southbound automobile, trotted or stepped from behind bus into path of northbound automobile, was for jury in action against school district.

**5. Schools and school districts ⇐122**

In action against school district by 13 year old boy who alighted from southbound school bus and was struck by northbound automobile, it was for jury to decide whether a youth of his age, intelligence, and experience, in view of warnings, which he assumed referred to a southbound automobile, should have looked in both directions before leaving place of safety behind bus.

**6. Negligence ⇐136(14)**

Generally, question of negligence is for jury.

**7. Negligence ⇐136(26)**

Generally, question of contributory negligence is for jury.

**8. Schools and school districts ⇐122**

Where boy, when no vehicles were visible on highway, alighted from southbound school bus and, though aware of southbound automobile, stepped from behind bus into path of northbound automobile which had failed to stop, proximate cause of injury was for jury in action against school district. Vehicle Code, § 533, St.1939, p. 1453.

**9. Schools and school districts ⇐121**

In action against school district by 13 year old boy who alighted from school bus and was struck by automobile, evidence supported implied findings on questions of negligence of bus driver, contributory negligence, and proximate cause.

**10. Schools and school districts ⇐89**

The driver of a school bus was required to exercise only ordinary care and prudence, as regards school district's liability for injuries to 13 year old boy who alighted from bus and was struck by automobile.

**11. Trial ⇐243**

In action against school district by child who alighted from school bus and was struck by automobile, instruction that bus driver was required to exercise only ordinary care was not in conflict with instruction relating to ordinary care to be exercised by plaintiff and care required of an adult in charge of children.

**12. Schools and school districts ⇐122**

In action by boy who alighted from defendant's school bus and was struck by codefendant's automobile, question of proximate cause was properly submitted to jury though evidence was undisputed.

**13. Schools and school districts ⇐122**

In action against school district by boy who alighted from school bus and was struck by automobile, giving instruction on negligence, if any, of automobile driver was not error, though case had been dismissed as to such driver, where school district contended that automobile driver's negligence was sole proximate cause of accident.

**14. Trial ⇐203(1)**

A party is entitled to proper legal instructions on his theory of the case.

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Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Richard Foster, a minor, by Eldridge Foster, guardian ad litem, against Fred Einer and wife, and Pomerado Union School District, for personal injuries received by the minor when struck by an automobile after he had alighted from a bus operated by the school district. The action was dismissed as to Fred Einer and wife, and from a judgment in favor of the school district, plaintiff appeals.

Affirmed.

Hubbell & Matherly, of Escondido, for appellant.

Tripp, Callaway, Sampson & Dryden, of Los Angeles, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of the Pomerado Union School District in an action for damages for injuries to plaintiff which occurred on the afternoon of April 13, 1943.

Fred Einer and Ethel Hurst Einer were originally named as defendants. They paid plaintiff $4,000 for a covenant not to sue and the action was dismissed as to them. Hereafter we will refer to the Pomerado Union School District as defendant.

Plaintiff was thirteen years and three days old at the time of the accident and a pupil in the sixth grade of the school maintained by defendant which operated a bus to transport pupils between the school and their homes. The school bus conformed to the requirements of law and was being operated by Henry W. Tassell, an employee of defendant who was acting within the scope of his employment.

The accident happened on a public highway a short distance south of Lake Hodges in San Diego County over which the bus was proceeding in a southerly direction. Plaintiff saw his father and mother sitting in an automobile parked on the east side of the road and told Tassell of that fact. Tassell stopped the bus on his right half of the highway and asked them if the plaintiff was their son and if it would be all right to let him out to ride with them, to which Mrs. Foster answered, "Yes". At that time there were no other vehicles within sight on the highway. Tassell opened the right door of the bus and plaintiff sprang out and trotted along its west side and around its rear. During that time two vehicles appeared. One was traveling south and appeared around a bend in the road about 150 feet north of the bus. The other was traveling north and appeared around a curve in the road variously estimated to be from 150 to 450 feet south of the bus. This automobile was owned by Ethel Hurst Einer and was being driven by Fred Einer, her husband. She was riding with him.

Both Mr. and Mrs. Foster and Tassell called warnings to plaintiff to look out as there was a car coming. He heard them and saw the car approaching from the north. Believing this was the car about which he was being warned, he either trotted or stepped out from behind the bus into the street and was struck by the Einer car which did not stop as required by law.

Sec. 533, Vehicle Code, St.1939, p. 1453. Plaintiff was badly injured and his right arm had to be amputated.

The pavement at the point of the accident was approximately 17 feet, 8 inches wide. The easterly side of the bus was about two feet west of its center. There was a granite bank on the west side of the highway which prevented Tassell from driving the bus off the pavement.

The driver of the car approaching from the north obeyed the law and stopped before reaching the bus.

[1] Plaintiff claims negligence on the part of Tassell on account of his alleged violation of two provisions of the regulations adopted by the State Department of Education bearing on the operation of school busses.

The first regulation provides as follows: "Section X, paragraph 17: 'No school bus shall stop and pick up or let off passengers except at regularly designated stops, which stop shall be designated by the governing board of the school district concerned.'"

It is not alleged in the complaint, nor established in the evidence, that the place where Tassell stopped to let plaintiff alight from the bus was not a regularly designated stop.

The other rule upon which plaintiff relies provides as follows: "Section IX, paragraph 2: 'Whenever a school bus stops at a point where traffic is not controlled by a human flagman or a clearly visible electrical or mechanical signal, to discharge pupils who must cross the street, or highway in order to reach their destination, such passengers must cross the street or highway in front of the bus, except that when, because of laws regulating traffic, passengers discharged from a bus cannot cross the street or highway in front of the bus but must cross behind the bus, they may do so. In either case, the bus shall not be moved from such point until all the passengers have crossed the street or highway. In either case, also the driver of the bus shall not permit the pupils to cross the street or highway until they may safely do so, and shall, if necessary, escort such passengers across the street or highway.'"

Plaintiff maintains that Tassell was guilty of negligence as a matter of law in not seeing that plaintiff passed into the street around the front of the bus instead of going around its rear and in not escorting him across the street.

Plaintiff's argument resolves itself into this: That Einer was guilty of negligence as a matter of law in not stopping the automobile he was driving before passing the bus which was admittedly discharging a school child; that Tassell was also guilty of negligence as a matter of law in not seeing that plaintiff passed into the street in front of the bus and also in not escorting him across the street; that their concurring negligence was, as a matter of law, the proximate cause of the accident so the verdict in favor of defendant is contrary to law.

[2] We do not take any such simple view of the case. The first portion of paragraph 2 of section 9 of the rules does not in so many words place the duty on the driver of seeing that children let out of a school bus pass around its front. Of course it may be conceded that a person placed in charge of school children ordinarily should endeavor to see that they obey the rules. Here there is nothing to indicate that at the time Tassell let plaintiff out of the bus there was anything to indicate that plaintiff would violate the rule and pass around the rear of the bus. There is nothing to indicate the exact time which elapsed between plaintiff springing from the bus and the accident but it must have been brief as he testified he trotted around the bus. Whether Tassell should have anticipated that the youth would go to the rear of the bus and should have taken precautions against such an action clearly was a matter of fact for the jury.

[3] The last sentence of the rule does not place the absolute duty on a driver to escort children across highways. He must do so if such action is necessary. Also this sentence places on the driver the duty of preventing children crossing the road when they may not do so safely. Under the facts of this case, there being no cars in sight when plaintiff sprang from the bus, the question of whether or not Tassell should have seen that plaintiff did not then cross the road or should have escorted him across the road was a question of fact for the jury and not a question of law for the court.

[4, 5] Plaintiff states that the question of contributory negligence is not an element in the case. In this we cannot agree. Contributory negligence was alleged in the answer. The plaintiff testified that he heard the warning given him; that he saw

one car and assumed that was the one he was warned about; that he then stepped or trotted from behind the bus into the street and was injured. These facts certainly presented the question of his contributory negligence to the jury which was entitled to consider them and decide whether a youth of his age, intelligence and experience, in view of the warnings given, should have looked in both directions for approaching automobiles before leaving a place of safety behind the protection of the bus.

[6, 7] As a general rule the questions of negligence and contributory negligence are questions of fact for the jury. Furuta v. Randall, 17 Cal.App.2d 384, 62 P.2d 157; Mahar v. MacKay, 55 Cal.App.2d 869, 132 P.2d 42; Uribe v. McCorkle, 63 Cal.App. 2d 61, 146 P.2d 22; Hershey v. Laswell, 63 Cal.App.2d 219, 146 P.2d 509. We believe this rule applies here to both plaintiff and Tassell.

[8] If we assume negligence on the part of Tassell there still remains the question of proximate cause for determination by the jury. As is said in 19 Cal.Jur. 732: "The proximity of one fact to another in a case, and their relation and sequence to each other, is essentially within the province of the jury to determine. * * * Thus the question whether an injury was caused by the act of a defendant, by an intervening act of a responsible third person, or by an act of God, whether a violation of statute contributed proximately to an injury, and whether a minor had such judgment and ability to comprehend that his act was the proximate cause of the injury, are matters for determination by the jury."

[9] Thus the question of negligence, contributory negligence and proximate cause were questions of fact that should have been and were submitted to the jury by the trial court. There is substantial evidence in the record supporting the implied findings of that body on those questions. This disposes of the contention of plaintiff that the trial court erred in permitting the jury to pass on the negligence of Einer and Tassell.

[10] It is next urged that the trial court erred in instructing the jury that Tassell was only required to exercise ordinary care and prudence and that this instruction conflicts with another which correctly defined the standard of ordinary care in a case involving children.

The trial judge quoted to the jury the two regulations of the California State Department of Education we have referred to and added that "It is the duty of anyone in charge of a school bus to conform to the regulations governing the operation of school buses, and the failure to do so would be negligence."

In Shannon v. Central-Gaither Union School District, 133 Cal.App. 124, 23 P.2d 769, 770, it was said: "We are of the opinion that a bus which is operated only for the convenience of a particular school under the circumstances of this case is a mere private carrier as distinguished from a common carrier, and that ordinary prudence for the safety of children under similar circumstances is all that is required of the district or the driver of the bus."

[11] There is no conflict between the two instructions. In one the trial court was defining ordinary care as applied to Tassell and bearing on his negligence. In the other it defined the ordinary care to be exercised by plaintiff, a child, as bearing on his contributory negligence and the ordinary care required of an adult in charge of children.

[12] Plaintiff argues that the trial court erred in instructing the jury on proximate cause. His counsel states his position as follows: "On undisputed evidence the proximate cause of the accident was a matter of law, and the jury had no right to determine whether the negligence of either or both defendants was the proximate cause of the accident." This contention is without merit. Rae v. California Equipment Co., 12 Cal.2d 563, 86 P.2d 352; Gerberich v. Southern California Edison Co., 5 Cal.2d 46, 53 P.2d 948; Watkins v. Nutting, 17 Cal.2d 490, 110 P.2d 384; Sweet v. Sager, 28 Cal.App.2d 211, 82 P.2d 201; Inai v. Ede, 42 Cal.App.2d 521, 109 P.2d 400; Wohlenberg v. Malcewicz, 56 Cal.App.2d 508, 133 P.2d 12.

[13, 14] Lastly it is contended that the trial court committed error in instructing on the negligence, if any, of Fred Einer, as the case had been dismissed as to him. This argument is without merit. One theory on which defendant relied was that the sole proximate cause of the accident was the negligence of Einer. A party is entitled to proper legal instructions on his

theory of the case. Bickford v. Pacific Electric Ry. Co., 120 Cal.App. 542, 549, 8 P.2d 186.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.




69 Cal.App.2d 388

## LAGOMARSINO v. MARKET STREET RY. CO. et al.

Civ. 12823.

District Court of Appeal, First District, Division 1, California.

May 29, 1945.

Rehearing Denied June 28, 1945.

Hearing Denied July 26, 1945.

1. Carriers ⇐320(10)

Where plaintiff, transferring from bus to streetcar which had just ended its run, was standing with others in customary loading place between double tracks, waiting for gate of car to open, and was struck by car passing on adjacent track with two-foot clearance, whether passing car was operated in reasonably safe manner was for jury. Civ.Code, § 2100.

2. Carriers ⇐287(1)

A street railway must select a reasonably safe station space to receive passengers.

3. Carriers ⇐287(1)

A street railway does not become guardian or insurer of persons about to board streetcars in the sense that a station area is guaranteed as place of safety from wrongs of third persons.

4. Carriers ⇐247(1)

The relation of carrier and passenger is not sustained merely under circumstances of a prospective passenger, as on a streetcar, standing in a station area prior to immediate approach of a car.

5. Carriers ⇐247(3)

Where a person intends to board a vehicle such as a street car as a passenger, and so indicates by standing alongside it, and motorman indicates intention to receive the prospective passenger, as by stopping car and preparing immediately to receive such person, relation of passenger and carrier is established, and statute prescribing duty of care becomes applicable. Civ.Code, § 2100.

6. Carriers ⇐287(1, 2)

Where prospective passengers on streetcar are standing in customary loading place between double tracks, waiting for gate of car to open, reasonable degree of skill must be exercised by employees, not only on the standing car, but also on a car passing on adjacent track. Civ.Code, § 2100.

7. Carriers ⇐247(2)

The relation of carrier and passenger may not arise until prospective passenger, as on a streetcar, is in position to board car at an established stop or has actually been accepted as a passenger.

8. Carriers ⇐247(1)

Generally, in order to create relation of carrier and passenger, the passenger need not actually enter the vehicle, such as a streetcar, but it is necessary that motorman should have done something by way of invitation to board the car.

9. Carriers ⇐239

The failure to present in advance a valuable consideration to a carrier, such as a street railway, does not alone determine whether relation of carrier and passenger exists.

10. Carriers ⇐247(5)

Where plaintiff, transferring from street railway company's bus to company's streetcar which had just ended its run, was standing with others in customary loading place at gate of car, waiting for it to open, jury properly found that plaintiff was a "passenger", as regards care required of motorman of car passing on adjacent track.

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger".

11. Carriers ⇐280(2)

The expression "highest degree of care" is no stronger than the statutory requirement of "utmost care" imposed on a street railway or other carrier of persons for reward. Civ.Code, § 2100.

See Words and Phrases, Permanent Edition, for all other definitions of "Utmost Care".

**12. Carriers ⇐287(2)**

Where plaintiff transferring from bus to streetcar was standing with others in customary loading place between double tracks waiting for gate of streetcar to open, motorman of car passing on adjacent track with two-foot clearance was required to exercise the highest degree of skill and vigilance. Civ.Code, § 2100.

**13. Carriers ⇐287(2)**

Where plaintiff, transferring from bus to streetcar, was standing with others in customary loading place between double tracks waiting for gate of car to open, and was struck by car passing on adjacent track with two-foot clearance, instruction that defendant railway owed plaintiff the highest degree of care was proper. Civ. Code, § 2100.

**14. Carriers ⇐287(2)**

Where plaintiff transferring from bus to street car was standing with others in customary loading place between double tracks waiting for gate of streetcar to open, and was struck by car passing on adjacent track with two-foot clearance, instruction that defendant railway had duty to provide a reasonably safe place where passenger may board streetcar was justified. Civ. Code, § 2100.

**15. Carriers ⇐287(2)**

Where plaintiff transferring from bus to street car was standing with others in customary loading place between double tracks, waiting for gate of streetcar to open, railway company had duty not to do anything to render such place unsafe, as by operating car on adjacent track with only two-foot clearance. Civ.Code, § 2100.

**16. Trial ⇐260(8)**

Where court, answering jury's question, gave a form instruction barring recovery if plaintiff's negligence contributed "in any degree" as a proximate cause of accident, defendants could not complain of refusal of their instruction barring recovery in case of contributory negligence, "however slight".

**17. Trial ⇐133(6)**

In action by prospective passenger struck by streetcar, counsel's statement that defendant company's attitude had always been "the public be damned" was to be condemned, but was not ground for reversal, where trial court admonished jury to disregard it, and denied motion for new trial.

**18. Trial ⇐133(6)**

The trial judge's conclusion on question of effect of counsel's misconduct will not be disturbed unless plainly wrong.

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Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action for personal injuries by Rosa Lagomarsino against Market Street Railway Company, Ernest Fernandes, and others. Plaintiff obtained a verdict for $20,000, reduced to $12,000 as a condition to denying a new trial, and from the judgment as reduced, the named defendants appeal.

Affirmed.

Cyril Appel, Ivores R. Dains, and Bronson, Bronson & McKinnon, all of San Francisco, for appellants.

Shirley, Robb & Saroyan and J. Francis Shirley, all of San Francisco, for respondent.

WARD, Justice.

Plaintiff recovered judgment for $20,000 against defendant Market Street Railway Company and defendant Fernandes, motorman on the car which struck her. As a condition to denying the motion for new trial the court reduced the judgment to $12,000. Defendants appeal from the judgment as thus reduced.

As set forth by appellants, the facts of the case are as follows: The accident occurred about 5 o'clock on Monday afternoon, August 2, 1943, near the intersection of Bryant and 16th Streets in San Francisco. Bryant Street runs north and south; 16th Street runs east and west. Double streetcar tracks occupy each street.

Defendant company operated its No. 27 buses on Bryant Street, and its No. 22 streetcars on 16th Street. On the afternoon of the accident plaintiff had boarded a No. 27 bus at 7th Street, and had alighted at 16th Street, to transfer to a westbound No. 22 streetcar. In their operation on 16th Street eastbound No. 22 cars used the south track, westbound cars the north track.

Some eastbound No. 22 cars operated only to the west side of Bryant Street and then turned back. When these cars

reached Bryant Street the farebox, trolleys, fenders and controls were shifted, and the cars, in order to proceed west, switched from the south track to the north track, by a switch or cross-over located between Bryant Street and the next street west. These cars were referred to as the "standing" cars, and occasionally as the "Bryant" cars. Other No. 22 cars eastbound on 16th Street crossed Bryant Street, and traveled to the end of the line in the vicinity of the shipyards before returning. At the trial these cars were termed "through" cars, or "3rd Street" cars.

The accident involved (1) a No. 22 car which had just completed its eastbound run to the west side of Bryant Street and was standing on the south track (prior to turning back) and (2) a "through" No. 22 car which had finished its run to 3rd and 18th Streets, taken on a full load of shipyard workers, and was on its return trip, moving west on 16th Street on the north track and at the time of the accident, passing the "standing" No. 22 car. The space between the two cars as the "through" car passed was 1 foot 11¾ inches.

The right rear gate of the "Bryant" car was customarily opened for passengers while the car remained standing on the south track before switching to the north track. Plaintiff and others were standing in front of this gate, waiting for it to open, and were thus in position between the south and north tracks, when a No. 22 car on the north track traveling westerly came from east of the 16th and Bryant intersection and passed them. The passing car struck plaintiff, knocking her down and inflicting certain injuries.

As grounds for reversal of the judgment defendants contend that plaintiff was guilty of contributory negligence as a matter of law; that the court erred prejudicially in its charge to the jury; and that plaintiff's counsel was guilty of prejudicial misconduct. Plaintiff was contributarily negligent, as a matter of law, according to defendants, because (1) she was negligently unaware of the passing car and stepped back against it after the front part had cleared her safely, and (2) she would not have been endangered had she remained on the sidewalk, moved behind the stopped car, or adjusted her position in the space between the tracks as the westbound car passed her. Plaintiff, familiar with the operation of cars and buses at that point, testified that she neither saw nor heard the approaching car; she felt a "terrible pulling" on the back of her coat and immediately was down on the ground.

[1] The company's custom of opening the right rear gate while the car was on the south track exposed persons about to board the car in dangerous proximity to cars passing on the north track. The defendant company could have taken on passengers through the gate used for the exit of passengers and kept the right rear gate closed until the car switched to the north track. In view of these circumstances it was for the jury to decide whether or not the northbound car passing persons between the tracks was operated in a reasonably safe manner. On appeal defendants rely on asserted poof as a matter of law of plaintiff's negligence rather than on their lack of negligence. They contend that plaintiff voluntarily chose to stand in a position she knew to be dangerous instead of in a safe position, and that she failed to exercise any care whatever for her safety. Stated in another way, defendants invoke the rule set forth in 38 Am.Jur. 873 and quoted in Stricklin v. Rosemeyer, 61 Cal.App.2d 359, 362, 142 P.2d 953, 954, as follows: " 'One having a choice between methods of doing an act which are equally available, who chooses the more dangerous of the methods, is ordinarily deemed negligent, in the absence of a showing of the existence of an emergency, sudden peril, or other circumstance justifying such choice. The fact that the less dangerous method takes longer and is inconvenient and attended with difficulties furnishes no excuse for knowingly encountering the peril." Similar language is used in Zolkover v. Pacific Elec. Ry. Co., 81 Cal.App. 772, 254 P. 926, and Choquette v. Key System Transit Co., 118 Cal.App. 643, 5 P.2d 921. In each of the cases cited the trier of the facts found in favor of the defendant and the reviewing court affirmed the judgment. Their language is therefore not controlling in the present case unless defendants can show that no inference other than one of plaintiff's negligence can reasonably be drawn from the facts.

Defendants do cite two cases wherein the appellate courts reversed judgments for plaintiffs on facts held to constitute contributory negligence as a matter of law. The cases are McKeown v. Northwestern Pac. R. R. Co., 20 Cal.App.2d 324, 66 P.2d 1250, and Bailey v. Market Street C. Ry. Co., 110 Cal. 320, 42 P. 914. The plaintiff

in the McKeown case while waiting for the train had walked down the concrete platform between defendant's double tracks. When she heard the whistle of the approaching train she turned around and walked back to the place where the train stopped. She was so close to the edge of the platform that the overhang of the train struck her left arm. In the Bailey case plaintiff stepped in front of a moving cable car. These cases are distinguishable from the present case. In neither of them was the plaintiff waiting to board a standing car, about to open, at a place which was a customary loading point when struck down by a car on the other track, operated by a motorman who was aware of the presence of a group of persons between the tracks clustering about the entrance to the standing car with the purpose of boarding it.

In many details the facts in Chunn v. City & Suburban Railway, 207 U.S. 302, 28 S.Ct. 63, 52 L.Ed. 219, are similar to those of the present case. At pages 307, 308, 309 of 207 U.S., at page 64 of 28 S.Ct., 52 L. Ed. 219, the court said: "The plaintiff had come to a place where passengers had habitually boarded the defendant's cars. The defendant had encouraged and invited persons to enter its cars going south from the space between the tracks, by opening the doors and receiving them from that side. It was a place which, in itself, was perfectly safe, unless made otherwise by the manner in which the defendant used the east track for the passage of cars. The plaintiff, therefore, was not a trespasser nor a mere traveler upon the highway. It is not important to determine whether she had become a passenger. Intending to become a passenger, she had come to a place recognized by the practice of the defendant as a convenient and suitable one from which to enter the car, and the car stopped to receive her. The defendant owed her an affirmative duty. It was bound to use that care for her protection which was reasonably required in view of the situation in which she had, at the defendant's invitation, placed herself, of the purpose for which she was there, of the approach of the car which she was intending to enter, and of the dangers to be apprehended from contact with a rapidly moving car, propelled by mechanical power. A jury might well say that, under such circumstances, reasonable care demanded the exercise of the utmost vigilance, foresight, and precaution. * * * The question whether the plaintiff herself was guilty of contributory negligence presents somewhat greater difficulty. There was room to stand between the two cars and escape contact with either. But the margin of safety was narrow and left little allowance for the infirmities of mankind. In the confusion of two cars approaching from opposite directions it is too much to expect nice calculations of distances. It is not to be wondered at that in the attempt to escape the one the plaintiff fell foul of the other. * * * We think that the plaintiff, if she was rightly where she was, was not, as a matter of law, guilty of negligence in failing to appreciate accurately the boundaries of the narrow zone of safety which the defendant's conduct had left to her. * * * Nor was the plaintiff necessarily wanting in due care by taking her place between the tracks. It was the usual place from which entrance to the Washington car was made. It was safe enough under ordinary circumstances. It was made unsafe only by reason of the defendant's negligent act in running another car rapidly by. The plaintiff had the right to assume that the defendant would not commit such an act of negligence, and that, when it stopped one car and thereby invited her to enter it, it would not run another rapidly by the place of her entrance and put her in peril. We think that it cannot be said, as a matter of law, that the plaintiff was guilty of contributory negligence." In Curry v. Market Street Ry. Co., 54 Cal.App. 2d 165, at page 168, 128 P.2d 715, 716, an action for injuries sustained to plaintiff while standing between tracks with intent to board a street car, the court said:

"When a passenger seeks to enter a car operated upon the inner rails he is entitled to assume that those operating cars on the outer rails will exercise care to see that he may do so safely.

"Whether such care has been exercised is a question of fact to be determined by the jury under the circumstances of each case. It was so held in Pevonak v. San Francisco, 206 Cal. 648, 275 P. 785, a case very much like this in its facts, with the exception that both cars were moving through the loading zone at the same time. On reversing a judgment upon directed verdict for the two railways the court said: (206 Cal. page 651, 275 P. page 786) 'In other words, it is our view that it was a question of fact for

the jury whether or not these two cars should have simultaneously traversed their respective tracks when a group of ten or twelve persons were crouched together in such a narrow space, their being also ample evidence that the crowd had been placed in this position without fault upon their part, having crossed said municipal tracks for the purpose of boarding a car which the agent of respondent Market Street Company did not allow to stop and having been prevented from retracing their steps to a place of safety by the oncoming of the two other cars.'"

In the present case the point or place adopted as a car stop was a hazard with which appellants were familiar. Pevonak v. San Francisco, 206 Cal. 648, 275 P. 785.

Appellants object to the following instructions: "The responsibility imposed by law upon a carrier of passengers for hire, such as a street railway company, includes the duty to provide a reasonably safe place where the passenger may board the street car.

"If you find from the evidence that plaintiff was exercising ordinary care for her own safety and occupying a place designated by the Market Street Railway Company as a boarding place, then defendant railway company owed to plaintiff the highest degree of care to avoid injuring her.

"The word 'station' as used in these instructions refers to any place at which it is the practice of the carrier to stop for the purpose of receiving or discharging passengers. This includes such places which must be used, or reasonably may be expected to be used, by persons intending to become passengers and while waiting to board vehicles of the carrier."

[2-8] The word "provide" in the first paragraph, without explanation, does not definitely express the rule applicable to a situation such as this, but the court in the next paragraph makes it plain that "provide", as used, does not mean the erection or equipment of a place to board the streetcars but rather the designation of a place as an area or space. This idea is further fixed by reference to the word "station" as a place at which it is the practice of the carrier to receive or discharge passengers. The carrier was bound to select a reasonably safe station space to receive passengers. The carrier does not become the guardian or insurer of persons about to board streetcars in the sense that a station area is guaranteed as a place of safety from the wrongs of third parties. The relationship of carrier and passenger is not sustained under circumstances of a prospective passenger standing in a station area prior to the immediate approach of a carrier vehicle, but if a person intends to board a vehicle as a passenger and so indicates by the act of standing alongside, and the person in charge of the vehicle indicates an intention to receive the prospective passenger, and, as in this case, stops the car and prepares to immediately receive the person, the relationship of passenger to the carrier is established. From that moment the carrier must use the utmost care and diligence, and a reasonable degree of skill must be exercised (Civil Code, sec. 2100; 4 Cal.Jur., sec. 66, p. 901; Chunn v. City & Suburban Railway, supra; Hart v. Fresno Traction Co., 175 Cal. 489, 167 P. 885) by its agents or servants, not only on the standing but on a moving vehicle operated by the same carrier as well. Of course the company seldom controls the space between the curb and track or the actions of passengers coming from the curb. Northrup v. Pacific Elec. Ry. Co., 8 Cal. App.2d 189, 47 P.2d 365: Choquette v. Key System Transit Co., supra. For that reason the relationship may not arise until the passenger is in a position to board the car at an established stop or has actually been accepted by the carrier as a passenger. "* * * that is to say, that one who has the control of or who is operating a car must do something by way of an invitation to one to board the car before the relation of passenger and carrier is created so as to render the carrier liable in damages under the passenger relation." Hildebrant v. San Francisco, 69 Cal.App. 590, 595, 231 P. 1008, 1010. "The relationship of carrier and passenger arises when the passenger enters with intent to pay or pays for entrance into the vehicle or carriage. There may be a hiatus in the relationship in instances too numerous to mention, but, when the purchaser of the rights to be conveyed is in a position to be accepted as a passenger, the relationship is again in force. It is not necessary, in order to create the relation of carrier and passenger, that the passenger should have actually entered the vehicle. The relation is in force when one, intending in good faith to become a passenger, goes to the place designated as the site of departure at the appropriate time

and the carrier takes some action indicating acceptance of the passenger as a traveler." Sanchez v. Pacific Auto Stages, 116 Cal. App. 392, 396, 2 P.2d 845, 847. "That a passenger should have actually entered the vehicle is not a necessary prerequisite to the establishment of the relation of carrier and passenger. Such relationship is established when a person who intends in good faith to become a passenger goes to a depot, waiting room or other place designated as the site of departure, and by some action taken by the carrier, the latter indicates acceptance of the passenger as a traveller." Grier v. Ferrant, 62 Cal.App.2d 306, 311, 144 P.2d 631, 633.

[9-13] The failure to present a valuable consideration in advance to the carrier is not alone determinative of the relationship of carrier and passenger. Grier v. Ferrant, supra. Carriers often collect en route or at the end of a journey. It is not important that a fare should be collected, but it is essential that the relationship of carrier and passenger exist. In the present case the jury was justified in finding that plaintiff was a passenger. A carrier of persons for reward must use the utmost care and diligence. Civil Code, sec. 2100. "The expression 'highest degree of care' is no stronger than the statutory requirement 'utmost care.'" Osgood v. Los Angeles etc. Co., 137 Cal. 280, 70 P. 169, 170, 92 Am.St.Rep. 171. The skill and vigilance required of a prudent operator of the moving vehicle, as in this case, should have been of the highest degree. The previously quoted instructions might have been reframed, but under the facts of this case the use of the words "highest degree of care" was proper.

[14, 15] The issue of the motorman's negligence justified the instruction on the duty of the company to provide a safe place to board the car. It was negligent for the motorman to operate the car as he did because the company had a duty not to do anything to render its customary loading place unsafe.

[16] Defendants complain that certain offered instructions were not given. The one deserving of mention reads: "If you find from the evidence that Rosa Lagomarsino was guilty of contributory negligence, as defined in these instructions, however slight such contributory negligence on her part may have been, then you should return your verdict for the defendants." The significance of the refused instruction lies in the fact that the quantum of contributory negligence of plaintiff, if any, may have bothered the jury. The jury returned to the court after deliberation, at which time the following transpired:

"The Court: You are the foreman? A. Juror: Yes, Your Honor. Your Honor, the jurors would like to ask this question: Can damages be awarded if contributory negligence, regardless of degree, is established.

"The Court: Will you repeat that question?

"The Juror: Can damages be awarded if contributory negligence, regardless of degree, is established?"

Thereupon the court gave an instruction not previously given which contained the following: "If you find that plaintiff was negligent, you then must determine a fourth issue, namely: Did that negligence contribute in any degree as a proximate cause of the accident? If you find that it did, your verdict must be for the defendant."

Appellants cannot complain of this instruction. Rather than attempt an extemporaneous definition of contributory negligence, the court read a form instruction. To object to the instruction given because it fails to say "contributory negligence however slight" when it does say that negligence in any degree will bar plaintiff's recovery, is to quarrel about the method of expressing rather than the substance of the rule.

[17, 18] The statement of the attorney for the plaintiff that "your attitude has always been 'the public be damned'" is to be condemned. A preceding statement by the attorney for defendants that "we can't control the public" may have called for a reply but not one that might tend to excite a resentful feeling against the adversary. The excitement of argument in the trial of cases should not so interfere with the cool, calm presentation of a client's case as to prejudice the cause upon appeal. However, the trial court passed upon the question and evidently determined that the remark did not in fact prejudice the cause of defendants. The jury was admonished to disregard the remark. "A trial judge is in a better position than an appellate court to determine whether a verdict is probably due wholly or in part to misconduct of counsel, and his conclusion in the matter will not be disturbed unless, under all the

cicumstances, it is plainly wrong." Aydlott v. Key System Transit Co., 104 Cal.App. 621, 629, 286 P. 456, 459; see, also, Walling v. Kimball, 17 Cal.2d 364, 110 P.2d 58.

The judgment is affirmed.

PETERS, P. J., and BRAY, Justice pro tem.




69 Cal.App.2d 304

## PEOPLE v. CROWDER.

Cr. 565.

District Court of Appeal, Fourth District, California.

May 23, 1945.

Hearing Denied June 21, 1945.

**1. Criminal law ⇐531(3)**
**Homicide ⇐237**

Evidence supported jury's finding that defendant, charged with murder of mother, was not insane at time of killing or at time of making confession. Pen.Code, §§ 1016, 1017, 1026, 1368.

**2. Criminal law ⇐736(2)**
**Homicide ⇐270**

Whether defendant, charged with murder of mother, and convicted of manslaughter, was, at time he committed the act or made confession, legally responsible, was question of fact for jury. Pen. Code, §§ 1016, 1017, 1026, 1368.

**3. Criminal law ⇐1159(5)**

Jury's finding that defendant was legally responsible at time of killing and at time of confession, supported by evidence, would not be disturbed on appeal, although jury might have been justified under the evidence in rendering different verdict. Pen.Code, §§ 1016, 1017, 1026, 1368.

**4. Criminal law ⇐274**

Where defendant, at time of murder prosecution in 1931, was found to be insane and was committed to state hospital and in 1944, after regaining sanity, was returned for trial, denial of his motion to withdraw his plea of guilty and set aside information on ground that at time of preliminary hearing he was insane and not represented by counsel was not error where, on objections to confession, question of insanity at time of making confession was presented to jury and defendant had been fully informed of his rights at preliminary examination but expressed willingness to proceed and testify. Pen. Code, §§ 1016, 1017, 1026, 1368.

**5. Criminal law ⇐1149**

Exercise of power to allow plea of guilty to be withdrawn for purpose of setting aside information, on grounds that at time of preliminary hearing defendant was insane and was not represented by counsel, was left to sound discretion of trial judge. Pen.Code, §§ 1016, 1017, 1026, 1368.

**6. Constitutional law ⇐257**
**Criminal law ⇐12**

Statutes relating to the several pleas, and trials thereon, where the defense of insanity is interposed, are not unconstitutional as depriving accused of his liberty without due process of law. Pen.Code, §§ 1016, 1017, 1026; U.S.C.A.Const. Amend. 14, § 1.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

George Henry Crowder was convicted of manslaughter, and he appeals.

Affirmed.

Henry Schmidt, Dorris & Fleharty, and R. W. Henderson, all of Bakersfield, for appellant.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Asst. Atty. Gen., for respondent.

GRIFFIN, Justice.

In December, 1931, defendant and appellant was charged with murdering his mother on January 14, 1931. At the time of the arraignment in the Superior Court he appeared without counsel. He refused to allow the judge to appoint counsel to represent him. He entered a plea of guilty, as charged. Thereupon the court, on its own motion, appointed counsel to represent him, and set December 31, 1931, as the time for hearing a motion made by his counsel to withdraw the former plea of guilty and enter a plea of not guilty, or "for hearing any other motion to be made." Thereafter, the court granted the motion. The plea of guilty was withdrawn and defendant entered a plea of not guil-

ty and not guilty by reason of insanity. No other motions were made or suggested in reference to the sufficiency of the evidence at the preliminary hearing or the fact that he was not there represented by counsel.

At the suggestion of the trial judge, three physicians were appointed to examine defendant as to his present sanity. Upon the return of a report that he was then insane, a trial was had on that issue before a jury, under the provisions of section 1368 of the Penal Code. It found him to be insane and he was committed to the Mendocino State Hospital until he regained his sanity and all proceedings on the information were suspended until that time.

On November 13, 1944, it was claimed that defendant had regained his sanity. He was returned for trial on the information. He then, through his counsel, made a motion to withdraw his pleas and to set aside the information on the ground that at the time of the preliminary hearing the defendant was insane and therefore not competent to be a witness, and that he was not represented by counsel. This motion was denied. After trial, the jury found him guilty of manslaughter. By the same jury he was tried on his plea of not guilty by reason of insanity. It was found that he was sane at the time he committed the offense. Motions for arrest of judgment and for new trial were denied. Judgment was pronounced. The appeal is from the judgment which is attacked upon three grounds: (1) Insufficiency of the evidence; (2) refusal of the court to dismiss the information upon the ground that at the time defendant was subjected to the preliminary examination he was insane and was not represented by counsel; (3) that the provisions of sections 1016, 1017 and 1026 of the Penal Code relating to the several pleas and trials thereon, where the defense of insanity is interposed, deprive the accused of his liberty without due process of law and are in violation of section 1 of Amendment XIV to the Constitution of the United States.

Defendant confines his principal attack to the question of the sufficiency of the evidence relating to his sanity. He admits a conflict in the evidence on that subject but argues that "the testimony of the defendant's sanity is so insubstantial in comparison with the testimony that he was insane, that to accept it does violence to any rational standard of human judgment."

Defendant was born in Oklahoma in 1908. His brother is two years younger. They lived with their parents until 1925, when the parents were divorced. Thereafter, the boys lived with their mother. In 1930 they bought a home near Bakersfield. On the morning of January 14, 1931, at about 8:30 or 9 o'clock, two telephone workmen called at the Crowder home to reconnect a phone. They were told by the boys that "I don't think we want the telephone now." The phone men then went into the house to remove the instrument and started to open the front-room door. One of the boys shut the front-room door and directed the workmen to the dining room where the phone was located. The defendant's shirt was badly torn. The workmen left.

A few minutes later that morning, defendant's brother went to a neighbors' house and told them that his mother was dead. They immediately went to the house and found her sitting in the middle of the room in a big arm-chair, dead. There was a bullet wound in her right temple and blood had been streaming down her cheek. She was fully dressed and had a gun in her hand which had been purchased a couple of weeks before for the boys. The bullet entered the right side of the head slightly above the ear. There did not appear to be any powder marks on the face or temple. After their mother was killed, defendant and his brother went to live at the neighbors' for about a month. They later moved to the mountains. While at the neighbors they were very nervous. They did not go out to the cemetery where their mother was buried. The officers investigated the mother's death for some time. On December 19, 1931, defendant was apprehended. The officers testified that he was then rational. Defendant confessed to the killing of his mother to the officer, who wrote out the confession and defendant signed it.

The substance of the confession is that defendant and his brother had a fight, after which his brother went to bed; that defendant decided to "fix him" and so he "went and got the gun intending to pistol-whip" his brother; that as he got the gun his mother came into the room and tried to reason with him; that he shoved her into a chair; that when she screamed he

went "haywire" and he then put the gun up to her head and fired; that he saw that he had not awakened his brother so he put the gun in her hand and went to bed.

Both defendant and his brother were present at the conversation in reference to the confession. On the same day defendant was questioned by the assistant district attorney and he again admitted the killing. That confession was reported by a court reporter and defendant signed it. The details of that statement were about the same as related in the first confession.

On December 22, 1931, at the time of the preliminary examination, defendant was duly arraigned and was informed of his rights, which included his right to counsel at all stages of the proceeding. He elected to proceed without counsel, took the stand and personally testified that he had shot his mother and repeated in more detail the circumstances above related. He was held to answer on the charge of murder. Upon filing the information, proceedings were had as heretofore related.

The testimony as to the mental condition of the defendant at the trial may be thus summarized: There is expert opinion evidence that the defendant was sane and knew the difference between right and wrong and was able to appreciate the effect and consequence of his actions at the time he made the confessions and at the time of the killing. In addition to this, there is the opinion of more than half a dozen lay witnesses that the defendant was rational and sane at those times. It is true that the defendant was adjudged insane approximately a month and a half after the making of the confessions and a little over a year after the commission of the offense. There is also expert testimony as well as lay opinions that he was insane at the time the confessions were made as well as at the time the alleged offense was committed.

At the time of trial on the plea of not guilty, defendant's counsel raised the question of the sanity of defendant when he made the several confessions above mentioned as well as his confession made under oath at the preliminary examination. Considerable evidence, both lay and expert, was offered by both parties on this subject. It was later stipulated that all evidence on the question of defendant's sanity which was given at that hearing might be thereafter considered by the same jury in connection with the plea of not guilty by reason of insanity, in case such a trial proved necessary.

Dr. Rowe, superintendent of the Mendocino State Hospital where defendant was confined, after reciting his general and special qualifications relating to mental diseases, testified that in his opinion the diagnosis given by the officers at the time of his first insanity hearing was erroneous; that in his opinion, at the time of the killing and at the time of the making of the confessions, the defendant was of a psychopathic personality with episodal psychosis, i.e., the constitutional make-up of the man; that he had psychotic periods; that that in itself is not any recognized or known form of insanity; that the diagnosis of simple type dementia praecox, given by other medical witnesses for defendant, was erroneous because that form of insanity is very seldom cured; that its principal concept is a progressive deterioration; that defendant is not now so afflicted and that their theory or diagnosis was not correct at any time.

[1-3] The question of defendant's insanity, both at the time of making the confessions and at the time of the killing, was thoroughly presented to the same jury. They rejected both of defendant's contentions in this respect. There was substantial evidence supporting the finding of the jury on those issues. Whether the accused was, at the time he committed the act or made the confessions referred to, legally responsible, as responsibility is defined by the law, was a question of fact entirely within the province of the jury. That finding will not be disturbed by this court on appeal.

The fact that the jury might have been justified, under the evidence, in rendering a different verdict, is of no consequence. People v. Schuler, 87 Cal.App. 68, 75, 261 P. 1059; People v. Kirby, 15 Cal.App. 264, 272, 114 P. 794; People v. Dugger, 5 Cal. 2d 337, 341, 54 P.2d 707; People v. Lizarraga, 108 Cal.App. 152, 155, 291 P. 434; People v. Plyler, 126 Cal. 379, 382, 58 P. 904; People v. Willard, 150 Cal. 543, 89 P. 124; People v. Babcock, 57 Cal.App.2d 54, 55, 134 P.2d 54.

[4, 5] The second point raised involves the question whether the court erred in denying defendant's motion to set aside the pleas for the second time and to test the question whether defendant was insane at the time he testified before the committing

magistrate and to now object because he was not then represented by counsel. We do not see how defendant can claim that he has been prejudiced by this ruling. Defendant objected to the admission of his confessions into evidence. The entire question of his insanity at the time of making the confessions was then presented to the jury. The motion was not presented at the first opportunity presented when counsel was first appointed to represent him. The trial court then permitted defendant to make a motion to set aside his plea of guilty and to make any other motion he desired. Defendant did not make such a motion at that time. Furthermore, from the record, it appears that at the preliminary examination defendant was fully informed of his rights as well as his right "to counsel at all stages of the proceedings." The defendant does not dispute this fact. He expressed his willingness to proceed and to testify. Considering all of these facts, the trial court was justified in denying the motion. The exercise of the power to allow a plea to be withdrawn for the purposes indicated is left to the sound discretion of the trial judge. People v. Linton, 102 Cal.App. 608, 611, 283 P. 389.

Defendant makes no claim of abuse of discretion nor has he made any showing of prejudice to him by reason of the fact that the court did not allow him to withdraw his plea for the second time for the purposes indicated. No abuse of discretion resulted. People v. Miller, 123 Cal.App. 499, 11 P.2d 884; People v. Creeks, 170 Cal. 368, 371, 149 P. 821; People v. Serrano, 123 Cal.App. 339, 11 P.2d 81; Morehouse v. Superior Court, 124 Cal.App. 38, 39, 12 P.2d 133; People v. Campos, 10 Cal. App.2d 310, 320, 52 P.2d 251; People v. Best, 13 Cal.App.2d 606, 611, 57 P.2d 168; People v. Dutton, 27 Cal.App.2d 364, 365, 80 P.2d 1003.

[6] The third point involves the constitutionality of sections 1016, 1017 and 1026 of the Penal Code. Counsel for defendant has admitted that the Supreme Court of this state has, on many occasions, already upheld the constitutionality of these sections against such an attack, but now asks this court to reconsider those decisions. We need but cite the decision prepared by Mr. Justice Shenk, in People v. Coleman, 20 Cal.2d 399, 405, 126 P.2d 349, 353, in which he says: "The foregoing contentions are not new. They were made in other cases determined after the amendment of sections 1016 and 1020 of the Penal Code and the enactment of section 1026 of the same code all in 1927. * * * They were declared to be valid in 1928 * * * and have been upheld in a line of unvarying decisions for the last thirteen years and more (citing cases)."

The constitutionality of these sections as applied to the facts here presented has been fully determined.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.




69 Cal.App.2d 407

## DOETSCH et al. v. WAGNER.

Civ. 12812.

District Court of Appeal, First District, Division 2, California.

May 29, 1945.

**Hearing Denied July 26, 1945.**

**1. Vendor and purchaser ⇐49**

Contract for sale of land at specified price, and not specifying terms of payment but providing that purchaser agreed to extract gravel from the property at a price of 25 cents a yard, the money to be deposited each month as specified, required purchaser to take possession and actively quarry gravel.

**2. Quieting title ⇐44(3)**

In action to quiet title to land bought by defendant from plaintiffs under contract requiring payment of purchase price by extracting gravel from the property at a price of 25 cents per yard, evidence supported finding that purchaser abandoned the property and forfeited whatever right she had under the contract.

Appeal from Superior Court, Santa Clara County; M. G. Del Mutolo, Judge.

Action to quiet title by Joseph Doetsch and another against Frances E. Wagner. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Owen D. Richardson, of San Jose, for appellant.

M. Henry Robidoux, of San Jose, for respondents.

GOODELL, Justice.

This is an appeal from a judgment quieting title to a parcel of real property.

On August 29, 1941 an agreement was entered into for the sale by the plaintiffs to the defendant of a piece of real property in Santa Clara county consisting of about nine acres (most of which is a gravel bed) lying within the larger parcel described in the complaint. The defendant entered into possession of the land, installed equipment thereon, removed gravel therefrom (as contemplated), and after about nine months ceased quarrying operations and removed most of her equipment. This suit was commenced about six months thereafter. The court found that the defendant had abandoned the property and had forfeited whatever rights she had under the contract, also that the contract was void for uncertainty.

The appellant's position is that the contract is clear and certain except in a few minor particulars; that it does not obligate appellant to extract gravel nor specify any quantity that must be extracted, nor obligate her to occupy the property.

If the appellant abandoned the property and relinquished all rights under the contract the judgment should be affirmed regardless of whether the contract is void for uncertainty or not. Therefore the first inquiry seems to be whether the finding of abandonment (which is as follows) is supported by the evidence: "That in September of 1942, defendant Frances E. Wagner abandoned the real property * * * with the intention of forfeiting her rights in and to said real property; that plaintiff took possession of said property after said abandonment and said plaintiffs ever since have been and now are in the exclusive possession of said property." The court concluded: "That defendant Frances E. Wagner forfeited all of her rights under the Agreement * * * and said agreement * * * became terminated in September of 1942."

In presenting this case on appeal appellant's counsel was confronted with this finding, yet in his opening brief he made no attack upon the sufficiency of the evidence to support it. All that is said therein on the subject is that no breach resulted from the alleged abandonment since the agreement "did not obligate the Defendant to extract gravel therefrom or specify any quantity that must be extracted, nor obligate the Defendant to occupy the property." In the respondents' brief counsel makes a definite point of abandonment and discusses the evidence thereon but in appellant's closing brief no reply whatever is made to respondents' discussion of that point. We are therefore left without any enlightenment whatever from appellant's counsel on this vital point.

In considering the question of abandonment it is necessary to examine the rather unusual provisions of the contract. Respecting the purchase price the contract provides: "* * * the party of the second part hereby covenants and agrees to pay to the party of the first part the sum of $700.00 per acre, * * * in the manner following, that is to say: $10.00 upon the execution and delivery of this Agreement, the receipt whereof is hereby acknowledged; The party of the second part agrees to extract gravel from said property at a price of 25 cents a yard, said money to be deposited each month with the San Jose Title Co. or any other institution as may be agreeable to all parties. The said money shall remain in escrow pending an agreement with the Mortgagee to release said property upon the payment of a satisfactory amount per acre, not exceeding $700. per acre, less costs."

The purchase price of the nine acres at $700 per acre comes to $6,300. Nowhere in the contract (except the provision for a nominal and trifling down payment of $10) is there any specification of the time and manner of payment except the provision for 25 cents for each cubic yard of gravel taken out. The requirement for payment "in the manner following" preceding the "25 cents a yard" would indicate that that method, unusual as it is, was the method upon which the parties agreed. Otherwise there is no method at all adopted for the payment of the purchase price. If $6,300 had to be eventually paid, then at the rate of 25 cents a yard, 25,200 yards would have to be removed. In the nine months of operations only 700 yards were removed, and at that rate of progress it would take over 27 years to complete the payment of the purchase price! Attention is drawn to this rather startling circumstance in connection with the inquiry as to abandonment for the reason that the trial court might have

weighed the slow progress during the nine months of operations against the comparatively large amount of money to be eventually paid (stretched out over a long period) and considered the influence these factors might have had on the appellant in making up her mind whether to keep going or to quit.

Is the finding of abandonment supported by the record? The appellant had been in the gravel business, or business akin to it, for 14 years. Interested with her in this contract as a partner was one William H. Guernsey, who was experienced in the same business and who had charge of the physical operations on the property. In September, 1941, immediately after the contract was signed, they moved machinery, equipment and timbers onto the property, and built certain structures. There was some equipment already there including a bunker, rock crusher, hopper and a couple of engines. But some of the equipment was removed, so it took two or three months to get the place ready to operate. The appellant testified that the equipment and building which she put on the property cost her "no less than $2,000 about" and the labor about $1,000 more. She probably meant her *original* cost, for in her answer she pleaded that her installations were at a cost of approximately $300 and the court so found.

From September, 1941 until June 2, 1942, when the last load of gravel was hauled out, there were removed approximately 700 yards. This yardage is determined by the sum of $175 which the appellant paid. At the contract rate of 25 cents per yard it would mean that 700 yards were moved in those nine months. Payments were made as follows: in December, 1941, $50; in January, 1942, $25; in March, 1942, $50; and in April, 1942, $50.

Troubles of several varieties developed. The quality of the gravel was not as high as the appellant had anticipated; they ran into clay and silt which they had not expected to find. Appellant testified that the gravel was "in bad condition, not as deep as I thought it would be. We expected to use the drag-line down to eight or twelve feet. We run into so much clay and dirt that the city of San Jose wouldn't accept it." Guernsey testified that the gravel was so dirty it clogged the machinery; that San Jose turned it down because it was dirty and that they could not put in a gravel washing machine because they could get no labor.

Business was bad. Appellant and Guernsey both testified to disappointing business conditions. They found business so bad that it would not support both families (appellant's and Guernsey's). When water was needed for washing the gravel the appellant thought "the business didn't warrant going to further expense". Guernsey had a conversation with Doetsch in which the former told the latter that there was not much business and not "enough money in it at the present amount of business to keep the place going, and I told him I thought that I had better pull the machinery out until such times as business was better, and the only reason for taking the machinery out was because the neighbors there stole the gasoline and broke the machinery so that we couldn't run more than one-half of the time." The appellant testified that the principal reason she discontinued operations "was the war conditions and priorities came into effect at that time, and although I was more or less prepared to take it out and manufacture, many orders I have were cancelled that have never been filled, and I tried to get smaller orders and carry on, tried to sell it at the plant and couldn't, and about in the latter part of September there was a call for Mr. Guernsey from Washington, D. C. to report to the army engineers in San Francisco which he did." A witness produced by the plaintiff partially contradicted her testimony as to the decline in business. He testified that the war had *created* a demand for gravel, although he admitted that small business had fallen off. The appellant elsewhere admitted that she was not prevented from removing gravel because of priorities.

The machinery and equipment caused trouble. All the equipment which the appellant moved onto the place was second-hand. At first the gravel was removed by hand. There were "several very inconvenient break-downs" and the "machinery we put in at a great deal of expense was not adequate. We had to change machinery, so months went by without taking out any gravel whatsoever". The jaws and legs and other parts of the crusher were broken. Doetsch testified that Guernsey told him that if he had the equipment he could get some gravel out "but Mrs. Wagner will not spend a cent", and that he (Guernsey) "had an awful hard luck

story". Some of the equipment had been rented to the appellant by the witness Carter. Guernsey on cross-examination testified "there wasn't any business to amount to anything, and I told him (Doetsch) we were thinking of pulling the equipment out of there on account of it being wrecked, and not being business enough there to warrant keeping a man there all the time—the equipment being wrecked and office being wrecked, and stuff being stolen and all, he was going to pull it out." The appellant testified that they had quite a bit of trouble with the equipment because of the condition of the material.

The appellant testified as to her conversation with Doetsch on one of his visits to the place, as follows: "He saw us on the property; he saw everything that went in, did have trouble, couldn't keep the thing going * * *" further, that he (Doetsch) then offered to take 10 or 15, or even 5 cents a yard, instead of 25 cents which was the contract rate to help appellant get started. Guernsey testified to the same effect. Doetsch denied this and he also denied ever telling the appellant that she need not extract gravel until it became profitable to do so or telling Guernsey they had nothing to lose and everything to gain and the court found with the plaintiffs on that conflict. The record is quoted verbatim on what to us is not clear:

"Q. Did he ever say anything about not requiring him to go ahead with the extraction of gravel? A. Yes.

"Q. What did he say? A. If we had to suspend for any reason it was inadvisable, he couldn't take it out, we couldn't and no one else."

We do not pretend to know what this means.

It is undisputed that the last load of gravel removed by the appellant was on June 2, 1942. Guernsey left for war work in October, 1942, and before leaving "took out as much (equipment) as he could". The record shows no discussion between appellant and respondents when the equipment was removed showing any intention to return or to resume operations. Between June 2 and the time Guernsey left there seems to have been some pilfering going on. Doetsch testified that between June and September 1942 gravel was removed most every day by strangers who came in and got it when Guernsey was not there, saying Guernsey had told them to help themselves. The pilfering was not confined to the gravel but apparently the appellant's equipment suffered as well from that and from malicious mischief or vandalism according to Guernsey's testimony. Appellant testified that she removed some of the equipment "because it was being destroyed and wrecked, practically ruined". Just when this occurred is not clear from the record. There were left on the property mounts, chutes, bunkers, timbers and the small building, which were still there at the time of the trial. Two shovels also were left, which the appellant valued at about $50. A witness estimated the cost of replacement of the equipment left on the property at $350 or $400 at the time of trial. In the judgment the defendant is expressly given the right to remove all her personal property from the premises.

About September 8, 1942 Doetsch placed a barricade across the road with the sign on it to keep out. There were some incidents at the barricade but it is sufficient to say that the evident purpose of Doetsch in putting it up was to treat the appellant as no longer entitled to enter. Mrs. Doetsch testified that Guernsey took the machinery out after the barricade had been put up. It should be noted also that in December, 1942 the appellant tendered a check for $50 which was returned by the respondents, and a month or two later another check or money order for $50 was tendered and rejected. The case was tried in December, 1943, which was about 14 months after the appellant had removed her equipment from the property. At that time the appellant was asked, "Now, if and when you are able to extract gravel do you wish to keep on"? to which she replied, "Yes, I should like to do that." Also in a letter the appellant stated that she would open the plant as soon as business warranted. The foregoing is a fair résumé of the evidence bearing on abandonment.

[1] There can be no doubt that this contract, unusual and uncertain as it is, contemplated (if it meant anything at all) that the appellant would take possession of the place and actively quarry gravel therefrom. The appellant's position in her opening brief is that "No breach of the Agreement resulted from the alleged 'abandonment' of the real property, since the Agreement did not obligate the Defendant to extract gravel therefrom or specify any quantity that must be extracted, nor obligate the Defendant to occupy the property." What that contention comes to is

simply this: that the appellant was free to stay off the property altogether or to move on and off the property at will, taking out as much or as little gravel as she pleased, for an indefinite period of time,—an option pure and simple. That that is *precisely* what it comes to is confirmed by appellant in her brief as follows: "And if it be argued that such a covenant gives the Defendant a perpetual right to extract gravel, the reply is that such is the language of the Agreement * * *". At oral argument that contention was repeated. The contrary is settled by the language of the contract, wherein the appellant bound herself, in so many words, *"to extract gravel from said property at a price of 25 cents a yard."* The only way she could extract gravel was by occupying the quarry. And the only way provided for the payment of the purchase price of $700 an acre for nine acres was by that peculiar method. Otherwise the contract is wholly meaningless. The contract contains a provision that the appellant shall be *entitled* to possession, but her agreement to take gravel, and thereby to pay for the acreage, by its very terms *binds her to take possession.* The facts remain that possession was taken, that gravel was removed, that such removal continued up to June 2, 1942 and that for the ensuing four months no gravel was removed under the contract. Then in September or October 1942 most of the machinery and equipment (the best of it) was taken off the place.

[2] The evidence bearing on the question of abandonment contains numerous declarations by the appellant and by Guernsey showing their determination to quit. Whether those declarations, together with the other evidence and the acts and conduct of the parties, indicated an intention to return at some time in the indefinite future and make another *try,* or to quit for all time, presented a question of fact. In deciding that question the court had before it a lot of testimony as to the inferior quality of the gravel which, in itself, would not be expected to tempt the appellant into a resumption of operations, and in addition to that it must be remembered that operations were at a standstill for four full months before Guernsey's departure for war work. In short, with the appellant in possession, her acts and conduct in surrendering that possession and in moving off her machinery and equipment was strong and convincing evidence of an intent to *abandon the property and relinquish all rights under the contract,* particularly when coupled with the declarations so frankly made while operations were still on. From all the facts and circumstances the court found that the appellant was through with the Doetsch place *for all time,* and there is an abundance of evidence to support that finding.

The appellant pleaded that the respondents had "waived the terms of said written Agreement pertaining to the extraction of gravel, the price thereof, the payments therefor, and also the terms of said Agreement for the forfeiture of all rights under said Agreement and all rights to moneys theretofore paid by this Defendant" because, she alleged, the plaintiffs had stated on numerous occasions that if for any reason the gravel could not be extracted, operations could be suspended and that the price per yard could be reduced from 25 cents to 10 or 5 cents if the appellant desired it. The appellant's and Guernsey's testimony to that effect and the plaintiffs' denial thereof have been already given. The court made a finding negativing this claim of waiver.

As already suggested, if the contract of August 29, 1941, instead of being, as it is, full of uncertainties, had been absolutely precise, definite and certain and the appellant had entered into possession under it and had then moved out under the circumstances shown by this record, a finding of abandonment of the property and a relinquishment of all rights under the contract would have been fully justified. It is therefore unnecessary, in view of the conclusion at which we have arrived, to discuss or decide the question whether, as the court found, the contract is void for uncertainty. One of the appellant's points is that the respondents cannot now rely upon uncertainty in view of the fact that the parties acted under the contract for about a year and therefore they must have understood its terms. Citing 6 Cal.Jur. p. 304, sec. 184, "Construction by Parties". How they acted under it is fairly well disclosed by the summary of the evidence which we have given, which we think does not establish very much by way of "practical construction". Be that as it may, that point falls under the heading of uncertainty, and it need not be decided herein.

The judgment is affirmed.

NOURSE, P. J., concurs.

69 Cal.App.2d 457

## BELCHER v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12818.

District Court of Appeal, First District, Division 2, California.

June 1, 1945.

Hearing Denied July 26, 1945.

1. Municipal corporations ⇐817(1)

Pedestrian, who fell on steps in sidewalk during strong wind, had burden to show an actionable wrong on part of defendant city. Gen.Laws 1943, Act 5619.

2. Pleading ⇐214(3)

In action by pedestrian who fell on steps in sidewalk during strong wind, city's demurrer confessed truth of allegations in complaint that city had built steps and knew of lack of handrail or other protection and of notice warning pedestrians to keep off street in windy weather.

3. Courts ⇐91(2)

Opinions of District Court of Appeal are set at large and vacated by granting of hearings by Supreme Court.

4. Negligence ⇐67

A person is bound to use ordinary care for his own safety and to observe dangers discoverable by observation of a person using ordinary care and caution and possessed of ordinary sight and hearing.

5. Municipal corporations ⇐805(1)

General knowledge by a city of winds therein is not superior to knowledge and observation of an adult and presumably reasonably prudent person exposed to wind, as regards liability to pedestrian who fell on sidewalk during strong wind.

6. Municipal corporations ⇐798

A city is under no duty to warn pedestrian of something he already knows, or of a danger obvious to everybody, as regards liability when pedestrian fell on steps in sidewalk during strong wind.

7. Municipal corporations ⇐755(1)

A city is not an insurer of pedestrians' safety, but is required to exercise only ordinary care to maintain streets in reasonably safe condition for those using them.

8. Municipal corporations ⇐755(1)

A municipality is not to be held liable for injuries merely because it may appear that certain property, not dangerous in its construction or intended use, could possibly be made safer by other means.

9. Municipal corporations ⇐756

The Public Liability Act created a liability unknown to the common law, and its application is to be strictly construed against claim, such as claim against city by pedestrian who fell on sidewalk. Gen. Laws 1943, Act 5619.

10. Municipal corporations ⇐796

A pedestrian who, during strong wind, fell on steps in sidewalk on street which, because of high wall on one side and apartment house on the other, allegedly formed a kind of canyon in which wind at times attained great velocity, could not hold city liable because of lack of handrail or of notice warning pedestrians of danger on windy days, though city was allegedly subject to a peculiar, gusty, severe wind several times a year. Gen.Laws 1943, Act 5619.

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Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Action by Sybil Belcher against the City and County of San Francisco for personal injuries suffered when plaintiff, a pedestrian, fell on steps in a sidewalk during a strong wind. From a judgment for defendant, entered after its demurrer had been sustained, plaintiff appeals.

Affirmed.

Vincent Surr, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Albert F. Skelly, Deputy City Atty., both of San Francisco (Lawrence S. Mana and Joseph Murphy, both of San Francisco, of counsel), for respondent.

GOODELL, Justice.

This is an appeal from a judgment in favor of the defendant, entered after its demurrer to the complaint had been sustained.

The complaint seeks damages for personal injuries suffered by the plaintiff, a pedestrian, when she was blown over and fell to the sidewalk during a strong wind. The action is based upon the Public Liability Act of 1923, Stats.1923, p. 675, Deering's Gen.Laws 1943, Act 5619, and on this ap-

peal the plaintiff "rests upon two alternative omissions constituting negligence" which, she claims, constantly render the street in question "dangerous when the wind blows hard," i. e., the absence of a handrail from steps in the sidewalk in question, and the absence of a sign or notice warning pedestrians that the street or steps are dangerous on windy days.

The complaint shows that Taylor street in San Francisco runs approximately north and south and descends steeply from California street to Pine street; on the westerly side of Taylor street in this block is a flight of concrete steps carved out of part of the sidewalk. These steps "are perhaps six or eight feet broad, and afford a tread of perhaps sixteen inches, while the rise from step to step is very moderate, perhaps six or eight inches of a drop." On the easterly side of Taylor street at the corner of California is a lofty apartment house; opposite it on the westerly side of Taylor is a high brick wall, and (to quote) "* * * this apartment house and this wall form a sort of artificial canyon along which, sometimes up and sometimes down, according to whether the wind is blowing from the south, or from the north, the wind at times attains a great velocity and strength. * * *" Further, "That by reason of the steepness of the descent along Taylor street from California street to Pine street, few would be disposed to use it were it not that the city, many years ago added to the charm and attractiveness of Taylor street" by building this flight of concrete steps. "In short," it is stated, "the steps are so well done, that everybody is tempted to make use of them, and to select Taylor street in preference to many other streets, as the finest thoroughfare and mode of egress" from the hilltop to the lower levels. And further: "That several times a year, and every year, and usually, but not always, continuing for three consecutive days, San Francisco is subject to a peculiar wind, known as the north wind, blowing chiefly from the north or northeast, which wind has various 'earmarks' that are recognizable. * * * It is a very gusty wind. It is a severe wind. * * * That when such a wind blows, the steps above described become dangerous, by reason of their seductive and enticing nature. That the negligence of which plaintiff herein complains is that these otherwise perfect steps have no handrail. They have no steel or other posts from which a heavy chain is or could be fastened, 'festooning' as a parabola from one post to the next, which in such time of danger one could grasp and save herself from being blown over. There is no warning posted anywhere to inform one that said street or said steps are dangerous on windy days. Thus the pedestrian is and in this instance was 'caught' before aware of it, and does not know that she is in the 'draw' of the wind on Taylor street before it is too late to do anything to escape therefrom; That in these omissions, plaintiff avers that the City of San Francisco has been and is negligent, and endangers life and limb of its inhabitants."

The complaint then alleges "That on or about the 12th day of February, 1944, one of these so-called 'north winds' was blowing in San Francisco, more or less from the northeast" and the plaintiff, who is tall and "fairly athletic" was walking downtown between 11 a. m. and 12 o'clock noon. "Accordingly," it is averred, "and without any inconvenience or any danger from the wind, she walked east along the south side of California safely to Taylor street; then she turned south and started to descend the steps on the west side of Taylor street to go to Pine street; but she had only proceeded a few steps down Taylor street when the northeast wind blowing at her back assembled beyond her strength and seized her and threw her down and injured her * * *."

The complaint alleges that the defendant municipality "has always known that there was no handrail or other protection on said steps, and * * * that there is not nor has there ever been any notice placed to warn pedestrians to keep off said street in windy weather * * *." Also that the records of the Weather Bureau show that at 11:28 a. m., which was about the time of plaintiff's injury on February 12, 1944, a northeast wind was blowing at a velocity of 24 miles per hour. The same records show that the maximum velocity in March, 1943 was 26 miles per hour, in April, 1943, 28, in May, 1943, 34, and that in December, 1943 it was as high as 35 miles per hour. In January, 1944 it was 25 and in February, 1944, 24 miles per hour. It alleges that the municipality has knowledge of the velocity and nature of its winds and of the unprotected condition of the steps in question.

A claim was presented to the city and rejected.

[1] The facts alleged in this complaint present a novel case—one of first impression. In the first place it will be observed from the pleader's rather elaborate description of the stairway that no claim is made that there is anything dangerous in the design or construction of the steps themselves. And it is not alleged that there were any irregularities or defects such as holes, ridges, or upraises upon which a pedestrian might trip or by which one might be entrapped (as appear in so many cases, such as Whiting v. City of National City, 9 Cal.2d 163, 69 P.2d 990). On the contrary there are affirmative allegations which frankly concede that "the steps are so well done that everybody is tempted to make use of them, and to select Taylor street in preference to many other streets, as the finest thoroughfare and mode of egress." They are characterized as "otherwise perfect steps" in connection with the allegation "That when such a wind blows, the steps above described become dangerous, by reason of their seductive and enticing nature. *That the negligence of which plaintiff herein complains is that these otherwise perfect steps have no handrail.*" What we have just emphasized seems to be the gist of plaintiff's case. With respect to this novel contention the respondent says: "If appellant's complaint sufficiently alleges a cause of action on account of a dangerous condition which existed as a result of the failure of the City and County of San Francisco to maintain a handrail along Taylor Street between California and Pine Streets, it would necessarily follow that the City and County of San Francisco is honeycombed with dangerous conditions of its public streets. In other words, on every one of the streets on its many hills the City and County of San Francisco would be required to erect and maintain handrails. The absurdity of this line of reasoning was recognized by the District Court of Appeal in Boughn v. Los Angeles City School District, 7 Cal.App.2d 347, 46 P.2d 223, which pointed out to hold a municipal corporation liable under such circumstances is to say that it must so maintain its property as to preclude the possibility of injury." To which the appellant replies: "* * * Respondent argues that if the City is at fault on Taylor street, it will be also at fault elsewhere. That is not an argument against culpability." In the Boughn case, 7 Cal.App.2d at page 350, 46 P.2d 225, the court said: "We have been cited to no case which holds on similar or analogous facts that the maintenance of a faucet which protrudes from two and one-half to three inches from the wall is negligence, and we know of none. Common sense suggests that to hold a school district negligent under such circumstances is to say that the school district must so build and maintain its premises as to preclude possibility of injury." And so in this case, the appellant, *whose burden it is to show an actionable wrong,* has cited no authority whatever where, under facts and circumstances anywhere nearly comparable or similar to those alleged in this complaint, a municipality, or any other defendant, has been held liable. The appellant observes that the respondent does not quote from a single case attempting to *absolve a city from a charge of negligence* in such circumstances, but the burden is upon the appellant, of course, to convince the court that there is legal responsibility in this case. The only "wind" case cited by the appellant is Smith v. San Joaquin Light & Power Corporation, 59 Cal.App. 647, 211 P. 843, where this court held in a case where the plaintiff, a child, was burned by a hanging live wire, that defendants' failure to protect its power line from the blowing of the parts of a tree against it, in a wind, was an act of neglect rather than an act of God.

The appellant cites numerous other authorities in support of her contention that a wind such as that alleged, is not an act of God. The respondent does not contend that it is, hence it is unnecessary to discuss appellant's authorities on that point.

[2] Again, cases are cited by the appellant on the subject of knowledge by the city of the condition of the steps and the absence of a handrail. The complaint alleges that the city itself built these steps many years ago, and that it "has always known that there was no handrail or other protection on said steps, and * * * that there is not * * * any notice placed to warn pedestrians to keep off said street in windy weather." The demurrer of course confesses the truth of these allegations. See also Fackrell v. City of San Diego, 26 Cal.2d 196, 157 P.2d 625; Sandstoe v. Atchison, T. & S. F. R. Co., 28 Cal.App.2d 215, 219, 82 P.2d 216; Black v. Southern Pac. Co., 124 Cal.App. 321, 12 P.2d 981, and Wise v. City of Los Angeles, 9 Cal. App.2d 364, 49 P.2d 1122, 50 P.2d 1079,

on the question of notice where a city has built the structure in question.

[3] The other cases cited by the appellant are not helpful. Three of them are district court of appeal opinions later "set at large" and "vacated," Martin v. Howe, 190 Cal. 187, 211 P. 453; In re Estate of Stierlen, 199 Cal. 140, 248 P. 509, by the granting of hearings by the supreme court. The first was George v. City of Los Angeles, Cal.App., 71 P.2d 601, where judgment went for the city and the Los Angeles Gas & Electric Corporation. On appeal it was *reversed* as to the city and affirmed as to the Electric Corporation. In the supreme court it was *reversed as to both,* 11 Cal.2d 303, 79 P.2d 723. The second case was cited on duty to give warning of a dangerous place; it is Melendez v. City of Los Angeles, Cal.App., 60 P.2d 865, where the district court of appeal *reversed* a judgment for defendant entered on the sustaining of a demurrer. It was an attractive nuisance case where two boys were drowned in a pool of muddy water. The supreme court *affirmed* the judgment for the city, 8 Cal.2d 741, 68 P.2d 971, holding that a pond was not an attractive nuisance, re-affirming Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993, and from that it of course follows that there was no duty to warn of danger. The third case is cited on the question of constructive notice; it is Whiting v. City of National City, Cal.App., 61 P.2d 504, which, like the George case and the Melendez case, was a decision by the district court of appeal. It *affirmed* a judgment holding the city liable in a sidewalk tripping case. A hearing was granted by the supreme court, where the judgment was *reversed,* 9 Cal.2d 163, 69 P.2d 990, the court holding that the defect was a minor one and that no injury would ordinarily be suffered therefrom when ordinary care was exercised in the use of the sidewalk.

[4-6] In addition to claimed liability based on the absence of the handrail, the appellant contends as her second point that the city was at fault in that "There is no warning posted anywhere to inform one that said street or said steps are dangerous on windy days." In the first place the city's knowledge that no warning sign was posted, alleged as above, is admitted for the purpose of the demurrer. The question is whether the city is under the duty to give such warning under the circumstances alleged in this complaint. The accident is alleged to have happened in broad daylight, between 11 and 12 o'clock noon. The appellant is an adult, and is alleged to be "fairly athletic." A person is bound to use ordinary care for his own safety and to observe and take notice of all such dangers as could have been discovered by the observation of a person using ordinary care and caution, and possessed of ordinary sight and hearing. The condition of the steps and the force of the wind were such as to be taken in at a glance and in an instant by any reasonably prudent person. Wind is a force of nature to which all persons are of course subject. If danger existed it was open and obvious. While the city's general knowledge of its winds must be conceded, such knowledge is not superior to the knowledge and observation of an adult, and presumably reasonably prudent, person actually exposed to the wind. "To look is to see." There is nothing in the complaint to the effect that the appellant did not know that on a windy day Taylor street between California and Pine streets was "a sort of artificial canyon." The city is under no duty to warn a pedestrian of something he or she already knows or of a danger (if there be one) obvious to everybody.

[7, 8] It has been repeatedly held that a city is not an insurer of the safety of pedestrians but is required only to exercise ordinary care to maintain its streets in a reasonably safe condition for those using them. It has likewise been held that liability is not to be fastened upon a municipality merely because it may appear that certain property, in nowise dangerous either in its construction or intended use, could possibly be made safer by other means. Schmidt v. City of Vallejo, 122 Cal.App. 5, 11, 10 P.2d 107.

[9, 10] The instant case is an unusual one presenting facts of rare occurrence. The fact that appellant's counsel has been unable to furnish authorities dealing with any relatively similar set of facts, or even remotely approaching those in the case at bar, is further evidence of the rarity of the case. To hold on the facts alleged that liability existed either because of the absence of a handrail or the absence of a warning would unduly extend the scope of the Public Liability Law and go far toward establishing the rule that a municipality is an insurer. "The statute of 1923 created a liability unknown to common law, and its application is to be strictly construed against

the claim." Whiting v. City of National City, 9 Cal.2d 163, 165, 69 P.2d 990, 991. We are satisfied that the trial court was right in sustaining the demurrer.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.




69 Cal.App.2d 254

**DAVIDSON et al. v. EALEY et al.**

**Civ. 7102.**

District Court of Appeal, Third District, California.

May 21, 1945.

**1. Appeal and error ⇐886**

That trial court, in finding that named person with owner's permission was so negligently operating automobile as to cause death of plaintiffs' decedent, erroneously designated owner instead of named person as driver, was a mere clerical error which could be corrected by appellate court by amendment of finding. Code Civ.Proc. § 956a.

**2. Automobiles ⇐192(1)**

The foundation of the statutory liability of automobile owner under imputed liability statute is the permission, express or implied, given by owner to another to use his automobile. Vehicle Code, § 402, St.1935, p. 153.

**3. Automobiles ⇐244(22)**

Conflicting testimony sustained trial court's finding that permission given by owner to use his automobile was general and not restricted to a limited use for a limited time in the hands of a specified party. Vehicle Code, § 402, St.1935, p. 153.

**4. Automobiles ⇐192(1)**

Where owner of automobile expressly or impliedly permits its use, and it is being driven by another with the consent of the permittee, who accompanies the driver, owner is liable for driver's negligence to the extent set forth in imputed liability statute. Vehicle Code, § 402, St.1935, p. 153.

**5. Automobiles ⇐192(1)**

The Legislature in adopting imputed liability statute intended to make owner directly responsible to a person injured through negligence of an operator driving automobile with owner's permission. Vehicle Code, § 402, St.1935, p. 153.

**6. Indemnity ⇐13(1)**

The automobile owner's right of subrogation under imputed liability statute to all rights of the person injured against operator whose negligence is imputed to owner does not rest upon existence of a judgment against operator in the same action, but applies if recovery is had against owner and covers any judgment and costs recovered against owner. Vehicle Code, § 402, St.1935, p. 153.

**7. Automobiles ⇐234**
**Indemnity ⇐13(1)**

Provisions of imputed liability statute providing that operator of vehicle whose negligence is imputed to owner shall be made a party defendant if personal service of process can be made upon him within the state and that upon recovery of judgment recourse shall first be had to operator's property, and subrogating owner to all rights of person injured against operator, were intended to protect owner from results of operator's negligence insofar as possible as between operator and owner without interfering with rights of injured party. Vehicle Code, § 402, St.1935, p. 153.

**8. Automobiles ⇐234**

Upon proof of owner's permission to operate automobile, owner becomes directly and severally as well as jointly liable for damages resulting from operator's negligence in an amount limited by imputed liability statute, and injured person need not make operator a party to action in order to recover against owner. Vehicle Code, § 402, St.1935, p. 153.

**9. Judgment ⇐17(4)**

Judgment against automobile owner for death resulting from negligent operation of automobile by one whose negligence was imputable to owner was not erroneous because of failure to serve operator with process, though operator admittedly was within the state and his whereabouts known to plaintiffs. Vehicle Code, § 402, St.1935, p. 153.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Ora C. Davidson and another against Tom Ealey and others to recover damages for the death of plaintiffs' husband and father as the result of an automobile collision. From a judgment in favor of plaintiffs against named defendant alone, he appeals.

Judgment affirmed.

Robert H. Davis and William H. Brawner, both of Los Angeles, for appellant.

Jones & Quinn, of Stockton, for respondents.

PEEK, Justice.

The plaintiffs are the surviving wife and daughter respectively of W. W. Davidson, who was killed as the result of a collision on January 5, 1941, between the automobile he was driving and an automobile owned by the defendant Tom Ealey, which was then being driven by one Nelson. By stipulation of counsel at the time of the trial it was agreed that as a result of the negligence of Nelson, Davidson was killed, and that if defendant Ealey was found to be liable, any damage suffered by the plaintiffs would exceed the statutory amount of $5000 as provided in Section 402 of the Vehicle Code, St.1935, p. 153. The judgment of the trial court was in favor of plaintiffs and against Ealey alone. From said judgment he has appealed.

Ealey resided at 1651 Essex Street in the City of Los Angeles. Nancy Walker, who is also referred to in the transcript as Maude Walker, Patsy Palmer, and Asabel Williams resided at the address. The two girls were desirous of visiting one Sadie Williams, a mutual friend who lived in Stockton. Ealey testified that Nancy, Patsy and Asabel asked him to loan them his car, to which he agreed, with the provision that Asabel, who he had known for some time and knew to be a careful driver, would drive the car. He further stated he told them they were to be back in Los Angeles not later than January 4th.

Nancy first testified the car was loaned to her provided she could furnish a driver. Later she testified that Ealey would not lend her the car but that he would lend it to Asabel. She finally testified that she asked Asabel "to carry me to Stockton," to which he agreed as he had never seen that part of the state; that they then all got together and asked Ealey if he would lend Asabel the car; that Ealey told them he would, provided they went only to Stockton and brought the car safely back to Los Angeles. The party left Los Angeles on December 27th, arriving in Stockton the following morning, where they stayed until the day before the accident.

On that day a party developed and included in it were the two girls, Asabel, a "Miss Lindy" from San Francisco, and James P. Nelson, who was identified as the driver for one Madeline Jackson, at whose home the party was held. In the words of Nancy, "There was just a party of us there drinking and we all decided to carry Miss Lindy home, because her time was up and she was ready to go home." From the deposition of Nelson, which was read into the record, it is disclosed that he was requested to drive the car by the woman whom he understood to be Mrs. Ealey, the owner of the car, and who told him she would pay him for driving them to San Francisco. The person so named by Nelson is the Nancy Walker previously referred to herein. The record does not disclose what happened to Asabel.

The accident occurred on the return trip from San Francisco at a point a short distance south of the City of Stockton. By a further stipulation of counsel during the course of the trial it was agreed that as a result of the accident Nelson was convicted of a felony, and at the time of the trial was incarcerated in San Quentin prison.

Appellant now contends that the findings and judgment of the court are contrary to and not supported by the evidence and against law: First, that Finding No. III, which in part states "that at said time and place Defendant Tom Ealey" so operated the car as to cause the accident, is substantiated by no evidence whatever and is clearly erroneous; secondly, that the evidence shows the car was operated in violation of the express limitations imposed by the owner, and, lastly, that Nelson was at all times within the state but was not served with process in accordance with Section 402, Sub. (c), of the Vehicle Code.

In support of his first contention appellant argues that there is no evidence whatever to support the finding that "* * * at said time and place Defendant Tom Ealey" so operated the Buick automobile as to cause the death of Davidson, and

any judgment based thereon must be reversed. The finding in its entirety reads as follows:

"That it is true that on the 5th day of January, 1942 at approximately 6:30 A.M. James P. Nelson was driving the Buick automobile hereinbefore referred to by and with permission and consent of defendant Tom Ealey, in a northerly direction upon and along Highway 50, a public highway in the County of San Joaquin, at a point about eight miles South of Stockton near Fisher's Hatchery. That at said time and place Defendant Tom Ealey so negligently, carelessly and recklessly operated said Buick automobile hereinafter referred to as to cause the same to collide with a Ford automobile which was being operated in a southerly direction upon and along Highway 50 by said Walter Wesley Davidson. That as a proximate result of the negligence, carelessness and recklessness alleged Walter Davidson was killed instantly."

[1] It is readily apparent from a reading of said finding that the true purpose and intent thereof was to find that Nelson, with the permission and consent of Ealey, was so carelessly and negligently driving the automobile at the time of the accident that as a proximate result thereof Davidson was killed. The fact that Ealey is designated as the driver can be nothing more than a mere inadvertence or a clerical error to which no greater importance should be attached. This situation falls squarely within the provisions of Section 956a of the Code of Civil Procedure, wherein it is stated that said section shall be liberally construed in order that whenever possible, causes may be finally disposed of by a single appeal without further proceedings in the trial court, and that "* * * a district court of appeal may make findings of fact contrary to, or in addition to, those made by the trial court." The second sentence of said Finding No. III is therefore amended to read as follows:

"That at said time and place Defendant James P. Nelson so negligently, carelessly and recklessly operated said Buick automobile hereinbefore referred to as to cause the same to collide with a Ford automobile which was being operated in a southerly direction upon and along Highway 50 by said Walter Wesley Davidson."

In all other respects said finding will remain as adopted by the trial court.

It is appellant's argument in support of his second contention that as two witnesses testified the car was loaned to Williams to drive to Stockton and no further, and to be returned to Los Angeles not later than January 4th, there was no evidence to show any authorization for any other use, and therefore the original permission was for a limited use for a limited time in the hands of a specified party to whom the permission was restricted.

[2, 3] The foundation of the statutory liability of an owner under Section 402 of the Vehicle Code is the permission, express or implied given by him to another to use his car. Thus the real question for this court to determine is whether there is any evidence or inference to be drawn from the evidence to support the finding that "* * * Nelson was driving the Buick automobile * * * by and with the permission and consent" of the defendant owner. An examination of the transcript in relation to this question convinces us that the previously noted testimony of Nancy Walker, although contradicted by Ealey, was sufficient to sustain the finding of the court that the permission given by Ealey to her was general and unaffected by any restrictions. This conclusion finds application in the comments of the trial judge at the conclusion of the hearing when he stated in part: "The defendant gave Nancy Walker general permission to use his car * * * and if it was limited in any way, it was merely because he was aware that Nancy Walker could not drive the car. * * * The court does not accept the defendant's version of the case, namely, that he limited the use of the car to Asabel * * *." Therefore, "the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner." Herbert v. Cassinelli, 61 Cal.App.2d 661, 143 P.2d 752, 754; Bayless v. Mull, 50 Cal.App.2d 66, 122 P.2d 608.

[4] Even if the rule were otherwise it is apparent from the evidence and the further observation of the trial judge that "there can be no doubt that Nancy Walker, who actually borrowed the car, was agreeable to the trip, because she accompanied the party and agreed that Nelson should do the driving," poses a further question, which likewise must be determined against appellant. It is well established that "if an automobile is being driven by another with the consent of the permittee, where

the permittee accompanies the driver, the owner is liable to the extent set forth in section 402 of the Vehicle Code." Burgess v. Cahill, Cal.Sup., 154 P.2d 395, 397; Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521; Hughes v. Quackenbush, 1 Cal.App.2d 349, 37 P.2d 99; Armstrong v. Sengo, 17 Cal.App.2d 300, 61 P.2d 1188.

Appellant's final contention is that as Nelson admittedly was within the State of California at all times and his whereabouts known to respondents, their failure under such circumstances to serve him with process renders any judgment obtained against the owner alone, erroneous, and it must be set aside. Our examination of the transcript has failed to disclose that any objection was raised in this regard by defendant during the course of the trial. Upon the authority of Broome v. Kern Valley Packing Co., 6 Cal.App.2d 256, 44 P.2d 430, 432, this court may well conclude, under such facts and circumstances, that appellant, by failing to interpose timely objections thereby waived any right, if any he had, to compel the compliance by plaintiff with the provisions of subdivision (c) of said section 402. It is not necessary, however, that this issue be determined solely upon technical grounds.

[5] Subdivision (a) of said section provides for the responsibility of the owner for injuries resulting from the negligent use of his car through the permissive operation of the same by another. Subdivision (b) limits the owner's liability to stated sums. By these two provisions it undoubtedly was the main purpose and intent of the legislature to make the owner directly responsible to a person injured through the negligence of an operator driving the car with the owner's permission. Broome v. Kern Valley Packing Co., supra.

Subsection (c) [the particular portion of said section upon which appellant bases his final contention] requires that the operator of a vehicle whose negligence is imputed to the owner shall be made a party defendant if personal service of process can be made upon him within the state, and upon recovery of judgment, recourse shall first be had against the property of the operator. The fact that the operator need not be made a party defendant in all cases is an additional and strong indication that the liability of the owner is, as stated previously, primary and not dependent upon whether or not the operator is made a defendant. Again, as stated in the Broome case, the provision that upon recovery of judgment, recourse shall first be had against the property of an operator who has been served, "must have been intended for the benefit of the owner and not only can it be waived by him but the same can only apply where a judgment is recovered both against the operator and the owner."

[6] Lastly, Subdivision (d) discloses that in the event of a recovery against the owner he shall be subrogated to all rights of the person injured and may recover from the operator the total amount of the judgment and costs. This rule expressly applies to any recovery under this section and is limited in no way. The right of subrogation given by this subsection does not rest upon the existence of a judgment against the operator in the same action but applies in the event a recovery is had against the owner and covers any judgment and cost recovered against the owner.

[7] No case is cited by appellant in support of such contention. His argument is that although the recent case of Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043, holds that lack of final adjudication of the liability of the operator (Holland v. Kodimer, 11 Cal.2d 40, 77 P.2d 843; Broome v. Kern Valley Packing Co., supra) or disappearance from the state (Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521) or death (Sayles v. Peters, 11 Cal.App.2d 401, 54 P.2d 94) does not affect the statutory liability of the owner under said section, nevertheless it does not follow that a plaintiff may disregard the provisions of the statute relating to service of process upon the operator. However, the able discussion of this phase of the question in the Broome case is to the effect that while the liability imposed upon the owner under said section may be secondary as between the owner and operator, it "is a primary and direct liability and not a secondary one in so far as the injured party is concerned." The court then observed that the provisions contained in subsections (c) and (d) [then found in section 1714¼ of the Civil Code] were "calculated to protect the owner from the results of the operator's negligence in so far as this may be done between those parties without interfering with the rights of the injured party." The portions we have quoted from the Broome case were likewise quoted with approval by the Supreme Court in the Baugh and Holland cases.

[8, 9] It also may be said that when the permission to operate the car has been proved, the owner becomes directly liable for the damage suffered in an amount limited by the statute. Such liability is direct and several as well as joint and "is not dependent upon a judgment against the operator. It is not necessary to sue the operator if the respondent plaintiff is satisfied with the limited judgment he may obtain against the owner." Milburn v. Foster, 8 Cal.App.2d 478, 480, 47 P.2d 1106, 1107, citing Broome v. Kern Valley Packing Co., supra.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur




69 Cal.App.2d Supp. 800

## MOON v. GOLDSTEIN.

Civ. A 5961.

Appellate Department, Superior Court, Los Angeles County, California.

May 21, 1945.

**1. Licenses ⇐13, 39**

A person undertaking to construct 30 houses, though on lots owned by him, is a "contractor" within the license law, and, being unlicensed, may not recover damages for alleged breach of contract for plastering. St.1941, p. 2603, § 7026.

See Words and Phrases, Permanent Edition, for all other definitions of "Contractor".

**2. Appeal and error ⇐1097(1)**

A holding on former appeal was law of case, and could not be questioned on subsequent appeal.

**3. Licenses ⇐13**

A landowner who constructs building, etc., not for his own occupancy is a "contractor" within license law, except an owner who contracts for a project with licensed contractor. St.1939, p. 385, § 7044; St.1941, p. 2603, § 7026.

**4. Licenses ⇐39**

A person not a licensed contractor, undertaking to build 30 houses on lots owned by him, may not escape requirements of contractors' license law by contracting with one licensed contractor to furnish labor and materials for only a minor part of project, nor by dividing project up among licensed contractors, unless project is at least substantially carried out by such contractors. St.1939, p. 382 et seq., § 7000 et seq.; St. 1941, p. 2603, § 7026.

**5. Licenses ⇐39**

Though neither a materialman nor a laborer needs a contractor's license, a person not a licensed contractor may not lawfully undertake to build 30 houses on lots owned by him by hiring the laborers and buying the materials, especially where he furnishes the lumber, even though he contracts with a licensed contractor to furnish the carpenter work. St.1939, p. 384, § 7027; St.1941, p. 2603, § 7026.

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Appeal from Municipal Court of City of Los Angeles; Charles B. MacCoy, Judge.

Action by E. R. Moon against Samuel H. Goldstein, who filed a cross-complaint for damages for plaintiff's failure to perform a contract to plaster certain houses. From a judgment for cross-complainant, plaintiff and cross-defendant appeals.

Reversed and remanded.

Louis Budway, of Huntington Park, for appellant.

Abe Richman, of Los Angeles, for respondent.

BISHOP, Judge.

[1, 2] The cross-complainant obtained a judgment awarding him damages because of the cross-defendant's failure faithfully to perform a contract to plaster thirty houses which the cross-complainant was erecting on lots owned by him. The cross-complainant was not licensed as a contractor, and we have concluded that he was, therefore, engaged in an enterprise prohibited by law and that he was not entitled to the judgment awarded him.

Obviously, in order to make out his case against the cross-defendant, the cross-complainant had to resort to his contract with him; he could not prove that the cross-defendant had damaged him by failing to live up to the obligation of a contract without first proving the contract. If, therefore, the cross-complainant violated some penal statutory provision in entering into

the contract with the cross-defendant, making the contract void, he may not recover damages for its breach. This was a conclusion we expressed in a memorandum opinion on a former appeal, citing Berka v. Woodward, 1899, 125 Cal. 119, 127, 57 P. 777, 45 L.R.A. 420, 73 Am.St.Rep. 31; Levinson v. Boas, 1907, 150 Cal. 185, 193, 88 P. 825, 12 L.R.A.,N.S., 575, 11 Ann.Cas. 661; Smith v. Bach, 1920, 183 Cal. 259, 262, 191 P. 14; Alvarado v. Davis, 1931, 115 Cal.App.Supp. 782, 6 P.2d 121; Holm v. Bramwell, 1937, 20 Cal.App.2d 332, 335, 67 P.2d 114, and we see no reason to doubt its correctness. Moreover, it is the law of the case and its correctness may not now be questioned. Penziner v. West American Finance Co., 1937, 10 Cal.2d 160, 169, 74 P.2d 252; Allen v. California Mutual B. & L. Assn, 1943, 22 Cal.2d 474, 481, 139 P.2d 321.

In People v. Moss, 1939, 33 Cal.App. Supp.2d 763, 87 P.2d 932, we had occasion to consider the charge that the defendant, who had bought the materials, hired the labor and enlisted the services of a superintendent, all to the end that a structure might be built on property owned by him, was a contractor within the purview of the Contractors' License Law, Act 1660, Deering's Gen'l Laws, 1937. Quoting from section 3 of the statute as it read when the events under review occurred, we concluded that its definition of "contractor" did not include the defendant, and continued with these observations (at page 767 of 33 Cal.App., at page 934 of 87 P.2d): "We do not question the beneficent purpose of this statute, and it should be given an interpretation in furtherance of that purpose. It imposes, however, another limitation upon the right of a citizen to go about his business without governmental interference, and we are of the opinion that such a limitation should not be recognized by the courts, especially where the sanction is possible imprisonment, except as the legislative power clearly, and constitutionally, imposes it. * * * we conclude that the least that may be said is that it is not clear that the legislature has intended to require an owner of a piece of land to have a contractor's license before he can himself erect a building on it."

[3] The legislature has, however, by subsequent enactments made its purpose clear that an owner who builds not for his own occupancy (see section 7044, Business and Professions Code, St.1939, p. 385) is, with an exception to be noted, regarded as a contractor. When the Contractors' License Law was codified in 1939 and became, with some changes, Chapter 9 of Division III of the Business and Professions Code, section 3 of the Law was carried over into section 7025, 7026 and 7027 of the code, St.1939, p. 384, with only insignificant alterations in transit. Later in the same year, by an act approved by the Governor almost five months after the decision in People v. Moss, Stats.1939, p. 3020), the words hereafter italicized were added to section 7026 so that it reads, so far as pertinent to our inquiry: "a contractor * * * is any person, except a licensed architect * * * who * * * undertakes *to* or offers to undertake *to* or purports to have the capacity to undertake *to* or submits a bid *to, or does himself or by or through others,* construct * * * any building * * * or other structure, project, development or improvement * * *." It was the addition of the words "or does himself or by or through others" which caused us to say, on the former appeal, that the section as amended in 1939 "differs from the corresponding statute construed in People v. Moss * * * in such manner as to require a different construction and to indicate that the amendment was made expressly for that purpose." So it was that we decided that one who builds thirty houses, although on lots owned by him, is a contractor within the definition of section 7026 as amended in 1939. We adhere to this conclusion on this appeal both because we consider it sound and because it is the law of the case.

In 1941 section 7026 was again amended, Stats.1941, p. 2603, this time by adding the words italicized in this portion of the section: "a contractor is any person, except *an owner who contracts for a project with a licensed contractor or contractors or* a licensed architect * * *." We had no occasion, on the former appeal, to refer to this 1941 amendment, for there had been no attempt to prove that the cross-complainant, who appeared to be a contractor under the section's definition, actually came within the exception added by the amendment. At the second trial, however, the cross-complainant, after the plaintiff rested, made an effort to prove that he was not what he seemed, by evidence that he had entered into contracts with several persons

to furnish the labor and material required for many of the processes required to build his thirty houses.

[4] The undertaking planned by the cross-complainant, i.e., his "project" (Webster's New International Dictionery, 2d Ed.), was the building of thirty houses. Beginning at least as early as August 15, 1942, he began letting "sub" contracts looking to the erection of all thirty. Obviously he could not escape the plain plan and purpose of Chapter 9 of the Business and Professions Code by entering into an agreement with but one licensed contractor to furnish the labor and materials for only a minor part of his project, that required, let us say, to paint the houses, and no more. Such a limited agreement would not make the cross-complainant "an owner who contracts for a project with a licensed contractor." By the statute, it is true, the owner may contract for a project with more than one licensed contractor, but several such contracts will not suffice if taken all together they fail in a substantial particular to cover the project. An owner, not licensed as a contractor, may not legally build thirty houses by dividing the project up among licensed contractors unless the project is at least substantially carried out by contracts with licensed contractors.

[5] In the construction of such houses as the cross-complainant built, the most important part, that usually handled by the general contractor himself, where there is one, is the furnishing of the lumber and the doing of the carpenter work. The evidence on the second trial discloses that the carpenter work on cross-complainant's thirty houses was done by Roscoe & Land, who "furnished all labor," and "performed all the labor for the carpenter work." Probably this testimony supplies proof that the cross-complainant contracted with them to do the carpenter work, although Exhibit 9, which was introduced as the "contract," by no stretch of the imagination constitutes a contract. But the evidence is unequivocal that they did not furnish the material required for the carpenter work, and there is no evidence suggesting that it was furnished by any licensed contractor. We are aware, of course, that a material man does not need a license, section 7027, Business and Professions Code, but neither does a laborer who is employed "with wages as the sole compensation" section 7026 id., and yet it is clear that an unlicensed owner cannot lawfully engage in such an enterprise as we find the cross-complainant to have carried through, by buying the materials and hiring the laborers. Such a course is not "contract[ing] for a project with a licensed contractor or contractors."

It was clearly established that the cross-complainant was engaged in carrying out a project which he could not lawfully do unless he came within one of the exceptions to the definition of "contractor" recognized by the statute. He failed in his attempt to prove that his case came within an exception, for in a substantial measure the project does not appear to have been contracted for with licensed contractors. Cross-complainant's contract with the cross-defendant appears to have been entered into in furtherance of the project he was unlawfully engaged in, and it is therefore void as to him. It follows that he was in no position to be awarded damages for its breach.

The judgment is reversed, and the cause is remanded for a new trial, appellant to recover his costs of appeal.

SHAW, P. J., and KINCAID, J., concur.

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